

APPEAL NO. 001144

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 26, 2000. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____; (2) claimant's injury was not caused by the claimant's willful intention or attempt to unlawfully injure another person; and (3) claimant had disability from July 2, 1999, through October 19, 1999. Appellant (carrier) appeals these adverse determinations on sufficiency grounds. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant sustained a compensable back injury. Carrier also contends that the hearing officer should have determined that it is relieved of liability because any alleged injury was caused by claimant's willful intention or attempt to unlawfully injure another person.

The hearing officer's decision sets forth fairly and adequately the evidence in this case and it will only be outlined here. Briefly, claimant testified that he was hit in the back by a forklift driven by Mr. S. Claimant said that after this, he and Mr. S exchanged angry words and that Mr. S came down from the forklift and hit claimant before others stopped the altercation. Claimant said "there was no fight" and that he was not injured in the altercation. Medical records state that claimant was diagnosed with a lumbar herniation after MRI testing was performed.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 406.032(1)(B) provides that a carrier is not liable for compensation if the injury was caused by the employee's willful attempt to injure himself or to unlawfully injure another person. Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

This case turned on the issue of credibility. If claimant was the aggressor in an attempt to unlawfully injure Mr. S, then carrier is not liable for compensation. See Texas Workers' Compensation Commission Appeal No. 931031, decided December 22, 1993. The hearing officer was presented with conflicting evidence regarding whether claimant

was hit by the forklift or whether claimant was injured in a physical altercation and willfully attempted to injure Mr. S. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. As such, he was charged with the responsibility for resolving the conflicts and inconsistencies in the evidence and deciding what facts had been established. The hearing officer was acting within his province as the fact finder in resolving the conflicts and inconsistencies in the evidence. The hearing officer's determinations that claimant sustained a compensable injury and that he did not willfully attempt to injure Mr. S are not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

Carrier contends the hearing officer erred in determining that claimant had disability. Carrier asserts that because claimant did not sustain a compensable injury, he did not have disability. However, we have affirmed the determination that claimant's injury is compensable. Carrier also asserts that the reason why claimant was unable to earn his preinjury wage was because his employment was terminated after the altercation. Termination for cause does not necessarily preclude a finding of disability. Texas Workers' Compensation Commission Appeal No. 92282, decided August 12, 1992. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, the hearing officer determined that claimant's injury caused him to be unable to earn his preinjury wage. We have reviewed the record and this determination and we conclude that it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Kathleen Decker
Appeals Judge

Tommy W. Lueders
Appeals Judge