APPEAL NO. 93069

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On December 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant herein) was not struck by a door when another employee kicked it shut as claimant passed through the doorway. Claimant asserts that the great weight of the evidence shows that he was struck and that the other employee had provoked the incident. He also asserts that the hearing officer did not act on certain motions for subpoenas he filed. Respondent (carrier herein) replied that sufficient evidence was introduced to support the decision of the hearing officer and that the claimant did not preserve for appeal any question as to subpoenas.

DECISION

Finding that the evidence sufficiently supports the decision and order, we affirm.

Claimant worked for (employer) for seven years. At the time of the incident on August 10, 1992, he was a forklift operator. Claimant acknowledged that his position allowed his supervisor to direct him to move merchandise by hand when there was not enough work to use the forklift. Claimant took issue, however, with what he described as an order to leave the forklift when there were still forklifts operating with drivers junior to him. A short time later a difference of opinion ensued between claimant and his supervisor, (Mr. O). The exchange was loud; it drew the attention of other employees on break and drew certain management personnel who were nearby to the area.

Claimant testified that after he was taken off the forklift he indicated that he would file a grievance. Then when he was on break, Mr. O approached him, verbally abused him, and shoved him. Claimant said he left to go back into the break room and Mr. O kicked the door shut against him. Other employees who were there were (Mr. G), (Mr. Z), and (Mr. D). Claimant said he was able to walk without aid, but later that night he felt stiff. When his shift was over, claimant went home and called the terminal manager, (Mr. R) from his home. Claimant said he told him what happened and indicated that he wanted some action taken. Claimant worked his regular shift on August 11, 1992. He called a doctor's office and was able to get an appointment for August 12, 1992. The doctor's report shows a muscle spasm in the lumbar area with a history given by claimant that he was hit by a door on August 10, 1992.

Mr. G testified in claimant's behalf. He said that as claimant went through the door to the break room, Mr. O kicked it, and he saw the door strike claimant. He added that claimant missed work for a period after the incident. On cross-examination, he said that claimant is outspoken and will stand up for what is right. Mr. G was only about seven feet away and could see that the door hit claimant. He described the spring on the door that controls its speed of closure as having little tension in it at the time, but it has been fixed now. Claimant also introduced statements from Mr. D and Mr. Z, but both referred to the disagreement without saying either saw a door hit the claimant. Claimant, on recall, said

that the day of the incident he remembered that buggys with freight in them obstructed the view into the window that is to the left of the door in question.

For the carrier, Mr. R said that on August 10th, claimant did call him to complain about the treatment he had received from Mr. O. Mr. R testified that in that conversation, claimant said that when Mr. O kicked the door that it almost hit him and could have injured him. Mr. R said that the next day, August 11th, he was told that claimant wanted to claim for an injury. Mr. R said he asked claimant why he was saying the door hit him when he previously said that it did not; according to Mr. R, claimant replied that at the time his body was warm and he did not notice it.

(Mr. DA) is the assistant manager and said that he heard of the incident the next day, August 11th. He testified that he met with claimant and another employee, who was with claimant, at which time the claimant said that Mr. O had kicked the door, almost hitting him. Mr. DA said that claimant, later that day, said the door hit him. Mr. DA asked him about that, pointing out claimant's earlier assertion, to which Mr. DA said claimant replied that he was telling Mr. DA now that it did hit him.

(Mr. A) testified that at the time of the incident he was the claims prevention supervisor regarding freight claims and was on the dock about 20 feet from the loud discussion between claimant and Mr. O. He saw Mr. O kick the door but said that in his opinion the door did not hit claimant because he had just gone through it. He was also of the opinion that the door was working satisfactorily then. He added that he could see the claimant through a window that was just to the left of the door so he knew claimant had made it through the door before it closed. Mr. A testified that nothing such as buggys blocked his view through that window that day.

Mr. O testified that there had been words between the claimant and himself and the two of them had "bumped" each other, when (Mr. DAV) told the claimant to go back into the lounge. Mr. O said that claimant flung open the door (the brake on the door did not slow its opening) and he had to move to avoid being hit. Mr. O admitted that he then kicked the door which caused it to move rapidly at first and then it closed slowly because of the brake. He said that claimant then came back out and said to the effect, that the door could have hit him. Mr. O said there were no buggys blocking the window beside the door that day, but acknowledged that buggys were sometimes parked to the side of the door.

Mr. DAV is the operations manager. He testified that he had spoken to claimant earlier the day of the incident about the fact that claimant was required to work other than with the forklift; claimant was "heated" at the time. Mr. DAV's office is near the lounge and he later heard yelling from that area and went to the area. Claimant and Mr. O were yelling at each other and Mr. DAV placed himself between them. When claimant opened the door to the lounge, Mr. O was near it and flinched. Mr. O then kicked the door. Mr. DAV has one bad eye that restricts his vision, but with which he has learned to compensate. He saw no impact of the door with claimant nor did he hear an impact. He then chastised Mr. O. Mr. DAV said that the door in question is old but that he was not aware of any repairs to it since

the day of the incident and he would probably have had the question of a repair go through him if one had been done. He has had the door close on him with no harm done.

The claimant asserts on appeal that the hearing officer erred in not acting on his request for subpoenas. The appeal says that the request was mailed to the Commission on December 16, 1992, but that the return receipt shows that the Commission did not receive the request until December 22, 1992. (The hearing was held on December 28, 1992.) Without going into detail as to whether claimant's request complied with the applicable rule for requesting subpoenas, the record of hearing contains no reference to the request. No request was made that a ruling be made on the record. There is not even an assertion that the request was presented to the hearing officer at a prehearing conference. No documents pertaining to the matter were offered into evidence or in any way made a part of the record. The Appeals Panel points out that had the issue been raised at the hearing, the hearing officer could have issued a ruling and perhaps granted a continuance to secure evidence in some manner. The Appeals Panel will not consider matters that were not made a part of the record. *See* Texas Workers' Compensation Commission Appeal No. 91132, dated February 14, 1992.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. As trier of fact he could consider the credibility of the witnesses and resolve conflicting evidence as to whether claimant was struck or not struck just as he could resolve conflicting evidence as to whether buggys obstructed the view of a window on the day in question. *See* Sifuentes v. TEIA, 754 S.W.2d 784 (Tex. App.-Dallas 1988, no writ) and Frank B. Hall Co. Inc. v. Buck, 678 S.W.2d 612 (Tex. App.-Houston [14th Dist] 1984, writ ref'd n.r.e.). The hearing officer had sufficient evidence before him to support his findings of fact and conclusion of law that claimant was not injured in the course and scope of employment on August 10, 1992. Since we do not find that the decision and order are so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm. *See* Herrera v. FMC Corp., 672 S.W.2d 5 (Tex. App.-Houston [14th Dist] 1984, writ ref'd n.r.e.).

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge