APPEAL NO. 990597

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was originally held on August 26, 1998. The issues in that case were injury and disability, where the hearing officer found appellant (claimant) had not sustained a compensable injury and did not have disability. That case resulted in a remand in Texas Workers' Compensation Commission Appeal No. 982482, decided December 4, 1998. The facts of the case are set out in some detail in Appeal No. 982482 and are summarized here only to establish a foundation for this decision. Claimant was a high school math/algebra teacher who asserts that he was deliberately struck in the face by a book bag (or backpack) being wielded by a student, DC, on _____. Exactly what led up to that incident is in conflict and is discussed in Appeal No. 982482. Although it is undisputed that claimant timely reported the incident, the circumstances and inferences that could be drawn by the reporting are in dispute and in conflict. Claimant also reported the incident to the police and a police report was prepared, with the police officer noting, "I observed the [claimant's] dental bridge and it appeared to be bent out of shape." Claimant saw his dentist, Dr. F, the next day. In a report of that day, Dr. F described that backpack incident and stated:

> Upon examination I found that he had bruising and swelling of the left cheek. Intraorally he had tenderness, swelling, and a laceration to the buccal mucosa adjacent to where the crown and partial were attached. The partial was bent. He had pain upon opening and closing his jaw. The crown had been dislodged.

Claimant was subsequently referred to a neurologist, Dr. A, who diagnosed a cerebral concussion, seizure disorder and cervical strain, which Dr. A related to the _____, incident. Respondent (carrier) defended on the basis that it was not liable because of the personal animosity and/or horseplay exceptions set out in Section 406.032(1)(C) and (2). As we noted in Appeal No. 982482, *supra*:

> The hearing officer, in her Statement of the Evidence, summarizes the evidence, comments "[t]he hearing officer was not persuaded by Claimant's testimony" without further explanation and makes a finding of fact that claimant "did not sustain an injury in the course and scope of employment on _____." The hearing officer does not enlighten us whether she did not believe claimant was hit in the face with the backpack, or whether no such incident occurred, or whether she believed claimant was the aggressor by hitting DC with the test paper, or whatever other theory she may have had. Carrier is very clear and adamant in its position that the injury, which carrier inferentially admits, was not compensable under the personal animosity and/or horseplay exception in Section 406.032.

We went on to remand the case, stating:

> Because we fail to understand the basis of the hearing officer's finding that claimant did not sustain an injury in the course and scope of employment, we remand the case to the hearing officer for reconsideration and findings not inconsistent with this decision. If the hearing officer applies either the personal animosity or horseplay theories, the hearing officer should cite evidence and authority to support that position. The hearing officer is also to make findings of the periods when claimant was unable to obtain and retain employment. No evidentiary rehearing on remand or new evidence is necessary. The hearing officer may, at her discretion, request additional oral and/or written argument from the parties.

No evidentiary hearing on remand was held and, apparently, the hearing officer did not request any additional oral and/or written argument from the parties. In a new decision, the hearing officer repeats the Statement of the Evidence, adding a section that essentially held that neither the personal animosity nor horseplay exception was applicable in this case. The hearing officer then made the following findings and conclusions:

FINDINGS OF FACT

2. Claimant was not injured in the course and scope of employment on _____ as a result [of] being struck on the face with a book bag by a student, [DC].

3. Claimant was not a voluntary participant in the _____ incident involving [DC] which caused Claimant's injury.

4. Claimant's injury did not arise out of an act of a third person intended to injure Claimant because of a personal reason. Rather, Claimant was assaulted by [DC] because of his employment.

5. Claimant's inability to obtain and retain employment at wages equivalent to the preinjury wage from January 22, 1998 continuing to the date of the hearing did not result from an injury sustained in the course and scope of employment on _____.

