APPEAL NO. 94097

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on December 21, 1993, (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) did not sustain a compensable injury on (date of injury), did not have disability and that the respondent (carrier) timely contested compensability of the claimed injury. The claimant appeals urging that the evidence was uncontroverted that he called in to report that he was back on duty at the time of an automobile accident which resulted in his injuries and that the findings show that he was injured as a result of the accident. Carrier argues that the evidence is sufficient to support the determinations of the hearing officer and asks that the decision be affirmed.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

The issues presented at the hearing for resolution were whether the claimant sustained a compensable injury on (date of injury), whether he had disability as a result, and whether the carrier timely contested compensability. This latter issue is not on appeal. The evidence was in considerable conflict and much hinged on the weight and credibility attached to the testimony of the claimant. The hearing officer, as the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)), apparently was not persuaded by the rendition of facts by the claimant. We have stated numerous times that the hearing officer, as the finder of fact, is responsible for resolving conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and that we will not substitute our judgment for that of the hearing officer on factual issues where there is sufficient evidence to support the factual determination. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994; Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. Only were we to find, which we do not under the setting of this case, that the findings of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, would there be a sound basis to disturb the decision. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

Very briefly, the claimant testified that on (date of injury), his employer told him to take a (MM) (it was disputed whether MM, an undocumented alien, was an employee) to lunch. The claimant stated that he called in on a radio and told the employer he was at lunch and that he later called to say he was back on duty. According to the claimant, he and MM were on the way to an employer warehouse to do some cleanup when involved in an automobile accident. The claimant indicated that he did not get any medical attention at the time, although he thought he injured his back, because he did not want to get his

employer or MM in trouble. An attorney retained by the claimant testified that he advised the claimant to seek workers' compensation and was representing claimant in a personal injury law suit. He said the claimant indicated he was afraid he would lose his job. In any event, the claimant started treatment with a Dr. H on or about July 8, 1993, and a report shows a diagnosis of "Acute Cervical/ Thoracic/Lumbar Sprain." The claimant also indicated he later fell up some stairs because of his back "locking up" and that his doctor states he needs knee surgery.

The claimant testified that he lied in a previous statement given to another insurance agent (apparently an agent for the automobile insurance company) and which he signed along with MM wherein it was stated that at the time of the accident they were on the way to a bike shop. It was brought out that MM does not own a vehicle but gets around on his bike. That statement also indicates that MM was not an employee although MM testified he was an employee and that (date of injury) was the first time he was going to clean up the warehouse.

It was brought out that there were not any cleaning materials or supplies in the vehicle at the time of the accident and that the claimant would not be going to the warehouse for such purposes. It was also brought out that the location of the accident was not at a place that was the most direct or shortest route from the place where the claimant ate lunch to the warehouse. The claimant stated the reason they took a longer route was to let their "stomachs calm down" and that there were chemicals at the warehouse that would upset one's stomach. He also acknowledged there were some inconsistencies in his testimony about who he was trying to protect, his employer or MM, and "that's the way life is."

Two employees of employer were called and testified that MM was not an employee and that the warehouse was rarely cleaned and that there were no cleaning supplies at the warehouse. The claimant continued to work following the (date of injury) accident and was terminated apparently in early July because he continued to take MM out with him in the company vehicle.

The hearing officer specifically found that the claimant was not engaged in or about the furtherance of his employer's business at the time of the (date of injury) accident. This is a necessary requisite to the compensability of an injury. Section 401.011(10) & (12). Further, the term course and scope does not include:

> travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:
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> (i)the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and
>
> (ii)the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

The evidence is sufficient to establish that the travel at the time of the accident was personal in nature and was not in the course and scope of employment and did not come within any exception. *See* Texas Workers' Compensation Commission Appeal No. 93754, decided October 7, 1993; Texas Workers' Compensation Commission Appeal No. 91078, decided December 19, 1991. Since there was no compensable injury established, the claimant could not have disability under the 1989 Act. Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." (Emphasis supplied). Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge