APPEAL NO. 93873

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*). On August 31, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) had deviated from the furtherance of his employer's interests when he drove his vehicle into a tree, rendering his injuries not compensable. Claimant asserts his view of the evidence and attacks an investigative report of the incident. Respondent (carrier) states that the evidence is sufficient to support the decision.

DECISION

We affirm.

At the hearing the issues were stated to be: (1) whether claimant's injury was in the course and scope of employment or occurred while claimant deviated therefrom; (2) was there disability; and (3) what temporary income benefits (TIBS) are due.

Section 410.204(a) states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

On appeal the claimant does not assert error in the findings of fact of the hearing officer, but states the following:

(1)"It was not understood" that claimant would lose his job;

(2)Claimant made statements about the condition of county property purposely, prior to an election;

(3)He questions the proof regarding his seat belt usage;

(4)States that he could see tail lights of the car that forced him off the road;

(5)Takes issue with the investigative report of (Sgt. H);

(6)Refers to his financial resources and pain;

(7)Applied for unemployment benefits because he needs the money; and,

(8)Points out that the grand jury did not indict him, says that a person is innocent until proven guilty, and says he did nothing wrong.

The Appeals Panel determines:

That the duly admitted evidence was sufficient to support the findings of fact,

conclusions of law, and the decision and order.

Claimant was a deputy sheriff in County. In 1992, elections for sheriff of County took place. A primary election was held in the spring, and the general election took place in November 1992. Claimant did not support the person elected in the November, 1992, election in either the primary or general election. The evidence showed that claimant, on more than one occasion, stated that he would see that certain county property would not be in serviceable condition for the opposition candidate. Claimant did not deny making such statements, although he could not recall the exact words, but said he made them purposely to have an effect on the candidate he opposed.

On (date of injury), claimant was driving his official vehicle on Highway 29, east of (county), Texas, when he hit a tree on the right-of-way just off the highway--twice.

Claimant testified that during foggy conditions a vehicle traveling toward him crossed over into his lane of traffic, and he left the road to avoid an accident. (The highway is four lanes wide with two lanes open to traffic in each direction.) Claimant testified that his car, after hitting the tree, backed up under its own power and then struck the tree a second time, under its own power. The initial investigating officer, (Trooper F), said that claimant told him that the car hit the tree twice. Trooper F was of the opinion that a person does not purposely drive a car into a tree and therefore the incident was an accident, notwithstanding that there were unexplained circumstances at the scene.

Sgt. H stated that he took over the investigation for Trooper F because Trooper F lived and worked in (county). His report indicated that the tree in question had been hit twice. A transmission reservoir had been ruptured. The car struck the tree the second time after having been backed 35 feet away from it. There were no skid marks. The report indicates that claimant initially thought the car "bounced" backward on impact and that he then may have stepped on the accelerator rather than the brake. The speed at initial impact was estimated to be 30 mph or less, and the speed on second impact was estimated to be 20 mph or less. Reference was made to a possible polygraph examination that claimant did not take because of medically-related reasons. The report then referenced claimant's statement to Trooper F that he was wearing his seat belt at the time, while claimant "was well known for his lack of safety belt use prior to the accident." The report concludes that it is physically impossible for a car to strike a tree and bounce back and that claimant struck the tree intending to damage county property.

Claimant introduced two investigative reports which indicated that persons with knowledge of the events were interviewed. (RH), who had apparently been a member of the sheriff's department since he is purported to have hired the claimant, characterized the possibility that claimant intentionally wrecked a county vehicle as not worthy of belief. He declined to give a written statement. (Mr. G) was questioned and gave the following information: He heard of the accident of claimant on his police radio and went to the scene. There was a thick fog. He does not believe claimant purposely wrecked the car, citing methods of doing damage that would not place the driver in peril. The report also

referenced statements from (Mr. K) and (Mr. C).

Mr. C stated that he heard claimant's radio report of the accident in which he alluded to a pick-up with small tail lights that had run him off the road. He stopped a pick-up; the driver said that he saw a police vehicle on the side of the road but thought the law officer had stopped someone.

The radio transcript was introduced by claimant and showed that he reported a car with small tail lights had run him off the road.

The carrier introduced a statement by Mr. K. It said that he was stopped by a deputy on (date of injury). He told the deputy that he saw a car on the side of the road with red and blue lights on. He was not sure it was off the road. Statements by (JP) and (PH), both employees of the county, referred to statements made by claimant relative to what might happen to county property prior to January 1, 1993. A statement by (GA) indicated that he owns a wrecker and responded to claimant's collisions. Prior to towing the car, he noticed a "line of oil out the back of the car." It was foggy, and he noticed no skid marks. The key was "on" but the engine was not running, and the transmission was in "drive."

Trooper F was called to testify by claimant. He could not explain the fact that there had been two contacts of the wrecked vehicle with the tree. On cross-examination, Trooper F mentioned arranging a polygraph without having been asked such a question; there was no objection to his reference to a polygraph or to any reference to a polygraph thereafter at this hearing. He said that claimant was known for not wearing a seat belt, but claimant told him that he had it on at the time. He agreed that one does not hit a tree and bounce back, but mentioned that an impact could knock a transmission into reverse. He has seen strange accidents before that could not be explained. He also mentioned that oil sometimes flows out as a vehicle is towed after a crash, but acknowledged that he saw the oil on the ground before the car was towed.

Claimant emphasized that a grand jury met and did not indict him in regard to this incident. He is a party to a civil suit against the county and has been sued by the new sheriff. He said that he did not mean to indicate a pick-up ran him off the road but thought that a pick-up that went by may have seen who did run him off the road. He testified that he did not intentionally destroy property, stage a wreck, or hit a tree. He acknowledged that he was "pretty sure" he would be terminated when the new sheriff took office.

Sgt. H was called to testify by the carrier. He stated that the fluid on the ground behind the wrecked vehicle was about 35 feet long. The lack of skid marks was unusual in his opinion. The car showed two places where it struck the tree. He said a car normally stops when it hits a tree. He has done many investigations and has never seen a car hit something, back up, and hit it again. He acknowledged that it was possible for a car to go into reverse for 35 feet and then go back into forward, but indicated it was highly unlikely. He said it was not possible for a car to bounce back 35 feet after striking a tree. On cross-examination, he stated that he had never heard of Ford cars changing from "park" to

"reverse" on their own. He was not at the scene within the first day or two of the incident.

All the points asserted by claimant on appeal relate to evidentiary matters that were for the hearing officer to judge. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The claimant's own statements, either to a witness who claimant called to testify, Trooper F, or his testimony at the hearing corroborated other evidence that the tree was struck twice, that he had made statements prior to the incident concerning what might happen to county property, and that he was wearing a seat belt at the time of the collision. No evidence indicated that there were any skid marks. The hearing officer was free to treat the testimony of the claimant about such matters as the assertion that a car ran him off the road, as merely setting forth fact issues for him to decide. *See* Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The hearing officer may resolve the conflicting expert opinions of Trooper F and Sgt. H as to whether a collision was an accident or not just as he can resolve conflicting medical opinions. *See generally*, Gregory v. T.E.I.A., 530 S.W.2d 105 (Tex. 1975). The lack of criminal charges does not control the decision in regard to workers' compensation; had a criminal case been pursued, it would have been decided under a standard of proof "beyond a reasonable doubt" whereas the 1989 Act uses a preponderance of the evidence test. The evidence was sufficient to support the findings of fact and conclusions of law.

Finding that the decision and order are sufficiently supported by the evidence, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge