APPEAL NO. 91029

On August 20, 1991, a contested case hearing was held. He decided that claimant, appellant herein, was not entitled to receive benefits for an injury sustained on _____. Citing the Texas Workers' Compensation Act (1989 Act), Tex. Rev. Civ. Stat. Ann. art. 8308-3.01 and 3.02 (Vernon Supp. 1991), appellant says respondent has the burden to prove that horseplay occurred and that such was a producing cause of the injury. He also asserts that no finding was made that horseplay was a producing cause, that Findings 9, 10, and 11 were not based on sufficient evidence, that Findings 12 and 13 were based on hearsay, that Finding 7 was not warranted in that the evidence was not specific enough to be given weight, and that Conclusions of Law 3 and 4 were not supported by the evidence and do not show horseplay to be a producing cause.

DECISION

We do not find merit in appellant's contentions and affirm the decision of the hearing officer.

Prior to _____, appellant, a police officer, and other officers, had confronted Officer T, a dispatcher, in an unofficial manner about his fear of electricity and stun guns. In the early morning hours of _____ as both appellant and Officer T were about to finish extended shifts, horseplay occurred. All agree that appellant had his stun gun out in the dispatcher's presence and discharged it several times. Officer T had no stun gun. Immediately preceding these multiple discharges, Officer TH had been present when appellant teased and encouraged Officer T to "pop" himself with a stun gun. Officer TH heard the stun gun going off several times as he was leaving the building. He went to his vehicle and appellant came out briefly. Appellant went back into the building and Officer TH heard a shot and then appellant's voice on his radio reporting that he had been shot.

The testimony of appellant and Officer T varies somewhat concerning the shooting. Both agree that appellant was in the dispatcher's area. Appellant states he put various reports in particular "bins" provided for such and picked up papers meant for him. Just as he did these things, he heard a shot and his leg went numb; he had not touched Officer's T pistol; he did not know why Officer T would shoot him. Officer T stated that when appellant came in he grabbed Officer T's pistol by its handle as it lay in its holster by the TV. Officer T grabbed the barrel and got it back and then held it in his lap. Appellant pulled out his stun gun and activated it. As Officer T jumped back in his chair, his pistol fired, striking appellant. Upon arrival, EMS and Fire Department personnel heard appellant say that he and Officer T had been "fooling around," or "goofing off" or "messing around."

The 1989 Act at Article 8308-3.01 imposes liability when an injury arises out of and in the course of employment. Parker v. Employers Mutual Liability Ins. Co. of Wis., 440 S.W.2d 42 (Tex. 1969), held that while an employee did not have to prove fault, he did have to prove that the injury arose out of the employment. Article 8308-3.02 then lists six exceptions. Both Articles 8308-3.01 and 3.02 are incorporated by reference into Article

8309h, which governs political subdivisions, by Section 3 thereof. Article 8308-3.02 provides in part:

> An insurance carrier is not liable for compensation if:
>
> (3) the employee's horseplay was a producing cause of the injury;

Each exception, including horseplay, basically requires that once a carrier introduces enough evidence to raise an issue as to the exception, then the employee has the burden to prove the exception does not apply in proving the injury "arose out of and in the course of employment." Security Insurance Co. v. Nasser, 755 S.W.2d 186 (Tex. App.-Houston [14th Dist.] 1988, no writ); TEIA v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1949, writ ref'd n.r.e.); Anchor Casualty Co. v. Patterson, 239 S.W.2d 904 (Tex. Civ. App.-Eastland 1951, writ ref'd n.r.e.); Weicher v. Ins. Co. of North America, 434 S.W.2d 104 (Tex. 1968).

In this case the City raised evidence of horseplay through statements and witness testimony. Appellant admitted at the hearing to horseplay shortly before the injury; the person who shot him described horseplay at the very time of, and as a producing cause of, the injury; and people who responded to the injury reported that appellant admitted against his own interest that he was "fooling around." The issue was therefore properly placed before the hearing officer and the appellant then had the burden to prove that the injury arose out of and in the course of employment and not as a result of horseplay.

Findings of Fact 12 and 13 were based on admissions by appellant to EMS and Fire Department personnel which constitute sufficient admissible evidence. Although the 1989 Act at Article 8308-6.34(e) does not require adherence to legal rules of evidence, an admission against interest is not hearsay and is admissible under Texas rules of evidence, Tex. R. Civ. Evid. 801(e)(2).

Finding of Fact 7, based on one officer's hearing the stun gun discharged several times, is relevant. Whether it occurred immediately prior to the injury or minutes before, it corroborated a significant part of the testimony provided by both parties directly involved in the injury. This finding was based on sufficient evidence.

