APPEAL NO. 91130

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On October 7, 1991, a hearing was scheduled. It was continued to November 5, 1991, after the hearing officer found good cause for claimant's (respondent herein) failure to appear. (hearing officer) presided at both sessions of the hearing and found that respondent incurred a compensable injury on _____. Appellant contests the decision as contrary to the great weight of the evidence since the injury was intentionally inflicted and adds that there was no issue or evidence as to disability upon which to order income benefits.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Respondent had been a laborer with (employer) for only about three months when he injured his back on _____. At the time of the incident, he was using a pickax to break up a pile of material for movement by a forklift. Respondent appears on the tapes of the hearing to say that a man named "G" was working with him. When swinging the pick, respondent fell down, stating he hurt his back. Employer took him to a physician, Dr. M. After initial consideration and care, Dr. M returned him to work with limitations until May 13, 1991. Respondent then testified that a superior, CW, berated him, using a racial epithet, upon his return from the doctor's office, so he left employer's premises. No offer of light duty was proposed by employer. Respondent returned to work on May 13 but could not work. No offer of light duty was described to him at that time either. Respondent never went back to work for employer and obtained other employment on October 1, 1991, making approximately $540.00 every two weeks whereas he had made approximately $200 every week for employer.

Appellant's primary contention in contesting compensability was that respondent intentionally injured himself. *See* Article 8308-3.02(2) of the 1989 Act. An employee, DB, of employer testified as custodian of records to an investigation conducted after the _____ incident. That investigation led to the employer obtaining three affidavits from employees saying they heard respondent say, in essence, that he would "knock his back out," that after a while "he would be sick," and "what would CW do should I knock my back out." Respondent said the statements were not true and questioned whether one affiant, MR, was ever near him on _____. In addition he said another employee, KF, in a discussion after the incident with respondent, said he would testify for respondent.

Exceptions found in the 1989 Act at Section 3.02 are substantially the same as those in the prior article found in TEX. REV. CIV. STAT. ANN. art. 8309, Section 1 (repealed 1989). The 1989 Act will be viewed as conveying the same meaning in this area. Walker v. Money, 132 Tex., 120 S.W.2d 428 (1938). When sufficient evidence has been admitted to raise the issue, an exception generally requires the employee to prove it does not apply

in showing that the injury arose out of and in the course and scope of employment. March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied); Anchor Casualty Co. v. Patterson, 239 S.W.2d 904 (Tex. Civ. App.-Eastland 1951, writ ref'd n.r.e.); and Weicher v. Ins. Co. of North America, 434 S.W.2d 104 (Tex. 1968). Under the same exception as is now before us: (wilful intent and attempt to injure himself), the court in Texas Employers Ins. Assn. v. Gregory, 521 S.W.2d 898 (Tex. App.-Houston [14th Dist.] 1976) required the carrier to introduce evidence of the excepted conduct. The claimant then had the burden to prove the exception did not apply in showing that the injury was within the course and scope of employment.

The decision as to whether an injury is in the course of employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ) and Shutters v. Dominoes Pizza, Inc., 795 S.W.2d 800 (Tex. App.-Tyler 1990, no writ). The hearing officer is the sole judge of weight and credibility. Article 8308-6.34(e).

Appellant's three affidavits were very brief and marked by lack of detail as to when and whom respondent was addressing his statements of self-harm; where he was on the premises and what he was doing at the time he made the assertions; and what each affiant was doing, at what distance from respondent, when he overheard the statement in question. None purports to have witnessed the accident itself. No statement was presented from "G" who worked directly with respondent, and no evidence was forthcoming that no one named "G" worked with respondent. Lacking as they are, these statements could still be viewed by the hearing officer as raising the issue of an exception under Article 8308-3.02, which the respondent then had to overcome in proving his case. To determine compensability the hearing officer must judge credibility, assign weight, and resolve conflicts and inconsistencies. In doing so he may believe all or part or none of any testimony before him. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied).

The hearing officer obviously gave more weight and credibility to evidence in support of respondent as opposed to the affidavits of appellant in reaching Finding of Fact 7 (respondent did not wilfully intend to injure himself). We do not view that decision as so against the great weight and preponderance of the evidence as to be manifestly unjust or wrong. International Ins. Co. v. Torres, 576 S.W.2d 862 (Tex. App.-Amarillo 1978, writ ref'd n.r.e.).

Medical reports, introduced as part of appellant's evidence (respondent only introduced two bills from Dr. O for doing an MRI), provided evidence of respondent's disability. Page 15 of Carrier Exhibit A is an Initial Medical Report dated _____, by Dr. H which indicates lumbar strain, that respondent reported the cause as work related, and that respondent was released to limited work until further evaluation on May 13. (Dr. H is a physician in the (clinic) as is Dr. M). Thereafter page 21 of Exhibit A shows Dr. M calling for a return to work on May 13 with limitations until May 15. Dr. M on page 24 of Exhibit A in a "Specific and Subsequent Medical Report" and on page 25 of Exhibit A, extended

respondent's period of limitations at work from May 15, 1991 to May 22, 1991. Finally Dr. M on page 27 of Exhibit A again allows respondent to return to work on May 24 with limitations and does not specify an ending date but implies that the limitations should be in effect at least until May 29 when respondent was to return for medical care.

The medical reports, coupled with respondent's statement that he could not work because of his back when he went back to do so on May 13, add to the basis for the hearing officer's conclusion that respondent sustained a compensable injury on _____. As stated, they also show evidence as to disability.

The record clearly shows, however, that there was no issue as to disability. As a result the hearing officer made no finding of fact addressing that point. Appellant takes issue with the order to pay income benefits contending there was no issue of disability and no evidence of disability continuing for a sufficient period to warrant the order. The evidence, however, shows no offer of a bona fide position but does show respondent had disability since he was restricted to limited duty to May 29, 1991, (22 days after the accident). As such, there is a basis in the record for the order to address income benefits. The 1989 Act at Article 8308-6.34(q) tells the hearing officer to determine and award benefits due.

The order complained of did not detail amount or length of income benefits but merely indicates that with a determination of compensability, coupled with sufficient evidence of disability, some income benefits in this case are due. As the order states, "in accordance with the Act," the parties should be able to determine temporary income benefits consistent with Article 8308-4.22(e), 4.23(a) and (b) and applicable rules including Tex. W. C. Comm'n, TEX. ADMIN. CODE § 129.2 (Rule 129.2). If they cannot, that issue may be directed to a new Benefit Review Conference.

The decision and order are supported by sufficient evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge