APPEAL NO. 93792

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.), a contested case hearing was held on July 28, 1993, in (city), Texas, with (hearing officer) presiding, to determine the issue of whether the appellant, LD, the claimant herein, sustained an injury on (date of injury), in the course and scope of his employment with (employer). The hearing officer determined that claimant did not prove he sustained a compensable injury, because he was injured while attempting to unlawfully injure a coworker, and he sustained injury for personal reasons not directed at him because of his employment with the employer.

The claimant has appealed this decision, arguing that it was based on untruthful testimony. The claimant contends that his tape recording of a Texas Employment Commission (TEC) hearing should have been offered into evidence which would show that the testimony given at the contested case hearing was not truthful. The claimant has sent a copy of the tape with his appeal. The carrier responds that the decision is sufficiently supported by the evidence.

DECISION

We affirm the decision of the hearing officer.

Claimant worked as a mobile home wall setter. On (date of injury), he stated that he was assaulted, for no reason, by coworker (MM), and struck in the face with a board.

Claimant stated that during the morning, he had brushed against MM's leg while turning a corner after walking up some steps, and that MM told him not to be playing with his "butt." He said that at noon, as he ate lunch in his car with his wife, his coworkers were pointing at the car and laughing, and one made an obscene gesture. The claimant then stated that MM came out to the car, opened up the passenger door, and threatened him, making a racial comment at the same time. Claimant's wife testified and corroborated this testimony.

The claimant stated that immediately after lunch, as he was putting on his tool belt to resume work, he asked MM "what's the deal." He stated that MM responded by running at him with a "2 by 4," and began hitting him until another coworker, (AC), pulled MM off. Claimant stated that he also grabbed a "2 by 4" thereafter but threw it down when admonished by AC and another coworker, (RR), that they were getting out of hand.

Claimant stated that he sought first aid, and was thereafter terminated by the employer after being told they had to fire him in order to fire MM. Claimant stated that he was referred to a clinic and was told that workers' compensation would pay for treatment of his injuries. Claimant was found to have a fractured nose, and had an operation on February 5, 1993.

Claimant speculated that MM, who had another job, began a fight with him because he had nothing to lose. He denied that he had been grabbing other men's posteriors that day, that he got up in MM's "face" after lunch, or that he threw a drink down at MM's feet. Claimant stated that he threw his drink into the trash as he entered that work station area. He said that before this date, he had no problems or animosity with MM.

AC testified and stated that MM complained to him that claimant had been grabbing his posterior that morning, and that the two had words. AC did not see claimant grab MM, but stated that claimant was grabbing others, and he had seen claimant grab MM on other days. AC stated that after lunch, minutes after 1:00 p.m., claimant walked into the work station area, went past his area and up to MM, and "got in his face." He said that claimant got within four inches of MM's face, and said, "Do you have a f----- problem?" MM replied, "Yes I do," and claimant responded, "well, what are you going to do about it?" AC said that claimant threw a cup that had some ice in it down on the floor, and that there was not a trash receptacle in that area. AC said at this point he felt there would be a fight and he began to move around his work area, and did not actually see the first punch thrown, but that claimant ended up on the floor. He stated that MM did not have a board and must have hit claimant with his fist. AC said that he pulled MM away physically and told him to quit, and then looked around and saw claimant had picked up a seven foot long 2 by 4. AC let go of MM because he did not want to get hit in someone else's fight. AC stated that MM arose and picked up one too, but both parties dropped their boards when admonished by RR and AC.

(SF), the supervisor, stated that after he investigated, he fired both men. He stated that MM told him claimant had grabbed his posterior and that MM had told him to stop.

A signed statement from RR stated that RR saw the parties after lunch, that claimant asked MM if he had a problem and MM answered yes, that claimant threw a cup down and asked MM if he was ready to fight, and that the fight began.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). 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 decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). 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). Whether an injury resulting from an assault at the workplace was in the course and scope of employment is generally an issue of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ).

The hearing officer, who was in the position to observe the demeanor of the witnesses, evidently found AC's testimony more credible, along with his explanation for the underlying reasons for the fight, rather than claimant's testimony that he was essentially attacked without provocation by someone with whom he did not have a prior animosity. There was no testimony, even by claimant, that the altercation grew out of the manner of performing work. There is sufficient evidence from which the hearing officer could conclude that the "personal animosity" or "wilful attempt to injure" exceptions to compensability, as set out in the Texas Workers' Compensation Act, TEX. LAB. CODE § 406.032 (1)(B) and (C), applied to this case.

The tape of the TEC hearing was referred to during the contested case hearing, however, it was never offered. Therefore, there is no error of the hearing officer to review, because he was not asked to rule on the evidence one way or the other. Because our review is limited to the record, we do not review additional evidence submitted with appeals, and have not reviewed the tape sent in by the claimant with his appeal.

After review of the record, we affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda Nesenholtz
Appeals Judge

Gary L. Kilgore
Appeals Judge