APPEAL NO. 92373

A contested case hearing was held in (city), Texas, on May 26, 1992, (hearing officer) presiding, to consider the sole disputed issue, namely, whether respondent (claimant below) received a knee injury in the course and scope of his employment on (date of injury) by being hit in the knee with a chair thrown by a coworker during an argument. The hearing officer found that coworker (coworker) cursed and hit respondent on (date of injury) because he had waited on a customer that coworker thought was his customer; that coworker swung a chair during an altercation with respondent about a customer on (date of injury) and the chair hit respondent in the left knee; and that respondent experienced swelling and pain in his left knee as a result of coworker's actions. Based on these findings, the hearing officer concluded that respondent had received a left knee injury which arose out of and in the course and scope of his employment on (date of injury), and that appellant is liable for compensation benefits for such injury pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). In its request for review appellant challenges the sufficiency of the evidence to support these findings and conclusions. Respondent, in his response, asks us to affirm.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions of the hearing officer, we affirm.

The statement of evidence in the hearing officer's Decision and Order fairly summarizes the evidence in this matter and is adopted. In brief, respondent testified that on (date of injury), a couple drove up to the sales building at the (employer) and respondent, a salesperson for employer, greeted the customers and accompanied them onto the lot to look at cars. He returned to the building to obtain the keys to a car the customers wanted to see. As he started up the steps to the porch on the building, coworker confronted respondent, cursed and shouted obscenities at him, picked up a chair and swung it striking respondent in the left knee, threw the chair off the porch, and then struck respondent in the chest with his fists. Others came out and the incident ended. Respondent was advised later that day that he was terminated for poor performance. He visited (Dr. H) on (date) and the records of that visit indicated respondent complained that his left knee was hit, that he had pain for five days, that swelling was observed, that x-rays were ordered, and that medication was prescribed. An x-ray report stated a diagnosis of knee sprain.

The coworker testified that he had made the first contact with the customers and that respondent had intercepted them. He said that when respondent came up onto the porch to enter the building for the keys, he had some words with respondent asking him not to cut him off from customers. He said respondent then lunged at him and he moved backwards and tripped over a chair. Coworker denied any physical contact with respondent and denied swinging the chair at him. He said that respondent filed a criminal assault charge against him which was still before the court.

Employer's controller testified the decision to terminate respondent for poor

performance had been made before (date of injury). The affidavits of two other employees present at the time stated they saw an altercation between respondent and coworker on the porch but saw no physical contact. One affiant stated that when coworker stumbled over a chair, he grabbed it to get around it but did not swing it at respondent or strike him with it.

Whether an injury is incurred in the course and scope of employment is a question of fact. Texas Employers' Ins. Ass'n v. Anderson, 125 S.W.2d 674 (Tex. App.-Dallas 1939, writ refused). Article 8308-6.34(c) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility it is to be given. It was for the hearing officer, as the fact finder, to sift through the testimony and documentary evidence and resolve the conflicts and inconsistencies. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer was free to believe all, part, or none of the testimony of any one witness including the respondent. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). We cannot substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Both parties attached documents to their appellate pleadings which were not a part of the record below. We have noted in prior decisions that Article 8308-6.42(a) (1989 Act) limits our review to the record developed at the hearing. *See, e.g*. Texas Workers' Compensation Commission Appeal No. 92154 (Docket No. redacted) decided June 4, 1992.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge