APPEAL NO. 991060

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 5, 1999. With respect to the issues before her, the hearing officer determined that the appellant's (claimant) claimed injury was caused by his wilful intention and attempt to unlawfully injure another person and, thus, the respondent (self-insured) is relieved of liability for workers' compensation benefits, and that the claimant did not have disability within the meaning of the 1989 Act because the claimant did not sustain a compensable injury. In his appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. The appeals file does not contain a response to the claimant's appeal from the self-insured.

DECISION

Affirmed.

The facts in this case were hotly contested. The claimant testified that on _____, he was working as a bus driver for the self-insured and had been so employed for about nine years. He stated that there were about 30 passengers on the bus, when a female passenger approached him from the rear of the bus. He testified that the passenger asked him to stop the bus at a stop that was not on his route, that he declined to do so, that she was using abusive language, and that she began hitting him about the face while he was driving and strapped into his seat with a lap belt. The claimant maintained that he was driving while the passenger was hitting him and that as soon as it was possible, he pulled the bus over to the curb and came to a stop. He denied that he attacked the passenger, insisting that he only attempted to push her off as she was attacking him and that he did not hit her. The claimant stated that he went to the emergency room in the evening of October 18th and that on October 19th he began treating with Dr. M, who took him off work and continued him in an off-duty status through the date of the hearing. The claimant stated that he injured his face, neck, back, hands, arms, and left leg in the incident. The claimant acknowledged that he was charged with assault but the charges were dropped. In addition, he testified that the self-insured has not taken any disciplinary action against him and that he is still employed by the self-insured, although he is not working.

The self-insured introduced two incident reports, one from the transit police and one from the city police department. The transit police report concludes that the claimant was the aggressor in the altercation with his passenger and that he threw the first punch. In so doing, the transit police report notes that the passenger acknowledged that she approached the driver about his not letting her off at the desired bus stop, that she asked him for his name and identification number, that the claimant became upset and struck her in the mouth with his right fist, and that thereafter, the claimant picked up his metal ticket punch and struck her four to five times on the face and head with it. The transit police report also provides that the city police officers spoke to some 10 other bus passengers at the scene and that they corroborated that the claimant threw the first punch and struck the woman on

the head with his hole punch. The self-insured also introduced the videotaped depositions of Mr. H and Mr. W, the transit police officers who investigated the disturbance, and they reiterated that the claimant had been the aggressor in the argument with the passenger. The report from the city police officers similarly states that the claimant initiated the physical confrontation with the passenger and that he struck her with his fist and a hole punch. That report also states that the witnesses that the city police officers spoke with confirmed the passenger's version of the incident over that of the claimant. Attached to the city police officer's report is a document recommending that the assault charges against the claimant be suspended due to the inability of the detective to contact the complainant.

This is a classic case of credibility. The hearing officer was presented with strikingly different versions of the incident that occurred on the bus on _____. The claimant insisted that the passenger was the aggressor in the altercation, that she threw the first punch, that she continued to strike him while he was attempting to drive the bus, and that he did not strike her, he only attempted to push her away when she was hitting him. However, the police reports and the deposition testimony of Mr. H and Mr. W state that the claimant was the aggressor, that he threw the first punch, and that he also struck the passenger with the metal hole punch. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. As such, she was charged with the responsibility for resolving the conflicts and inconsistencies in the testimony and evidence and deciding what facts had been established. She did so by giving more weight to the police reports and the deposition testimony of the transit police officers than to the claimant's testimony that he was not the aggressor and that he did not strike the passenger. The hearing officer was acting within her province as the fact finder in so resolving the conflicts and inconsistencies. Our review of the record does not reveal that the hearing officer's determination that the claimant's claimed injury was caused by his wilful attempt to unlawfully injure another is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Thus, the hearing officer properly determined that the self-insured was relieved of liability for workers' compensation benefits in this instance pursuant to Section 406.032(1)(B).

Disability is defined under the 1989 Act as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, by definition, the existence of a compensable injury is a prerequisite to a finding of disability. Given our affirmance of the determination that the claimant did not sustain a compensable injury, we affirm the determination that the claimant did not have disability.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge