APPEAL NO. 93986

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held in (city), Texas, on October 5, 1993, (hearing officer) presiding. With regard to the two disputed issues, the hearing officer held that the claimant sustained a compensable injury on (date of injury), in the course and scope of his employment, and that the claimant had disability beginning (date of injury) and ending April 14, 1993. The appellant, hereinafter carrier, appeals this decision contending that the hearing officer did not adequately consider carrier's evidence, and that certain of the findings of fact were not supported by the evidence. It also contends that the claimant's injury was not incurred in the course and scope of his employment because it was caused by claimant's intent to assault a third person, and because it took place after the claimant had been suspended without pay and had been asked to leave his employer's premises. The respondent, hereinafter the claimant, basically asks that the hearing officer's decision be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant had been employed as a security guard by (employer), posted at (motor company). He worked the night shift. On (date), claimant was called by (Ms. H), employer's office manager, telling claimant to report to the employer's north office in (city), Texas, the following morning. The claimant did so, and observed the other two security guards who worked at motor company being called in to an inner office. After they left, claimant was called into the same office where (Mr. F) was seated behind a desk; also present were (Mr. B), (Mr. W), and (Mr. G), all employees of employer. Claimant said Mr. F, whom he had never met before, told claimant he was being suspended pending investigation of theft at the motor company. The claimant said the four men began questioning him, but that they would not let him finish answering their questions. The claimant also said he told Mr. F that he had made copies of his daily reports, detailing security problems, and that Mr. F accused him of theft of property and services from motor company. Claimant said he "may have smiled" when Mr. F told him they had been running a "sting" operation at motor company with audio and video surveillance, and that he responded, "Then you've got the guy, who is he?" Claimant also said he was upset at what was happening but denied that he lost control of himself.

Claimant said that after Mr. B left the room, he also got up to leave. In doing so, he said he had to slide his chair forward in the small office, and that his chair bumped against Mr. F's desk. He said he was on his way out of the office when Mr. F said something to the effect of, "You S.O.B., I'll teach you to throw things around my office." He said Mr. F then came at him and pushed claimant across the hall and against a wall. Claimant said his reaction was to defensively place his hands on Mr. F's stomach, but he denied that he swung at or struck anyone. At that point, he said, Mr. B came up and grabbed him in a choke hold around his neck causing claimant to experience a grinding sensation in his upper back.

Shortly thereafter claimant exited the building; he said the entire incident only lasted five to seven seconds.

Claimant returned home and because he continued to experience pain he went to an emergency room. He was referred to (Dr. A), and admitted to the hospital for five days. Dr. A's reports state that x-rays and a CT scan showed compression fractures, anterior wedge type, of the thoracic vertebrae T6-7 (one report also includes T5). Claimant said Dr. A prescribed pain medication and told him that he needed pain management but that surgery was not an option. Claimant last saw Dr. A on February 5, 1992, and has not had medical treatment since that time. He said Dr. A wanted to refer him to a neurologist but claimant was unable to see him because of questions about insurance coverage.

Ms. H testified by telephone to events of (date of injury) which were diametrically opposed to claimant's version of the story. She said she was in her office when she heard a commotion from Mr. F's office and heard something like a chair being thrown. She also heard shouting, although she could not say positively who was doing so. She said the door then flew open and claimant came out; she said he was "out of control," shouting and cursing. She denied that Mr. F pushed claimant, and said she did not see him touch claimant at all. She said the three other men, including Mr. B, were holding claimant to restrain him because claimant refused to leave. In Ms. H's opinion, claimant was the aggressor in the altercation.

Claimant said that while he was recuperating at home after being released from the hospital he talked to Mr. W, employer's scheduler, who arranged for claimant to take another position for a client of employer's. Claimant said he went to check out that job, but that he realized he was in too much pain to take it at that time. Claimant later moved to a different city to live with his parents. On April 14, 1993, he took a job at a pizza restaurant. While his hourly wage was less than what he had made at employer, he said with tips it was about the same. He also said he believed that as of that date he had the ability to obtain and retain employment at the equivalent of his original wages.

In its appeal the carrier challenges the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

8.During the interrogation on (date of injury), claimant was physically assaulted by several co-workers, including claimant's supervisor, [Mr. F] and claimant's co-worker, [Mr. B].

9.Claimant was assaulted and placed in a choke hold around claimant's neck by [Mr. B] in the presence and acquiescence of claimant's supervisor, [Mr. F].

10.Claimant neither provoked nor caused the assault.

12.Claimant's back injury was caused by claimant's supervisor, [Mr. F] and [Mr. B], claimant's co-worker who intended to injure claimant because of claimant's employment with employer.

13.Claimant's back injury originated while claimant was at work and while claimant was engaged in or about the furtherance of the affairs or business of employer.

14.Beginning (date of injury), and ending April 14, 1993, claimant has been unable to obtain and retain employment at wages he was receiving prior to (date of injury), due to claimant's back injury.

**CONCLUSIONS OF LAW**

2.Claimant sustained a back injury which arose out of and in the course and scope of employment with employer on (date of injury).

3.Claimant had disability beginning (date of injury), and ending April 14, 1993.

The carrier contends that the above findings are not supported by the evidence and that the hearing officer's decision is "blatantly lacking" in its consideration of carrier's evidence and arguments. It further argues that claimant's injury was not in the course and scope of his employment because it was caused by his intent to assault a third person and because at the time claimant had been suspended without pay and essentially held the status of a terminated employee.

The 1989 Act provides in pertinent part that an insurance carrier is not liable for compensation if an injury was caused by the employee's wilful intention and attempt to injure himself or to unlawfully injure another person. Section 406.032(1)(B). As the court said in North River Insurance Company v. Purdy, 733 S.W.2d 630 (Tex. App.-San Antonio 1987, no writ), this particular exception to liability means that "an injury caused by the employee's willful intention and attempt to injure some 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."

The hearing officer, however, determined that the claimant neither provoked nor caused the assault, and that essentially Mr. F and Mr. B were the aggressors, thus taking this case out of the parameters of the above cited exception. Carrier argues that claimant's injuries were indeed caused by his intent to assault his supervisor, and cites caselaw for the proposition that an assault does not require that blood be drawn or a punch thrown, but that such could occur through a threatening gesture followed by words and coupled with an intention and ability to commit a battery.

We note that the precise words of the statute only require a "wilful attempt . . . to unlawfully injure another person," which certainly could involve less than actual physical

assault. However, the testimony of claimant, if credited by the hearing officer, is sufficient to support the hearing officer's determination, despite the fact that it was diametrically opposed to the testimony of Ms. H. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Although the testimony of the two witnesses herein was in total conflict, it is the fact finder's duty to resolve conflicts and inconsistencies in the testimony of any one witness as well as different witnesses; he may also believe one witness and disbelieve another. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). We will not disturb the decision of the hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The Act also contains a further exception to liability for an injury which arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment. Section 406.032(1)(C). Finding of Fact No. 12 says that claimant's injury was caused by the acts of third persons, but that they acted with intent to injure the claimant because of his employment. Carrier contends this finding is not supported by the evidence because claimant testified that he did not think Mr. B intended to harm him.

Whether an employee was in the course of his employment when he received an injury is a question of fact. Orozco v. Texas General Indemnity Company, 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ). The mere fact that an injury is caused by a co-employee is not controlling of the question of whether the injury is compensable under the Workers' Compensation Act. Texas Indemnity Insurance Company v. Cheely, 232 S.W.2d 124 (Tex. Civ. App.-Amarillo 1950, writ ref'd). Although one's employment may be the occasion for the wrongful act or may give a convenient opportunity for its execution, the general rule is that an injury does not arise out of one's employment if the assault is not connected with the employment, or is for reasons personal to the victim as well as the assailant. Shutters v. Domino's Pizza, Inc., 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ).

Under the facts of this case, it was undisputed that the events of (date of injury), that preceded the altercation had to do with and arose out of employer's business, namely a theft at its client motor company. Claimant's unrebutted testimony was that all the discussion in the office centered around this event. He also testified to events directly related to the interrogation which conceivably could have resulted in antagonism between the principals and himself. (Despite the fact that claimant said Mr. F shouted at him because of the chair incident, this occurred at the end of the interrogation.) Further, claimant was asked on cross-examination whether he thought Mr. B was trying to break his neck or just break up a fight. Claimant's testimony was that he thought the latter was true, and that he didn't believe Mr. B applied the choke hold in a "malicious" way. As noted above, there was no testimony or other evidence from Mr. B; Ms. H testified that Mr. B and others had hold of claimant and were trying to restrain him. With the evidence in this posture, we cannot say that there was insufficient evidence to support Finding of Fact No. 12.

The carrier argues that its position is further borne out by written and transcribed telephone statements by the principals who were present on (date of injury). These statements were excluded from evidence upon objection of the claimant; while the hearing officer's decision and order incorrectly lists these exhibits and does not indicate they were not admitted, the recorded proceedings of the contested case hearing discloses that the hearing officer emphatically excluded these exhibits, and later reiterated his ruling. Because the carrier did not complain of their exclusion on appeal, we will not address such ruling.

We also find no merit in the carrier's argument that the hearing officer gave little consideration to carrier's evidence. There is nothing in the record that so indicates. We have previously held that a hearing officer is not required to include a summary of the evidence, and that if such summary is included it need not mention every piece of evidence admitted, Texas Workers' Compensation Commission Appeal No. 93955, decided December 8, 1993, although the hearing officer's statement of evidence in this case could have been more balanced. As noted above, several of carrier's exhibits were excluded and thus did not warrant any discussion.

The carrier also contends claimant's injury is not compensable because he was essentially a terminated employee at the time. We note that claimant's uncontroverted testimony was that he was suspended without pay, that he was not terminated, and that indeed he was offered another post with employer a few weeks after the incident. With regard to terminated employees, *see* Texas Workers' Compensation Commission Appeal No. 93972, decided December 8, 1993, which quoted Professor Larson to the effect that workers' compensation coverage is not automatically and instantaneously terminated by the firing or quitting of an employee. We find no merit in this point of appeal.

Finally, the carrier argues that claimant has not continued to see a doctor and that any restrictions on his ability to work were essentially self imposed. We note that the hearing officer could rely upon claimant's own testimony to establish disability, that the claimant stated that he attempted to return to work but could not do so because of the pain, and that his doctor had advised him to work only if he felt he could do so, and that his inability to sit precluded his returning to his former occupation of truck driver. While the evidence as regards disability may have led a different fact finder to another conclusion, that alone is an insufficient basis upon which to reverse, so long as the record contains evidence to support the hearing officer. *See* Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz

Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge