APPEAL NO. 971539

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 23 and July 10, 1997. With regard to the issues at the CCH, she determined that the appellant (claimant) did not sustain a compensable injury, that the respondent (carrier) is relieved of liability due to the claimant's willful attempt to unlawfully injure another and that the claimant does not have disability. The claimant appeals, seeking a reversal of the decision, citing his belief that the hearing officer was biased and that his attorney did not effectively represent him, and the carrier responds, seeking its affirmance.

DECISION

We affirm.

The hearing officer fairly summarizes the facts in the decision and we adopt his rendition of the facts. We discuss only those facts necessary to our decision. The claimant was a mechanic at (employer). He testified that on _____, he had a disagreement with his boss, Mr. H, and Mr. H pushed him up against a counter, injuring his back. Mr. H testified that the claimant threw a pen at him and that he told the claimant that the claimant was terminated for the incident. Mr. H stated that the claimant then put his hand on his back and said he had injured it. Mr. H denied touching the claimant in any manner. Mr. H told the claimant to leave the premises, at which time the claimant began to put his tools in his automobile. Mr. H said the tools were heavy and required exertion on the back and the claimant said he moved them one by one. The claimant called the police. An officer came to the premises, questioned each man and issued each of them a citation for disorderly conduct. The officer then arrested the claimant for outstanding warrants. The claimant convinced the officer to take him to the hospital on the way to the police station. The hospital emergency room report reflects that the claimant complained of back pain, was not in acute distress, had "no apparent injury," had normal lumbar x-rays and was released from the hospital in good condition. The claimant saw his treating doctor, Dr. G, on November 14, 1996, who opined that he had back pain, prescribed physical therapy and took him off work. On March 13, 1997, the carrier-selected required medical examination doctor, Dr. K, opined that the claimant reached maximum medical improvement with a zero impairment rating.

An employee has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. "An insurance 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." Section 406.032(1)(B). A carrier has the initial burden of proof at a CCH to produce evidence of an employee's willful attempt to injure himself or another and, if it does, the burden of proof shifts to the employee to prove the exception does not apply. Texas Workers' Compensation Commission Appeal No. 931031, decided December 22, 1993. The determination as to whether an employee willfully attempted to injure himself or another is a factual question for the hearing officer to decide. *Id.* The hearing officer

determined that the evidence showed that the claimant willfully attempted to injure Mr. H when he threw the pen.

According to the decision's "Statement of the Evidence," the witnesses' credibility played an important role. The hearing officer disbelieved the claimant's version of the events while believing Mr. H's version. She concluded that the claimant, not Mr. H, was the aggressor. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

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. We conclude that the determinations regarding compensability and whether the claimant willfully attempted to injure another are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm those determinations.

The determination as to an employee's disability is a question of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id*. Since we affirm the decision with regard to the compensability issue, we also affirm regarding the disability issue.

The claimant complains in his request for appeal that the hearing officer was biased against him. Our review of the record reveals no such bias and, therefore, we reject his complaint. He also complains of the effectiveness of his counsel at the CCH. However, we do not ordinarily review on appeal the effectiveness of a party's counsel at the CCH. Texas Workers' Compensation Commission Appeal No. 941271, decided October 31, 1994.

The decision is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and, therefore, we affirm.

_____
Christopher L. Rhodes
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Joe Sebesta
Appeals Judge