APPEAL NO. 982732

On November 2, 1998, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were; (1) whether the respondent (claimant) sustained an injury in the course and scope of his employment on _____; (2) whether the claimed injury occurred while the claimant was involved in horseplay, thereby relieving the appellant (carrier) of liability for compensation; and (3) whether the claimant had disability resulting from the _____, injury, and if so, for what periods. The carrier appeals the hearing officer's decision that: (1) the claimant sustained an injury to his right biceps in the course and scope of his employment on _____; (2) the claimed injury did not occur while the claimant was involved in horseplay and the carrier is not relieved of liability for compensation; and (3) the claimant had disability resulting from the _____, injury from June 17, 1998, and continuing through the date of the CCH. No response was received from the claimant.

DECISION

Affirmed.

On _____, the employer was using a machine to bore a hole under a road to lay telephone cable under the road. The claimant worked as a laborer for the employer and on _____ his job was to place steel boring rods one at a time into the boring machine. There is evidence that the rods weigh between 25 and 50 pounds and are about six feet long. When a rod had been bored into the ground by the machine, the claimant would place another rod into the machine and that rod would connect to the previously bored rod. The claimant would pick the rods up from the ground one at a time and put them into the machine. He is right handed. He said that there was a five to ten minute wait between placing rods in the machine. The claimant said that in order to get the job done as fast as he could, he would sit with a boring rod in his hand while the previous rod was bored into the ground so that he would be ready to put the rod into the machine. AR operated the machine. The claimant had been putting the rods into the machine the morning of _____. He said that he had a rod in his hand and when he went to put it down into the machine his arm straightened out and he felt a muscle tear. He said that he told AR that his arm was hurting and that AR had a coworker, JM, take him home. The claimant went to a hospital emergency room the next day. The claimant said that he was not playing around with the rods trying to build his muscles up when his injury occurred. He said that the employer fired him on June 17, 1998, when the employer learned that he was filing a workers' compensation claim, that he has been told that he needs right arm surgery, and that he has not worked anywhere since June 17th.

AR stated in a transcribed recorded statement that he was operating the boring machine on the day the claimant injured his arm at work; that that morning the claimant was putting the rods into the machine; that he saw the claimant "messing around" with one rod "curling it like a dumbbell" using his right hand; that the claimant did that "quite a few" times; that when the claimant did the last curl it looked like his elbow "disappeared and sort of buckled over"; that he could tell the claimant was hurting; that the claimant did not drop the rod but laid it into the machine; that the claimant told him that he had pulled something in his arm; that all the claimant had to do was pick up the rods and put them into the machine; that the claimant was not supposed to be curling the rod; and that curling a rod is not something that has to be done before putting the rod into the machine. AR added that "I mean, you . . . you could if you wanted to, but hey, you know like I said, then you'd be messing around." AR replied in the affirmative when asked if the claimant was "horsing around." AR said that prior to the day the claimant was injured, he had not seen the claimant or anyone else curling the rods. AR said that BS was the claimant's immediate supervisor, and that at lunch, when BS had gone back to the shop, the claimant was complaining about his arm hurting real bad so he, AR, told JM to take the claimant home.

BS stated in a transcribed recorded statement that he is the foreman and the claimant's immediate supervisor, that on the day the claimant was injured at work he was across the road from where the machine was boring, that he saw the claimant sitting four or five feet from the boring machine curling a rod in his right hand like it was a dumbbell about 15 times, that the claimant was not supposed to be doing that, that the claimant was supposed to be putting rods into the machine, that the claimant's arm was hurting after he did the curling, that "before" he had seen the claimant curling rods "pretty regularly," that the claimant was "horsing around," that AR is an "employee" who operates the boring machine, that in the past when the claimant had curled a rod, nothing had been said to the claimant about not doing that, that "we figured nobody would do anything like that," that no one else had ever done anything like that, and that the claimant was fired the next day.

JM stated in a transcribed recorded statement that he is a laborer for the employer; that BS was the claimant's immediate supervisor; that on the day the claimant was injured at work, he saw the claimant beside the boring machine with a boring rod in his right hand "curling it" and "playing with it"; that that was not something the claimant was supposed to be doing; that the claimant was "horsing" around"; that after a while the claimant complained about his arm; and that after lunch he took the claimant home. When asked if he had seen the claimant "do that with the rods before," JM said "yeah, he did it many times, playing with'em you know."

A hospital emergency room record of June 17, 1998, records that the claimant complained of right upper arm pain and that the claimant reported that he was picking up pipe when he felt something tear in his arm. The claimant saw Dr. A on June 17, 1998, and Dr. A wrote in one report of the same date that the claimant was "holding onto a pipe with some force as he was letting down a heavy object with his right hand yesterday" and that

he felt a pop and tearing in his right biceps area. In another report of the same date, Dr. A wrote that the claimant "was lifting some weights with a pipe at work and sustained an injury yesterday when he felt a tearing sensation in the right biceps." The claimant said that he told Dr. A that he was lifting a "weighted pipe." Dr. A diagnosed the claimant as having a ruptured right biceps and noted that he anticipated that the claimant would need surgery for the injury. Dr. A wrote on June 19th that an MRI of the claimant's right upper extremity showed a tear of the musculotendinous junction and that he believes the claimant needs surgery to repair the biceps, but that that would not give the claimant normal strength.

The Employer's First Report of Injury or Illness (TWCC-1) notes that AR and JM are "workers" and that BS is the foreman. The claimant noted in his Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) that he tore a muscle in his upper arm when putting boring rods into a machine and that BS was his supervisor.

Unappealed findings of fact are that the claimant was assigned to feed boring rods into the boring machine on _____; that in performing his assigned task, the claimant would have a wait of approximately five minutes between feeding boring rods into the machine; that as he waited to perform his assigned task, the claimant was lifting a boring rod as if it was a weight and was curling the rod with one hand; and that as he waited to place another rod into the boring machine, the claimant ruptured the biceps and tendon of his right arm as he curled the boring rod with his right hand.

Section 401.011(12) defines "course and scope of employment" as "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 [with travel and transportation exceptions not applicable to this case]." Section 406.032, pertaining to "exceptions," provides in part that an insurance carrier is not liable for compensation if "the employee's horseplay was a producing cause of the injury." Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(10) defines a "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle."

The carrier appeals the following findings of fact and conclusions of law:

FINDINGS OF FACT

5. Claimant had the implied consent of his employer to engage in the curling activity while waiting to feed another rod into the boring machine.

7. Claimant's injury to his right arm was sustained in the course and scope of his employment.

8. Claimant's curling activity with the boring rod was not horseplay.

9. As a result of his torn right biceps, claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage beginning on June 17, 1998, and continuing through the date of the hearing in this matter.

CONCLUSIONS OF LAW

3. Claimant sustained an injury to his right biceps in the course and scope of his employment on _____.

4. The claimed injury did not occur while the claimant was involved in horseplay and the carrier is not thereby relieved of liability for compensation.

5. Claimant had disability resulting from the _____, injury beginning on June 17, 1998, and continuing through the date of the hearing in this matter.

The carrier contends that the hearing officer erred in applying a dictionary definition of horseplay as "rough or boisterous play." We cannot fault the hearing officer for using that definition because it is the same definition of horseplay the Appeals Panel used in Texas Workers' Compensation Commission Appeal No. 982250, decided November 5, 1998 (unpublished). We note that Texas courts have used the words "pranks," "fooling," and "friendly attack" in conjunction with their discussions of horseplay. *See* Cassel v. United States Fidelity & Guaranty Co., 283 S.W. 127 (Tex. 1926); Standard Accident Ins. Co. v. Stanaland, 285 S.W. 878 (Tex. Civ. App.-Galveston 1926, writ ref'd); Anchor Casualty Co. v. Patterson, 239 S.W.2d 904 (Tex. Civ. App.-Eastland 1951, writ ref'd n.r.e.); and Texas Employers' Insurance Association v. Brogdon, 321 S.W.2d 323 (Tex. Civ. App.-Fort Worth 1959, writ ref'd n.r.e.). The 1989 Act and rules of the Texas Workers' Compensation Commission do not define horseplay. The carrier does not state a different definition of horseplay, but cites Appeals Panel decisions wherein the activity considered to be horseplay was not necessarily rough or boisterous.

In United General Insurance Exchange v. Brown, 628 S.W.2d 505 (Tex. Civ. App.-Amarillo 1982, no writ), the court stated that if an employee willingly engages in an act of horseplay and that act of horseplay results in injury to the employee, then the horseplay is a deviation from the employee's course of employment which will defeat a claim for compensation, and that the deviation question is for the trier of the facts, unless the proof is such that reasonable minds can draw only one conclusion from the evidence. In Texas

Workers' Compensation Commission Appeal No. 92536, decided November 16, 1992, we stated that where there is implied permission during work hours for an activity undertaken at the place of employment, that activity may be found not to be a deviation but within the course and scope of employment.

The carrier contends that the hearing officer erred in finding that the claimant had the implied consent of his employer to engage in the curling activity while waiting to feed another rod into the boring machine, citing the holding in Calhoun v. Hill, 607 S.W.2d 951 (Tex. Civ. App.-Eastland 1980, no writ), a negligence case, that an employer has no duty to oversee or restrain their employees in personal activities which constitute no part of their job. Calhoun concerned an isolated instance of a footrace where a foreman was the starter for the race and the race resulted in the death of an employee and the court distinguished those facts from the facts presented in another case where the employer was aware of its employees' custom and practice of shooting wire paper clips with rubber bands and did nothing to stop that dangerous practice, which had resulted in a previous injury. The instant case does not involve an isolated instance because the statement of the foreman, BS, reflects that he was aware that the claimant regularly used the rods to perform curls and that the claimant was never told not to do that and there is no evidence that he was told not to engage in that activity on _____, when both the machine operator, AR, and the foreman, BS,saw the claimant curling a rod as he waited to put a rod into the boring machine.

The carrier contends that even if the claimant's activity of curling the boring rod was not horseplay, it constituted a deviation from the course and scope of employment. In Lesco Transportation Company v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.-Texarkana, 1973, no writ) the court stated that the rule is that when an employee abandons and turns aside from the course and scope of his employment, such deviation defeats a claim for compensation; that such deviation occurs if, at the time of injury, the employee is engaged in and pursuing personal work or objectives that do not further the employer's interest; and that, unless the proof is such that only one conclusion can be reasonably drawn from it by reasonable minds, deviation from the course and scope of employment is a question of fact to be determined by the trier of the facts. In Texas General Indemnity Company v. Luce, 491 S.W.2d 767 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.), an employee returned to the workplace, a cafeteria, during her vacation to collect her pay, as required by the employer, and after being paid she walked behind the cafeteria serving line to greet fellow employees and was injured. The court held that the employee's stepping behind the serving line did not constitute such a deviation as would remove her from workers' compensation coverage. In the instant case, the evidence and findings reflect that the claimant was at the work site holding the boring rod in readiness for placing it into the boring machine, and that while he waited to perform that task, he curled the rod several times, causing injury to his arm. Whether the claimant's activity in curling the rod under such circumstances constituted such a deviation as to take him out of the course and scope of employment was, we believe, a fact question for the trier of fact to determine.

The issues of injury in the course and scope of employment, horseplay, and disability presented questions of fact for the hearing officer to determine from the evidence presented. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the trier of fact the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We cannot conclude, as contended by the carrier, that the hearing officer erred as a matter of law in determining that the claimant was injured in the course and scope of employment, that the injury did not occur while the claimant was involved in horseplay, and that the claimant had disability from June 17, 1998, through the date of the CCH. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's determinations are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Christopher L. Rhodes
Appeals Judge