CONCLUSIONS OF LAW

2. Claimant did not sustain a compensable injury on _____.

3. Claimant did not have disability resulting from an injury sustained on _____.

Claimant appeals the decision, citing Texas Workers' Compensation Commission Appeal No. 961756, decided October 16, 1996, applying seven listed factors which would warrant our reversal of a hearing officer's factual findings. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Carrier responds, asserting that the "evidence established that any injury suffered by Claimant on _____ was the result of a personal dispute and/or horseplay between Claimant and the student in question." Carrier then cites case law to support a decision based on the personal animosity/horseplay exceptions in Section 406.032. Carrier goes on and lists some pieces of evidence which would tend to show that claimant's "alleged injury did not occur in the course and scope of employment and it was not the type of injury that prevented Claimant from working." Carrier urges affirmance.

DECISION

Reversed and we render a new decision.

The facts are as outlined in Appeal No. 982482, *supra*, and summarized above. The hearing officer comments on the evidence in regard to the personal animosity and horseplay exceptions in Section 406.032 and makes appropriate findings in Findings of Fact Nos. 3 and 4, quoted above. Those findings have not been appealed, are appropriate under the circumstances and are supported by the evidence. That said, we refer back to our decision in Appeal No. 982482 that while we understand that the hearing officer "was not persuaded by Claimant's testimony," the hearing officer makes no finding, nor is there any explanation, for the basis for the hearing officer's decision that claimant was not injured in the course and scope of his employment. Carrier lists several factors which might have influenced the hearing officer's decision which we address. (1) Claimant did not call security after the incident in question. That may be, but the failure of claimant to call security does not relieve a carrier of liability. The hearing officer, by her other findings, clearly believed an incident took place and "caused Claimant's injury." (2) That claimant had a long history of seizures which predated the incident and "was on anticonvulsant medication prior to the time of the incident in question." That is true, but if the hearing officer believed claimant's injuries were caused by a nonwork-related seizure, she should have so stated. The hearing officer's recitation of the evidence and findings make no mention of claimant's seizure history or that it was a factor in her decision. Carrier goes on to cite that claimant did not undergo some medical testing, was able to drive and left school on the day in question without informing his immediate supervisor. Although elements of those assertions may be disputed, even if true, they do not provide a defense why claimant did not sustain a compensable injury. They may constitute evidence regarding the extent of claimant's disability but not compensability.

As noted in Appeal No. 961756, *supra*, the Appeals Panel gives due deference to the hearing officer, as the fact finder; however, in determining whether the great weight and preponderance of the evidence is contrary to the hearing officer's finding we look to certain factors which may be "so persuasive . . . to warrant our reversal." These include: (1) undisputed evidence of a significant accident. In this case, it appears undisputed that

some kind of incident involving claimant being hit in the face by a backpack occurred. (2) An incident of somewhat traumatic force is supported by the police report and Dr. F's reports. (3) That common knowledge and experience tend to support the reasonableness of claimant's assertions is supported by common knowledge that being struck in the face by a backpack can cause a dental injury and perhaps a concussion. (4) Independent evidence of claimant's injury and pain is supported by the police report of the observations of the patrolman. (5) The seriousness of claimant's condition is supported by Dr. F's and Dr. A's reports. And (6) medical evidence supporting claimant's position in the form of reports by Dr. F and Dr. A. More importantly, the hearing officer gives no explanation for her conclusion other than the claimant's testimony was not persuasive. As previously indicated, we cannot ascertain whether this means that the hearing officer does not believe the incident happened or does not think claimant has an injury as defined in Section 401.011(26) for the basis for the conclusion.

Taken together, we hold that the hearing officer's findings that claimant was not injured in the course and scope of employment on _____, to be so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We reverse the hearing officer's finding on that issue and render a new decision that claimant sustained a compensable injury on _____, when he was struck on the face with a book bag.

In that the hearing officer's conclusion that claimant did not have disability appears to be predicated on the basis of no compensable injury, and having reversed that determination, there are no findings regarding the extent of injury and disability. Accordingly, the parties are free to relitigate both extent of injury and disability.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge