APPEAL NO. 001861

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 June 13, 2000. The hearing officer determined that the claimant had sustained a compensable injury and had disability resulting from that injury. The carrier has appealed the compensability and disability determinations, contending that the hearing officer committed reversible error in sustaining an objection to two exhibits and that the hearing officer's determination that the assault on the claimant was in the course and scope of employment was against the great weight of the evidence. The carrier contends that the injury was not compensable and, therefore, there was no disability. The respondent (claimant) asserts in response that the decision of the hearing officer is supported by the evidence, that the hearing officer properly excluded the two exhibits, and that the decision should be affirmed.

DECISION

Affirmed.

It is undisputed that on _____, the claimant was assaulted by a coworker and sustained an injury to his chest in the assault. The claimant testified that he was a meat server and was assigned to supervise other meat servers in the restaurant where he worked. On the morning of _____, he and another meat server, Mr. D, were to come in early to help set up for the restaurant's opening. The claimant arrived at approximately 9:30 a.m., but Mr. D did not. At approximately 11:00 a.m., the claimant saw Mr. D behind the bar and asked him what he was doing there. Mr. D rudely advised the claimant to mind his own business. The claimant then asked Mr. D if he was drunk. Mr. D then came from behind the bar and struck the claimant in what was described by the claimant as a "football shove." This was later described as a running shove with the arms outstretched and locked in place. The claimant testified that Mr. D's football shove struck him on the chest, knocking him backwards into one of the wait staff. The claimant testified that he felt a burning tightness in his chest after being shoved. He worked for approximately one hour, then left to seek medical attention.

The claimant first went to (center 1). He was diagnosed with a chest contusion and was placed on restricted duty. On January 23, 2000, he went to Dr. S of (center 2). Dr. S was identified as the company doctor. Dr. S diagnosed a chest contusion and placed the claimant on restricted duty. On February 11, 2000, after having treated the claimant for several weeks, Dr. S issued a work release, stating that the claimant could return to full duty. Dr. S also scheduled a follow up visit for February 18, 2000. On February 17, 2000, the claimant began treating with Dr. H. Dr. H advised the claimant to stay off work until further notice. The claimant's last visit with Dr. H for which chart notes were admitted took place on March 24, 2000. At that time, Dr. H continued to advise the claimant to stay off work. The claimant testified that he was released to full duty by Dr. H on March 27, 2000.

The carrier appeals the exclusion of two documents--a recorded interview with the assistant manager on duty on the date of injury and a report from an individual who was reportedly given the task of obtaining a statement from Mr. D.

Evidentiary rulings by the hearing officer on documents which are admitted or not admitted are generally viewed as being discretionary on the part of the hearing officer. Texas Workers' Compensation Commission Appeal No. 94816, decided August 10, 1994. The standard of review on such evidentiary issues is abuse of discretion. Texas Workers' Compensation Commission Appeal No. 93580, decided August 26, 1993. In determining whether there was an abuse of discretion, we look to see if the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). We have addressed this matter in several decisions and have held that a hearing officer could refuse to accept such unsigned, unsworn documents where there is no indicia of authenticity or identification. Texas Workers' Compensation Commission Appeal No. 92319, decided August 26, 1992. Where there was some extrinsic evidence of authenticity such as the signature of the transcriber and statement of accuracy of the transcript, we have upheld the admission of a transcript. Texas Workers' Compensation Commission Appeal No. 92577, decided December 3, 1992. In case before us, neither document was signed and there was no attempt to authenticate them at the CCH. The hearing officer did not commit error in failing to admit the documents. Our review of the complete record, including the documents that were not admitted indicates that the recorded interview which was excluded bolstered the claimant's rendition of the incident which resulted in his injury; that the second excluded document would have added no relevant evidence, and convinces us that, even if it were error for the hearing officer not to admit the documents, it was harmless error that did not result in material prejudice and did not result in the rendition of an improper decision. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ); Texas Workers' Compensation Commission Appeal No. 93749, decided October 6, 1993.

The carrier argues that the claimant was not a supervisor and had no reason to question Mr. D the morning of the assault. The carrier argues in its appeal, as it did at the hearing, that the claimant made remarks to Mr. D which were personal in nature and, in effect, instigated the assault by those remarks. The carrier asserts that the injury resulting from the assault was not sustained in the course and scope of employment.

The hearing officer could have found that the remarks made were incident to the employment; were related to Mr. D's performance of his work; and were, therefore, related to the employment. Although the carrier argues that the claimant's remarks to Mr. D were the result of the claimant's personal dislike for Mr. D, the carrier fails to point to any testimony or other evidence which evidences a personal dislike or relationship outside the work place. In Williams v. Trinity Universal Insurance Company, 309 S.W. 2d 850, 852 (Tex. Civ. App.-Amarillo 1958, no writ), where an employee was assaulted at work by a coworker for no apparent reason and the court concluded that the injury was not compensable, the assaultive injuries rule was stated as follows:

> In the case of injuries inflicted by assault, the rule is that if one employee assaults another solely from anger, hatred, revenge or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. But if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to rise out of the employment. The statement of the rule, as thus determined by authorities, is simple enough. Its application is sometimes fraught with puzzling effect. The vital question seems to be: was the accident connected with the employment? If it was, then it arose out of the employment, provided it occurred in the course of the employment. And the fact that the injury was deliberately and intentionally inflicted does not remove the occurrence from the category of an accident as contemplated by the statute.

In Nasser v. Security Insurance Company, 724 S.W.2d 17, 19 (Tex. 1987), a case involving an assault on a restaurant manager by the boyfriend of a customer, the court discussed the rationale for the "personal animosity" exception to carrier liability for compensation as follows:

> [T]he purpose of the "personal animosity" exception is to exclude from coverage of the Act those injuries resulting from a dispute which has been transported into the place of employment from the injured employee's private or domestic life, at least where the animosity is not exacerbated by the employment. [Citation omitted.] Whenever conditions attached to the place of employment or otherwise incident to the employment are factors in the catastrophic combination, the consequent injury arises out of the employment.

There was sufficient evidence upon which the hearing officer could conclude that the assault occurred while the claimant was in the course and scope of his employment.

The carrier argues that the claimant was released to full duty by Dr. S and that Dr. H's subsequent advice that the claimant not work was the result of a back condition unrelated to the chest contusion. The carrier argues that any period of disability after February 11, 2000, was the result of the back condition and not a result of the chest contusion. A review of Dr. H's records indicate that the claimant continued to complain of and be treated for a chest contusion.

A legal sufficiency point must be sustained: (1) when there is a complete absence of a vital fact; (2) when rules of law or evidence preclude according weight to the only evidence offered to prove a vital fact; (3) when the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) when the evidence conclusively establishes the opposite of the vital fact. Merrell Dow Pharmaceuticals, Inc. Havner, 953 S.W.2d 706, 711 (Tex. 1997). The disputed issues presented the hearing officer with questions of fact for her resolution as the fact finder. The hearing officer is the sole judge of the materiality,

relevance, weight, and credibility of the evidence (Section 410.165(a)) and we will not disturb the hearing officer's findings on appellate review unless they are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). There was sufficient evidence to support the hearing officer's conclusions that the claimant was injured in the course and scope of his employment, that the personal animosity exception did not apply, and that the claimant's injury at work was a producing cause of his inability to obtain and retain employment from January 23, 2000, through March 27, 2000. We are satisfied that the challenged findings and conclusions find sufficient support in the evidence.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge