

APPEAL NO. 001822

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 10, 2000. The hearing officer determined that the respondent's (claimant) injury of _____, was not caused by the claimant's attempt to unlawfully injure another person, nor did it arise out of an act of the personal animosity of a third person; that the claimant had disability from December 7, 1999, through March 31, 2000; and that the appellant (carrier) timely disputed compensability of this claim. The carrier appeals, arguing that the adverse determinations are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The finding of timely dispute has not been appealed.

DECISION

Affirmed.

The decision and order provides an extensive discussion of the evidence, which need only be highlighted here. The claimant worked as a forklift operator. On the evening of _____, he and a coworker, Mr. A were both operating forklifts loading a truck. The claimant said he advised Mr. A that they had to correctly load the truck or they would have to do it all over again. According to the claimant, Mr. A became upset and pulled his forklift up behind the claimant's forklift and blocked him. Cursing and swearing between the two occurred. The claimant said that he tried to wiggle his forklift out of the narrow space and in the process struck the Mr. A's forklift. The claimant said Mr. A then got off his forklift, came up to the claimant, and punched him in the face. The claimant said he almost fell off the forklift but was able to grab himself. He said he never struck back at Mr. A and sustained a facial scratch and an eye and back injury in the incident.

In a transcript of a telephone interview, Mr. A said the claimant struck him several times with the forklift and, when Mr. A got off his forklift, the claimant ran over Mr. A's toes. At his point, according to Mr. A, they got into a fistfight. There was other evidence from Mr. B, the supervisor, that the claimant had a history of bad attitude, aggressiveness, and truculence on the job and had on at least one occasion used a racial slur against Mr. A. He said that he saw the claimant and Mr. A from his office engaged in a heated argument, that the claimant bumped Mr. A's forklift twice; and that he went to the area to break up the confrontation. In his opinion, the claimant intentionally backed into Mr. A. Mr. B also said that Mr. A told him the claimant ran over his foot, but Mr. B did not think Mr. A's foot looked like it had been run over by a forklift. He did not know who threw the first punch.

Section 406.032 provides that a carrier is not liable for compensation if, among other things, the injury was caused by the claimant's willful attempt to injure another person or if it arose out of an act intended to injure the claimant for personal reasons and not directed at the employee as an employee or because of the employment. Whether the these defenses have been established presents a question of fact for the hearing officer

to decide. Texas Workers' Compensation Commission Appeal No. 971051, decided July 21, 1997; Texas Workers' Compensation Commission Appeal No. 93792, decided October 20, 1993. As was pointed out early in the CCH, the resolution of these compensability issue depended largely on an evaluation of the credibility of the claimant. The carrier argued that the claimant was essentially a troublemaker who provoked a confrontation with Mr. A out of personal hostility towards him. The claimant asserted that the confrontation arose when he asked Mr. A to do his work correctly so it would not have to be redone. In its appeal, the carrier argues essentially that the hearing officer was required as a matter of law to accept Mr. A's version of events. Section 410.165(a) provides that the hearing officer is the sole judge of he weight an credibility of the evidence. In his role as fact finder, he could accept or reject in whole or in part any of the evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993. The hearing officer accepted the claimant's version of what happened. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

The carrier also appeals the disability finding on the basis that the injury was no more than a "cut to his facial area." The claimant testified to a facial scratch, blurred vision, and low back pain as a result of the incident. Medical diagnoses included sprain/strain to all areas of the spine and cervical nerve root irritation. On January 14, 2000, the claimant requested a change of treating doctors because he was "not getting better under current one." The change was approved to Dr. C. On this date, Dr. C placed the claimant in an off-work status at least until April 1, 2000. While there was no express issue of extent of injury, the hearing officer did not limit the injury to a simple facial scratch.

Whether disability existed also presented a question of fact for the hearing officer to decide and could be proved by the claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The claimant's testimony together with this medical evidence, deemed credible by the hearing officer, was sufficient to support the finding of disability. *Cain, supra*; *Pool, supra*.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Gary L. Kilgore
Appeals Judge