Findings of Fact 9, 10, and 11, regarding events immediately preceding and during the incident concerning appellant and Officer T's possession of Officer T's pistol, appellant's use of his stun gun, and the manner in which Officer T discharged his pistol, were based primarily on testimony of Officer T. Inferential corroboration came from Officer TO investigative report which, upon admission, showed that Officer T's description of events was consistent with the angle of entry of the bullet in appellant's leg. Additional corroboration came from appellant's admission against interest described earlier. The hearing officer could choose to believe one of the parties directly involved as opposed to

the other. Johnson v. Employer Reinsurance Corp., 351 S.W.2d 936 (Tex. App.-Texarkana 1961, no writ); Highlands Ins. Co. v. Baugh, 605 S.W.2d 314 (Tex. App.-Eastland 1980, no writ). As stated, the appellant had the burden of proof and these findings were all sufficiently supported by the evidence.

Appellant also objects that a necessary finding, whether horseplay was a producing cause, was not made. While the words "producing cause" were not used, the hearing officer did make findings regarding horseplay that unequivocally showed the horseplay to be a producing cause. Those findings were:

> "9. (Officer T) was sitting in at his chair, which had wheels on its legs. His pistol was on a table near his chair. (Appellant) came over to (Officer T) and picked up (Officer T's) pistol. (Officer T) grabbed the pistol and wrested it away from (Appellant). (Officer T) held his pistol in his lap to keep it away from (Appellant).
>
> 10. When just a few feet away from (Officer T), (Appellant) then grabbed his stun gun from its holster, pointed the stun gun at (Officer T) and activated or "zapped" it to scare and tease (Officer T).
>
> 11. Startled, (Officer T) pushed his chair back on its wheels to try to get away from the discharge of the stun gun. In pushing his chair back, (Officer T) involuntarily discharged the pistol he was holding so that the round from the weapon struck (Appellant) in the left leg."

The sequence reflected in Finding 11 can be favorably compared to that described in Texas Employer's Ins. Asso. v. Brogdon, 321 S.W.2d 323 (Tex. Civ. App.-Fort Worth 1959, writ ref'd n.r.e.). There the court said, "The jury could find that Brogdon, a goosey individual, merely acted involuntarily in jumping up and grabbing Johnson to prevent Johnson from again jabbing him . . . ." Together these three findings trace an "unbroken chain of events" showing that the horseplay was a producing cause of the injury. See United General Ins. Exchange v. Brown, 628 S.W.2d 505 (Tex. App.-Amarillo 1982, no writ). In addition, the record clearly shows in the hearing officer's own words that the dispute before him was "whether horseplay was a producing cause" of the injury.

Appellant also presents two issues as to conclusions of law. While he identifies the conclusions in issue as 2 and 4, we are presuming he objects to 3 and 4 since they are substantive and Conclusion 2 is not controverted. Those conclusions follow:

> "2. (Appellant) was employed by (The City), Texas, on _____.
>
> 3. (Appellant) was not acting within the course and scope of his employment when he suffered a gunshot wound in the left leg,

and he was engaged in horseplay at the time of his injury.

4. An injury which occurs when the employee has deviated from the furtherance of the business or the affairs of his employer by engaging in horseplay is not compensable under the Workers' Compensation Act."

Conclusion 4 is attacked as not including the words "producing cause". A "producing cause" is broader than "proximate cause". Texas Indem. Ins. Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940). While this case has findings that show horseplay was a producing cause, Charter Oak Fire Ins. Co. v. Hollis, 511 S.W.2d 583 (Tex. App.-Houston [14th Dist.] 1974, writ ref'd n.r.e.) specifically allowed findings to be implied that an injury was a "producing cause" of the disability. That court found evidence in the case supported the implied finding but also emphasized the "sequence of events" that buttressed the implied finding at issue therein. Whether we conclude that Findings of Fact 9, 10, and 11 constitute a finding of producing cause or that they, together with the evidence before the hearing officer, support an implied finding, this case reflects adequate findings to support the decision.

While fact situations involving horseplay that was not a producing cause could be posited:

- horseplay ceased before the injury, Brown, supra;
- the injured party did not participate in the horseplay, Brogdon, supra; or
- while horseplay was active, an outside force caused injury;

none of these scenarios was before the hearing officer. His declaration of the issue in words that satisfy the statute coupled with his findings that trace an unbroken chain of events showing that horseplay was a producing cause are adequate to conclude that horseplay was a producing cause. In addition the hearing officer also found in Conclusion 3 that appellant was not acting within the course and scope of employment. This conclusion, in this case, could only be made if the hearing officer found that horseplay was a producing cause of the injury. Reviewing the case as a whole, we see no indication that the hearing officer applied an incorrect standard to the horseplay issue in making his decision.

Finally the evidence as described previously herein was sufficient to support the conclusions of law.

The decision and order of the hearing officer is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge