APPEAL NO. 992275

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The first contested case hearing (CCH) was held on September 22, 1999. In response to the issues at the CCH, the hearing officer determined that: appellant/cross-respondent (claimant) did not sustain a compensable injury; that he was not injured in the course and scope of his employment; that he was attempting to unlawfully injure another at the time he was injured; and that he did not have disability. Claimant appealed, contending that the hearing officer erred in determining that he was the aggressor and that he did not sustain a compensable injury. Respondent/cross-appellant (carrier) responds that the Appeals Panel should affirm the determinations that claimant did not sustain a compensable injury and that he did not have disability. Carrier filed a cross-appeal in which it contends that the hearing officer erred in determining that "due to the claimed injury, claimant was unable to obtain or retain employment at wages equivalent to" his preinjury wage. The file does not contain a response from claimant to the cross-appeal.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he did not sustain a compensable injury and that he did not have disability. Claimant contends that he did not wilfully attempt to injure another person at work, that he was not the aggressor in the altercation with his boss, and that because the altercation concerned the way claimant was performing his work, the injury was compensable.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

An injury which results from a controversy over interference with an employee's work has been held to be connected with the performance of his work and thus a risk incidental to his employment. Texas Employers' Insurance Association v. Cecil, 285 S.W.2d 462 (Tex. App. - Eastland 1955, writ ref. n.r.e.). However, Section 406.032(1)(B) provides that a carrier is not liable for compensation if the injury was caused by the employee's wilful attempt to injure himself or to unlawfully injure another person.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. 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.

Claimant testified that on _____, he was operating a piece of heavy machinery when the owner of his employer, Mr. B, approached him and they began to argue. Claimant said Mr. B attacked him, ripped his shirt, and kicked him above the eye causing claimant to fall and injure his back. Mr. B stated that claimant appeared to be intoxicated, that he was not operating the machinery properly, that he was told to get off the machine, that claimant said he quit and got into a vehicle to leave with RB, that claimant then became angry and cussed at Mr. B, that claimant was the one who attacked Mr. B, and that Mr. B kicked claimant to defend and protect himself. Mr. B and a supervisor, RB, testified that claimant ran up and tried to pull Mr. B off a roller and Mr. B then kicked claimant to prevent claimant from pulling him down. Claimant denied that he had been drinking and said that he had passed out in his truck before the incident due to blackouts he was still suffering after having been pistol whipped in an unrelated March 30, 1999, incident.

This case turns on the issue of credibility. If claimant was the aggressor in an attempt to unlawfully injure Mr. B, then carrier is not liable for compensation. *See* Texas Workers' Compensation Commission Appeal No. 931031, decided December 22, 1993. The hearing officer was presented with two different versions of the incident that occurred on _____. Claimant insisted that he was not the aggressor in the altercation. However, Mr. B and RB both stated that claimant was angry and he started the altercation by cussing and trying to pull Mr. B off the roller. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. As such, he was charged with the responsibility for resolving the conflicts and inconsistencies in the testimony and evidence and deciding what facts had been established. He did so by giving more weight to the testimony of Mr. B and RB than to claimant's testimony that he was not the aggressor in the altercation. The hearing officer was acting within his province as the fact finder in so resolving the conflicts and inconsistencies. The hearing officer's determination that the claimant's claimed injury was caused by his wilful attempt to unlawfully injure another is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb that determination on appeal. Cain, *supra.* The hearing officer properly determined that carrier was relieved of liability for workers' compensation benefits in this instance pursuant to Section 406.032(1)(B).

Claimant also challenged Finding of Fact No. 3, although he did not set forth the reasons for his disagreement with that finding. The hearing officer determined in that finding that and that "claimant was not injured in the course and scope of his employment." The claimant did not specifically appeal the finding that "claimant resigned his employment prior to receiving his injury on _____, and was therefore no longer a covered

employee at the time of his injury." This finding does appear to be the basis for the hearing officer's finding that claimant was not in the course and scope of his employment at the time of his injury. To the extent that these findings are adequately appealed, we note that workers' compensation coverage is not automatically and instantaneously terminated by the firing or quitting of any employee. The employee is deemed to be within the course and scope of employment for a reasonable period while he winds up his affairs and leaves the premises. *See* Texas Workers' Compensation Commission Appeal No. 992063, decided October 29, 1999. The fact that a claimant resigns does not mean that any injury thereafter automatically is not compensable. We conclude that Findings of Fact Nos. 2 and 3 are not necessary to the decision in this case, and we strike them. Given the hearing officer's determination regarding claimant's attempt to unlawfully injure another, carrier is relieved of liability in this case and does not owe benefits for that reason.

Claimant contends that the hearing officer erred in determining that he did not have disability. Disability is defined under the 1989 Act as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). A compensable injury means an injury that arises out of and in the course and scope of employment for which compensation is payable under the 1989 Act. Section 401.011(10). The existence of a compensable injury is a prerequisite to a finding of disability. The claimant in this case did not sustain a compensable injury. We affirm the determination that the claimant did not have disability.

In its cross-appeal, carrier contends the hearing officer erred in determining that "due to the claimed injury, claimant was unable to obtain or retain employment at wages equivalent to" his preinjury wage from _____, to August 5, 1999." Carrier asserts that claimant cannot have disability unless the injury is "compensable." In this case, the hearing officer determined that claimant was injured, that carrier is relieved of liability for that injury under Section 406.032(1)(B), that there was no compensable injury, and that claimant does not have disability. The determinations regarding disability in this case were not adverse to carrier. Further, the hearing officer could determine from claimant's testimony that one of the reasons why he was unable to obtain or retain employment at wages equivalent to his preinjury wage from _____, to August 5, 1999, was because of the claimed injury. Both claimant and RB said claimant fell to the ground after he was kicked. Claimant said he has not been able to work and stated that he has been having back pain. Although claimant had a prior unrelated injury, the hearing officer was not required to find that this was the sole cause of his inability to obtain or retain his preinjury wage. We conclude that this determination is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust.

We affirm the hearing officer's decision and order.

_____
Judy L. Stephens
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Elaine M. Chaney
Appeals Judge