APPEAL NO. 94170

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On November 29, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the respondent, PS, the claimant herein, sustained a compensable injury to his hand at his residence on (date of injury), while attempting to obtain access to his home to retrieve welding equipment due to direction from his employer, (employer), and that he had disability therefrom since August 7, 1993, through the date of the hearing.

Carrier timely appealed, disputing the credibility of the claimant and pointing out certain facts that refute the hearing officer's decision. The claimant responds that the decision of the hearing officer should be upheld.

DECISION

The decision and order of the hearing officer are affirmed, as the great weight and preponderance of the evidence is not against her decision.

Claimant was employed primarily as a truck driver for the employer, a plumbing business. The day of the accident, (date of injury), he had been assigned to clean up trash from a school worksite and return it to the yard. Claimant, who lived two blocks from the yard, severely injured his right hand when he broke through some glass at his residence while attempting to "jimmy" the lock with a credit card. He was trying to break in because he left his keys in his personal automobile, and his wife was not at home. The circumstances under which claimant came to be injured at his residence were the subject of controversy during the hearing.

According to the claimant, he was there to pick up welding equipment pursuant to direction from his employer to get equipment in order to weld a tie down bar to his truck in order to better secure loads. Claimant also stated that he was operating in accordance with general directions given sometime earlier by the business owner to take whatever steps necessary to make the truck "roadworthy." That morning, claimant had been given his directions to clean up the worksite at (school) by (Mr. W). Claimant said that after bringing the first load back to the yard, he complained to another supervisor (Mr. RW) that the load was shifting around. He recommended to Mr. RW that a channel iron should be welded to the truck in order to tie down the load. On direct testimony, claimant recounted the conversation as follows:

Claimant: . . . And I told him then that the load was moving around too much and I couldn't boom it down properly, that I needed to weld channel iron on the side of it. . . . And he looked at it, and had said, "Yes. We do need to do something about that. But go back over there to [school]." And I said, "Okay. On the last load I'll pick up the welding stuff."

Claimant stated that when he made this statement, Mr. RW did not say anything to him to indicate that he did not have permission to do this. He stated later in his direct testimony that Mr. RW "specifically instructed" him to go home to get his channel iron. He also testified that he went home to retrieve his welding helmet and grinder.

Claimant said he had once before done a welding job on the same truck to put on an angle iron, and had gone home, with permission, to retrieve some welding equipment. He said that he used a welding machine owned by the business for this previous job. Claimant denied that he had gone home on (date of injury) for the purpose of getting cigarettes, denied that he had told anyone this, but also indicated that on the date of the accident and for the period thereafter he was on medication. On the date of the accident, claimant ended up going to a hospital emergency room and was in the hospital for surgery. Claimant said that he did not have personal health insurance. Because of the continuing problems with his hand, he was unable to work.

Claimant said that the cleanup trip from which he was returning was the last run needed, and he was not aware of any further assignments. The accident happened around 11:30 a.m. Claimant said that he found out from his wife that he had been terminated. Claimant said his wife returned to the yard after he was taken to the emergency room to obtain an unopened package of cigarettes from his truck.

A number of employees of the employer testified. (Mr. L), project manager, said it was his understanding that claimant was to move to another project in the afternoon. He said that the day of the accident, he asked claimant where the accident happened. Mr. L said that claimant said he broke a window in his house while there to get a pack of cigarettes. He talked to claimant again on the telephone, on August 9, 1993, and refreshed his memory of the conversation from notes he made. Mr. L said that claimant told him again that he hurt his hand while at his residence to retrieve a pack of cigarettes, and that one pack of cigarettes "wasn't worth the trouble it had caused." (Claimant denied he talked with Mr. L on this date.) Another statement about going to get cigarettes was made by claimant to Mr. L on August 13th. Mr. L said it was not until August 16th that he understood that claimant maintained he had gone home to get welding equipment. According to Mr. L, the employer maintained welding equipment and rods at the yard. He denied claimant had actually been terminated, although he acknowledged there was discussion about termination because claimant had gone home without permission.

Mr. W stated that he instructed claimant first thing in the morning that he was to work at the school, and that he did not expect claimant to be able to finish the job that day. In fact, Mr. W said, another person was assigned to complete the task after claimant was injured. Claimant would have gone on to his next job the following day.

(Mr. J), the company president, agreed that claimant had done an earlier welding job on the truck, about a week before the accident. Mr. J said that the company had welding helmets at the yard but that welders often preferred to use their own. He said that employer maintained welding supplies at the yard, and that welding materials not readily available at

the yard would be purchased from the company down the street, not obtained through employees. He said that he never gave claimant general instructions to do whatever was necessary to the truck, and that claimant's only standing instructions were to regularly check the gasoline, oil, and fluids. Mr. J's statement to the adjuster on September 16, 1993, stated that claimant had not had to go home to get any equipment for this "first" welding job.

Finally, Mr. RW denied he specifically told claimant to go get welding supplies. He said that claimant told him that something should be welded to the truck to boom down materials. Mr. RW said that, in the spirit of being open to ideas and suggestions, he told claimant that they needed to get that taken care of, but not to worry about it today but to go back and complete his job. Mr. RW said that the claimant did not mention he would be going home, and that while employees could use their own welding equipment, that could be done only if they brought it with them. Mr. RW said he was not involved in the first welding job claimant had done on the truck.

Mr. RW said that he discovered later that the truck already had devices that would allow loads to be tied down, so that claimant's suggested welding job was not necessary. Other witnesses for the employer agreed that Mr. RW was empowered to direct claimant's activities.

Claimant testified once more on rebuttal. He denied that there was further cleanup work to be done at the school. When asked again about the conversation he had with Mr. RW, claimant testified that when he said he had a channel iron at the house, Mr. RW said, "Well, go get it." He also indicated that a factor in going home was Mr. J's general instructions to do whatever necessary to get the truck ready. In a statement to the adjuster given September 15, 1993, claimant stated that he was "instructed" by Mr. RW to go by his house and pick up welding equipment. Claimant said in this statement and at the hearing that nothing but a welding machine was available at the yard, according to his understanding.

While notes from claimant's medical history records document how his injury occurred, none of them attribute the activity either to employment, or to a personal errand.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak, or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Texas Workers' Compensation Commission Appeal No. 92598, decided December 23, 1992, *citing* Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio, 1983, writ ref'd n.r.e.). A claimant's testimony alone is sufficient to establish that an injury has occurred. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). 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 will not be set aside by the Appeals Panel because different inferences and conclusions may be drawn upon review, even when the record contains

evidence, as here, 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 decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge