APPEAL NO. 94084

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on December 10, 1993, to determine the following issues:

1.Did the claimant sustain a compensable injury on or about (date of injury No. 1), and (date of injury No. 2);

2.Did the claimant report the alleged injuries to the employer on or before the 30th day following the alleged injuries, and if not, does good cause exist for failing to report either of the alleged injuries timely;

3.Is the claimant's filing requirement extended because of the employer or the carrier's failure to file a written report of the injuries when the employer or carrier had been given notice or had actual notice of the injury; and

4.Did the claimant have disability resulting from the injury sustained on (date of injury No. 1), and/or for the injury sustained on (date of injury No. 2), and if so, for what periods.

The hearing officer found issues 1, 2, and 4 against claimant, who has appealed. The carrier responds that the hearing officer's decision should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant testified that he was employed by (employer) from September 1990 until June of 1991. He was promoted during that time and thereafter was required to work on a daily basis with a supervisor named (Mr. C). Claimant characterized Mr. C's management style as "intense," "boisterous," and "abusive;" he said Mr. C frequently engaged in physical contact with him, including hitting him on the back and the groin.

On (date of injury No. 1), claimant said he was coming out of a bathroom and Mr. C struck him in the chest for no reason. Although both claimant and his attorney conceded he suffered no injury from this incident, claimant said he told Mr. C not to hit him again because he had had surgery for a previous back injury. (Claimant said he had discussed this prior injury, which was not job related, with Mr. C at their initial interview.) However, on (date of injury No. 2), claimant said Mr. C struck him in the lower back, around the area of his surgery, for no apparent reason. Claimant said he felt immediate pain in his back and his legs, and that he became angry and told Mr. C he was going to sue him.

Because he said he was fearful about losing his job and a means of support for his family, the claimant said he did not seek medical attention for the (date of injury No. 2) alleged injury until July, after he resigned his position with employer on June 26th. (Claimant acknowledged that his resignation letter did not mention an on-the-job injury.) He said that he treated with Dr. R from July 1991 until August 1992, and that thereafter he saw a Dr. Z. No medical reports were in evidence, and claimant stated at the hearing that he currently was not receiving medical treatment. Although he said no doctor took him off work, he described his symptoms during treatment as including sharp pain in his legs and the inability to sit or walk for long periods of time.

After leaving employer claimant worked for a succession of automobile dealerships; he was laid off briefly in November of 1991 and again in June of 1992, and remained unemployed until March of 1993. During this time he collected unemployment benefits. He got another job in March and was employed at the time of the hearing.

In September of 1991 claimant filed suit against Mr. C and employer wherein he alleged injury from both incidents arising from the intentional acts of Mr. C. In a June 1, 1993, order, the trial court directed a verdict for employer and a jury found for the defendant, Mr. C. The case is presently pending in the court of appeals.[1]

Claimant filed a claim for workers' compensation for the (date of injury No. 1) alleged injury on August 13, 1993, and for the (date of injury No. 2) injury on October 15, 1993. Pursuant to the agreement of the parties, both claims were consolidated for purposes of this hearing.

The hearing officer determined that when Mr. C struck claimant in the back on (date of injury No. 2), such action was directed at the claimant in his status as an employee and because of his employment. However, she also held that claimant did not sustain an injury from this incident, and that his pre-existing back injury was not exacerbated by the blow to the back. Claimant argues on appeal that the incident happened at work and that it caused his injuries. (The hearing officer also determined that the claimant did not sustain an injury in the course and scope of his employment on (date of injury No. 1), based on claimant's testimony and his attorney's representation.) The hearing officer clearly found the incident to have arisen out of and in the course and scope of claimant's employment, and further not excepted from the carrier's liability due to the intentional, personal act of a third person. *See* Section 406.032(1)(C). With respect to whether an injury resulted thereby, the Appeals Panel has observed that an accident--in the sense of an undesigned, untoward

[1]Although the carrier raised, and the parties briefed the issue of collateral estoppel, the hearing officer stated in her decision that "the evidence presented did not require that this premise be addressed."

event traceable to a definite time, place, and cause--does not necessarily equate to an injury. *See* Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992, *citing* Jarrett v. Travelers' Insurance Company, 66 S.W.2d 415 (Tex. Civ. App.-Amarillo 1933, writ dism'd by agr.). Moreover, pain alone is not compensable absent some debilitating condition resulting from an injury. National Union Fire Insurance Company of Pittsburgh, Penna. v. Janes, 687 S.W.2d 822 (Tex. App.-El Paso 1985, writ ref'd n.r.e.). The burden is on a claimant to prove by a preponderance of the evidence that an injury occurred within the course and scope of employment. Texas Employers Insurance Company v. Page, 553 S.W.2d 98 (Tex. 1977). Upon review of the evidence in this case, we cannot say that the hearing officer's determination on the issue of injury is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Likewise, we cannot say that the hearing officer's determinations on the issues of timely notice and disability are against the great weight of the evidence. In his appeal the claimant contends that the (date of injury No. 2) injury and its significance were reported when he was struck and he told Mr. C, "You hurt me." (Claimant conceded that he did not notify anyone of the alleged (date of injury No. 1) injury.) At the hearing the claimant testified that he became angry and told Mr. C he was going to sue him, and contended that Mr. C knew he had been injured; he also answered affirmatively the direct examination question of whether he told Mr. C about the pain he was suffering. The hearing officer found, however, that the claimant did not timely notify Mr. C or any other supervisor that he was injured as a result of Mr. C's actions. The hearing officer as sole judge of the relevance and materiality of the evidence and of its weight and credibility, Section 410.165(a), is entitled to believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). She accordingly could have believed that claimant's response to Mr. C conveyed solely a message of anger rather than one of a job-related injury. We find the hearing officer's determination supported by sufficient probative evidence.

Finally, the claimant challenges the hearing officer's holding that claimant did not suffer disability, defined in the 1989 Act as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. Section 401.011(16). The claimant testified that no doctor took him off work because of the (date of injury No. 2) alleged injury, and that he continued to work except for those periods of time in which he had been laid off. Further, a finding of compensable injury is a necessary prerequisite to a determination of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992. The hearing officer's finding of fact and conclusion of law that claimant did not have disability are supported by the evidence.

Our review of the evidence below discloses no error by the hearing officer. We accordingly affirm her decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge