APPEAL NO. 92367

On June 25 and 26, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), the appellant herein, had not sustained a compensable injury as defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-1.03 (10) (Vernon's Supp. 1992) (1989 Act), and that the respondent was not liable because any injury occurred as a result of appellant's wilful intent to injure a coworker, as set forth in Article 8308-3.02(2). At the time of the events leading up to the claimed injury on (date of injury), the appellant was employed by (employer).

Appellant argues that his injury should be compensable because it grew out of a disagreement based upon the manner in which the work of the employer was being performed, and that such injuries have been consistently determined compensable under case law determined under prior law. Appellant contends that there is insufficient evidence supporting the hearing officer's finding that appellant intentionally threw the sledgehammer. Appellant argues that a finding of fact that a herniated disc more probably occurred as a result of appellant's slinging a sledgehammer at a coworker, rather than being hit by a stake thrown at him, is not supported by any evidence within the record, and is wholly outside the record. Appellant generally disputes the sufficiency of the evidence supporting the hearing officer's determinations, pointing out where the evidence was more favorable to his position. Respondent asks that the decision of the hearing officer be affirmed. Respondent further reasserts two other exceptions it asserted at the contested case hearing (and that were apparently rejected by the hearing officer): (1) that the accident occurred as a result of horseplay; and (2) that the accident occurred during a deviation from the course and scope of employment.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Generally, medical evidence is not required to prove that an injury occurred, and lay testimony alone may be sufficient proof. Gee v. Liberty Mutual

Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, a trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The insurance carrier must additionally introduce evidence to raise an issue as to exceptions listed in Article 8308-3.02; once such evidence raises the issue, the burden is on the claimant to prove that an exception does not apply. Texas Workers' Compensation Commission Appeal No. 91029 (Docket No. redacted) decided October 25, 1991.

Aside from the fact that an altercation occurred on (date of injury), the record in this case is replete with conflicting accounts of the incident. The appellant states that he was engaged in removing stakes from a "form" into which concrete is poured. Two coworkers, (Mr. S) and (Mr. D), were in the area. Appellant contended that the second-in-command supervisor, (Mr. T), was angry and threatening to fire him. He stated that Mr. T was speaking aggressively toward him, dissatisfied with where he was working. Appellant stated that he told Mr. T that he was already doing what he told him to do, and turned around to work on an inclined area under a bridge overpass. He was above Mr. T, who was at the bottom of the incline. He stated that he felt something hit his back, which he at first assumed was something falling off the bridge, and that he instantaneously and reactively turned. As he did so, the sledgehammer that he was using to remove the stakes flew out of his hand down the incline toward Mr. T. He denied that he had threatened Mr. T or insulted his mother.

During rebuttal testimony, appellant stated that the main reason for the argument between the two was that appellant was dissatisfied with being underpaid for the job he was asked to do. Appellant testified then that his injury was a herniated disc. No medical evidence was submitted by either party. Appellant was subsequently fired for his role in this incident.

Mr. T testified that he was not a supervisor or foreman, and had no control over the work and salary of appellant. He stated that he sometimes would be requested by his supervisor, due to his experience, to assist less senior workers with their job tasks. He stated that on the date in question, because concrete was on the way to the site to be poured, he went over to where appellant was working to relay this information. Mr. T said that appellant was not doing his work. Mr. T told him that he was not going to do his work, and that appellant responded: "you're not anybody" and told him he was a brownnoser. An argument ensued. Mr. T stated that appellant threw a stake at him and cursed his mother. He admitted that he threw it back, and said that it hit appellant on the hand. At this, appellant turned around and threw the sledgehammer at him in a side-arm swing, which hit him and knocked him down. As a result of this incident, Mr. T was suspended for about a week. Mr. T stated that he filed a misdemeanor assault charge against appellant. The record indicates, but was not entirely clear, that the charge was dismissed.

Mr. T stated that he and appellant typically joked with each other on the job; two other witnesses, Mr. D and Mr. S, confirmed that the style of Mr. T and appellant was apparently

to trade verbal barbs with each other. Mr. T agreed that the argument the date of the incident was not like others, although he stated that he initially thought that appellant might be joking. He denied that he threatened to fire appellant, but stated that appellant, when he threw the sledgehammer, told him he would kill him. He stated that appellant worked the rest of that day and the following two days.

Mr. D was called as a witness by the appellant. He stated, on both direct and cross-examination, that he did not believe that the argument between the parties had to do with the job, but that comments made by appellant were directed at Mr. T personally. He stated that he did not see appellant throw a stake first at Mr. T, but did see Mr. T throw a stake at appellant and utter an expletive about his mother. He said at the hearing that appellant flung the sledgehammer in reaction to the blow from the stake; however, in a statement given to respondent's adjuster on February 11, 1991, and in an affidavit provided on February 20, 1991, Mr. D stated that appellant threw the sledgehammer at Mr. T. He stated that Mr. T was knocked down by the sledgehammer primarily because he reached out toward it.

Mr. S, the other coworker in the area, stated that he had the initial impression that Mr. T and appellant were playing around, in the manner in which they customarily got along, characterized by saying "heavy-handed things" to each other. He stated that appellant threw the first object, a stake, at Mr. T; Mr. T threw it back, hitting appellant on the back, and appellant, in anger, threw the sledgehammer at Mr. T. He stated that obscenities were exchanged by both men. He did not hear appellant threaten to kill Mr. T.

Both Mr. D and Mr. S indicated that they were working in the same area, and were about 10-12 feet away from appellant and Mr. T. The record indicates that the stakes thrown were "two-by-four" in size, with a pointed end and a flat end.

The hearing officer recites in her statement of the evidence that an argument started when Mr. T began telling appellant how to do his job; Finding of Fact No. 4 indicates that the disagreement arose regarding Mr. T's right to tell appellant how to work. While this Finding has not been appealed, we would note that the record is extremely conflicting on the source of the disagreement, and the appellant himself attributes the argument to his dissatisfaction with his paycheck. Be that as it may, the record contains sufficient evidence to support the hearing officer's conclusion that any subsequent injury arose out of appellant's intentional flinging of the sledgehammer at Mr. T. Appellant's testimony in chief, which tended to portray him as caught somewhat by surprise by Mr. T while he was dispassionately doing his work, is not borne out by any of the other witnesses, who testified to a colorful exchange of language and temper between the two. The hearing officer could well conclude that a stake thown uphill at the appellant would not generate the force on impact that would have herniated his disc, as opposed to his forceful throwing of a heavy sledgehammer. Therefore, we cannot agree that her Findings of Fact Nos. 13 and 14 are outside the record developed in this case, or against the great weight and preponderance of the evidence.

It is fair to say that case law developed in this area of exception goes either way. *Compare* Kurtz v. Liberty Mutual Insurance Co. , 572 S.W.2d 766 (Tex. Civ. App.- Waco 1978, no writ) *and* Liberty Mutual Insurance Co. v. Hopkins, 422 S.W.2d 203 (Tex. Civ. App.- Beaumont 1967, writ ref'd n.r.e.). Whether an injury resulting from an assault occurred in the course and scope of employment is a generally question of fact. *See* Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.- El Paso 1981, no writ). This being so, we cannot say that the decision of the hearing officer in this case is wrong as a matter of law, or so against the great weight and preponderance of the evidence so as to be manifestly unjust. Her decision is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge