APPEAL NO. 960313

Following a contested case hearing held on January 11, 1996, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury in the course and scope of her employment with (employer) on _____, that her injury did not occur while she was in a state of intoxication, that her horseplay was a producing cause of the injury, and that she did not have disability. Claimant has appealed both the factual findings that she was not engaged in any activity that originated in or had to do with her employer's business and that her standing on a wall with an 18-foot drop during gusty winds constituted a form of horseplay and the legal conclusions that horseplay was a producing cause of her injury and that she did not have disability. The respondent has urged that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

The salient facts in this case were not in dispute. Claimant testified that on _____, she flew to city A as a flight attendant crew member for employer, that she and the other two flight attendants were to remain there overnight before working another flight the next day, and that after reaching their hotel she and the two coworkers, Ms. R and Ms. C, decided to go to dinner in city B. Claimant said that after crossing the border, they first went to a pharmacy where she purchased various medications and then went to dinner where she consumed two beers. Claimant further testified that after dinner and some shopping, the friendly clerk at the pharmacy drove them back across the border to city A and that when they reached the hotel they agreed to his suggestion that they drive to a scenic overlook. While proceeding to the overlook, they purchased beer, wine coolers and a disposable camera and when they arrived photographs of the group were taken. According to Ms. C, claimant suggested they all step up onto the barrier wall at the overlook, which was about knee high and two to three feet wide, for a group photo. Ms. C testified that she and Ms. R looked over the wall and declined to step up on it but that claimant did. Claimant testified that once on the wall, she assumed a pose she had often done in the past, apparently a cheerleader pose, consisting of extending her left leg up over her head supported by her arms. She stated and other evidence indicated that there was a gusty wind present and that, when she brought her leg back down, she lost her balance, fell backwards, spun herself around in midair, and dropped 15 to 18 feet to the concrete below, landing on her feet. According to Ms. C, claimant had her left leg extended upwards in her left hand and her right arm also extended straight up and lost her balance as she was bringing her leg down. Claimant indicated she was taken by ambulance to a hospital and the medical records indicated that claimant sustained multiple fractures of bones in her feet and ankles, underwent surgery, and was discharged from the hospital on July 30, 1995.

Claimant also adduced the statement of a coworker, Ms. P, which recounted Ms. P's having sustained an injury when assaulted on the street of a city where she was remaining overnight on trip for the employer.

A compensable injury is defined as an injury which occurs in the course and scope of employment for which compensation is payable under the 1989 Act. Section 401.011(10). Course and scope of employment means "an activity of any kind or character that has to do with and originates in the work, business, trade or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Section 401.011(12). Our decision in Texas Workers' Compensation Commission Appeal No. 950973, decided July 31, 1995, contains an instructive review of a number of cases involving injuries sustained by employees away from their work sites, either while in a motel or hotel or while engaged in obtaining meals, with some of the injuries being found compensable and others not. Neither at the hearing nor on appeal did claimant contend that her injury was compensable under the either the "personal comfort" doctrine or the "dual purpose" travel provisions of Section 401.011(12(B) and the facts of this case would not, in our view, support claimant's recovery under either doctrine. Nor did she contend that going to the scenic overlook was an employer sponsored social event.

Claimant seemed to contend that her injury was compensable because she was being paid per diem for the time she spent in city A before commencing her next working flight. She also inferred in argument that the employer had treated Ms. P's injury as compensable under the 1989 Act and thus that claimant's injury should be given like consideration. The latter contention is quite clearly without merit since claimant had the burden of proving that her injury was compensable. As for the former, notwithstanding that claimant was being paid per diem at the time she fell, she had the burden of proving that her injury was sustained in the course and scope of her employment. She did not articulate just how her driving to the scenic overlook, after having eaten and having driven back to her hotel, and posing for a picture on top of the barrier wall somehow constituted an activity which originated in or had to do with her employer's business and how she was furthering the business or affairs of her employer at the time; nor did she articulate just how her accident resulted from a risk or hazard reasonably inherent in or incidental to her employment. Lumberman's Reciprocal Ass'n. v. Behnken, 246 S.W. 72 (Tex. 1922). This issue presented the hearing officer with a question of fact to resolve and it is the hearing officer who is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165(a). We will not disturb challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We are satisfied that the finding that claimant's injury occurred when she was not engaged in any activity which originated in or had to do with her employer's business is supported by sufficient evidence.

As for the finding that standing on a wall with an 18-foot drop during gusty winds

constitutes a form of horseplay, again we do not find it to be against the great weight and preponderance of the evidence, particularly with the evidence showing that claimant's coworkers declined to join her on the wall and that she was completing a pose involving extending one leg out and above her head at the time. Whether claimant's conduct when injured amounted to horseplay was a question of fact for the hearing officer to resolve. Section 406.032(2) provides that an insurance carrier is not liable for compensation if the employee's horseplay was a producing cause of the injury. As the Appeals Panel noted in Texas Workers' Compensation Commission Appeal No. 94779, decided July 25, 1994, a case involving an employee whom the hearing officer believed to have slipped and fallen while lifting his foot up to give a coworker a "Blackfoot salute," the rationale behind the horseplay exception is that "if an employee willingly engages in an act of horseplay that results in an injury, such horseplay is a deviation from the employee's course of employment."

Because claimant did not sustain a compensable injury, she did not have disability as defined in the 1989 Act. Section 401.011(16).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge