APPEAL NO. 92319

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On May 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She held the record open until June 4, 1992, for the addition of certain medical evidence, but it was not provided. She found that claimant, respondent herein, did have a compensable injury and was entitled to temporary income benefits for a month. Appellant states that respondent, if injured, was not injured compensably and that the evidence does not support a determination of disability.

DECISION

Finding that the decision is based on sufficient evidence of record, we affirm.

Respondent was a janitor for (employer) having just begun permanent employment with that employer after working there for approximately four months as an employee of a temporary service. While at work on Sunday, (date of injury), respondent passed coworker (JS), who was sweeping material into an aisle by his work place. Respondent testified that he asked JS not to do that because he did not pick up that trash on Sunday. According to respondent, JS replied that he would tell a supervisor that respondent would not pick up the trash in the aisle (or words to that effect). Respondent then told JS that he would tell about JS's smoking marijuana on the job. After spitting in respondent's face, JS pushed him down, at which time respondent said his thumb was hurt. Thereafter respondent said that JS hit and kicked him when he was down with the incident comprising about 15 minutes. At hearing, respondent denied that JS hit him with a piece of lumber and denied that he had said that JS had done so in a telephone interview he gave. He also denied hitting JS with any lumber. He said that he did not tell the doctor who gave him a physical exam the next day (previously scheduled for him as a new hire) because he was afraid he would lose the job. (That exam did find evidence of marijuana in respondent's urine.)

JS, in a document described as a telephone interview, but which was not signed by either JS or the person who conducted the interview, said that respondent confronted him and told him he would not clean up the mess he was making. JS's version was that he said that was all right, at which time respondent insulted him and hit him with a piece of lumber. He admitted that he pushed respondent, but said that respondent did not fall down. He said that about two days later respondent got into a fight at a nearby store.

While the hearing officer's decision to admit unsigned telephone interviews was in the interest of appellant and respondent did not respond to the appeal, the telephone interviews in question deserve examination under Article 8308-6.34 of the 1989 Act which addresses admission of evidence. Article 8308-6.34(a) says that the hearing officer shall allow affidavits into evidence. Article 8308-6.34(b) says that summary procedures may be used "including witness statements." Then Article 8308-6.34(e) says that the hearing officer may accept written statements signed by a witness and shall accept written reports

signed by health care providers. (Emphasis added). This indicates, even when summary procedures are used, that a hearing officer is on firm ground when refusing to admit unsigned witness statements.

After the employment physical exam on (date), respondent kept working until January 20, 1992, when he asked to see a doctor about his back and thumb. He was later fired on January 20th and went to an emergency room on January 21, 1992. In February, he then saw (Dr. B) who said respondent was unable to work as of February 5, 1992, and put him on bed rest for two weeks. As of February 20, 1992, Dr. B released respondent to the care of the county because the appellant notified him that it denied responsibility.

While conflicts as to details of the exchange between respondent and JS were significant, there was no dispute that an incident between the two with physical contact took place on (date of injury). Even JS stated that the confrontation took place over the manner in which JS was cleaning his area and how that affected respondent's duty as a janitor. The hearing officer, as trier of fact, could choose to believe either of the two participants as to details of the fight when their statements conflicted. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In addition, the trier of fact can generally believe all, part or none of what a particular witness says. Whether an injury was incurred in the course and scope of employment is usually a question of fact for the hearing officer. In this case the hearing officer had sufficient evidence to find that respondent was not injured for personal reasons and did not willfully intend to unlawfully injure another (and therefore exceptions set forth in Art. 8308-3.02 did not apply). *See* Texas Workers' Compensation Commission Appeal No 91070 (Docket No. redacted) decided December 19, 1991. While findings addressing these issues would have been better phrased had they reflected that respondent had established that injury had not resulted from his own unlawful assault or because of personal reasons on the part of JS, appellant did not take issue with the way findings were worded. *See* Appeal No. 91070, *supra*.

Although the doctor who performed the physical examination the next day did not find injury, it was not looking for transient injuries such as respondent reported. Respondent also testified that while an x-ray was done, the doctor did not examine his back and thumb. The hearing officer could believe the respondent and the opinion of Dr. B in deciding that an injury occurred. *See* Texas Workers' Compensation Commission Appeal No. 92167 (Docket No. redacted) decided June 11, 1992.

Under the 1989 Act, Article 8308-1.03(16) defines disability as the "inability to obtain and retain employment as wages equivalent to the preinjury wage because of a compensable injury." The testimony of respondent and the decision by Dr. B to take respondent off work provided sufficient evidence upon which to base the finding that a period of disability had occurred. *See* Appeal No. 92167, *supra*. Which doctor's medical records were more reliable was also a question for the hearing officer to decide.

The evidence in this case could certainly have supported a different result.

However, the Appeals Panel will not interfere with the trier of fact's resolution of conflicts in the evidence or pass on the weight or credibility assigned to a witness' testimony, unless the decision is against the great weight and preponderance of the evidence in a case that turns on factual issues, we will affirm.

The decision in this case is not against the great weight and preponderance of the evidence. We affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

_____
Sue M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge