APPEAL NO. 93141

Pursuant to the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq* (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on January 28, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) was not entitled to benefits under the 1989 Act for an injury he sustained at his place of employment because the injury was caused by the claimant's willful intent and attempt to unlawfully injure another person. Claimant disputes several of the hearing officer's findings of fact and his discussion and evaluation of the evidence and appeals his decision. Respondent urges that the decision be affirmed.

DECISION

Finding the decision of the hearing officer to be supported by sufficient evidence, we affirm.

Two issues were presented for resolution at the contested case hearing: (1) whether the claimant sustained an injury in the course and scope of his employment or whether he sustained an injury from a willful attempt to unlawfully injure another person; and, (2) whether the claimant was an employee at the time of the injury or whether the carrier waived this issue by its failure to contest compensability on the grounds that claimant's employment had been terminated at the time of injury. Regarding the second issue, the hearing officer determined that the carrier had waived its right to contest compensability on the ground that the claimant was not an employee, that determination has not been appealed, and the matter will not be further addressed in this decision. Concerning the first issue, the evidence consisted of the testimony of the claimant, the testimony of the claimant's supervisor, and that of a coworker. As might be anticipated, the testimony was in conflict in significant part concerning the incident leading up to the injury, a broken ankle.

The claimant testified that on the morning of (date of injury), he and his supervisor, (JC), engaged in an argument over the way the claimant was repairing an alternator. The argument heated up when JC told the claimant he was not to sit on a stool as he performed his tasks. JC took the stool away at which time the claimant shoved him. According to the claimant, at this time JC kicked him in the groin, got a head lock on him, pivoted and threw him to the floor, the twisting action of which caused the claimant's ankle to be broken. Paramedics were called and the claimant was taken to the hospital. The claimant specifically denies that he has a quick temper, that he shoved JC more than once on September 4th, and claims that no one else was present during the incident in question.

JC testified that both previous to and on the morning of (date of injury), he had problems with the claimant's performance of his duty. He also stated his opinion that the claimant had a quick temper and mentioned several examples. When the argument became heated on the morning of September 4th, including the claimant's hitting and banging things, he told the claimant to leave and go home and later told him he was

terminated. JC testified that during the course of the argument, the claimant shoved him into a vise. He stated the claimant cursed him and said that JC was lucky that he, the claimant, "ain't beat your head in with a ball-peen hammer already." JC testified that he took the stool away from the claimant's work area, slammed it on a table, and that a few minutes later the claimant came over to where he was working and told him to take his glasses off and that he, the claimant, was going to stomp his head in. When JC took his glasses off, the claimant jumped at him and knocked him into his tool box. JC stated that when he stood up, the claimant charged at him, and since he had no place to go, and having to protect himself, he kicked the claimant in the stomach, grabbed him by the head, threw him on the floor, and pinned him down.

A coworker, (RH), testified and, contrary to the assertions of the claimant, stated he was present in the room during the entire altercation and observed the sequence of events. His testimony corroborated in all principal respects JC's version of the events of the morning of September 4th.

The issue in this case involves the exception to recovery of workers' compensation benefits found in Article 8308-3.02 which provides as follows:

An insurance carrier is not liable for compensation if:

* * * * *

> (2)the injury was caused by the employee's wilful intention and attempt to injure himself or to unlawfully injure another person.

In Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991, we cited North River Insurance Co. v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ) where the court, in considering a similar provision under the prior statute (TEX. REV. CIV. STAT. ANN., art 8309, Section 1 (repealed 1989)), quoted with approval the following jury charge on the provision:

> ‘Employees Intention to Injure Another’ means an injury caused by the employee's willful intention and attempt to injure some other person is not in the course of employment, unless the injury results from a dispute arising out of the employee's work or in the manner of performing it and the employee's acts growing out of such dispute are done in a reasonable attempt to prevent interference with the work or in reasonable self-defense. (emphasis ours)

The hearing officer found as fact that the claimant shoved JC twice and was approaching him a third time with the intent to injure him unlawfully and that such act by the claimant was not a reasonable attempt to prevent interference with claimant's work, nor was it an act of self defense. These findings of fact bring this case under the specific exception found in Article 8308-3.02 and the guidance of Purdy, *supra*, which relieves the carrier of liability for compensation. The hearing officer is the fact finder under the contested case hearing procedures (Article 8308-6.34(g)) and in considering the evidence brought before him, is the sole judge of the relevance and materiality of evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e).

To be certain, the testimony in this case was in conflict in several pertinent areas. However, it is one of the primary functions of a fact finder to resolve conflicts and inconsistencies in evidence and testimony. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex.Civ.App.-Amarillo 1974, no writ. He may well believe all, part, or none of the testimony of any witness (Taylor v. Lewis 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.) and he may believe one witness and disbelieve others. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983 writ ref'd. n.r.e.). It is apparent the hearing officer gave greater credence to the testimony of JC and RH and believing them, had a sufficient basis to determine that the claimant was not entitled to benefits under the circumstances. Appeal No. 91070, *supra*. *See also* Texas Workers' Compensation Commission Appeal No. 91032, decided October 30, 1991. *Compare* Texas Workers' Compensation Commission Appeal No. 92488, decided October 28, 1992; Texas Workers' Compensation Commission Appeal No. 92246, decided July 27 1992; Texas Workers' Compensation Commission Appeal No. 92103, decided May 1, 1992.

Where, as here, there is sufficient evidence to support the hearing officer's decision and it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, there is no sound basis to disturb the decision. In Re Kings Estate, 244 S.W.2d 660 (Tex 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta

Appeals Judge

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Philip F. O'Neill
Appeals Judge