APPEAL NO. 931055

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing, (hearing officer) presiding, was held in (city), Texas, on October 5, 1993. The issues were whether the claimant sustained an injury in the course and scope of his employment on (date of injury); whether his injury arose out of the act of a third person intended to injure him because of personal reasons, and not by virtue of his employment; and whether claimant sustained disability as a result of his (date of injury) injury. The hearing officer concluded that the claimant was injured in the course and scope of his employment when he was shot and robbed on the date in question, that the exception set forth in Section 406.032(1)(C) did not relieve the carrier from liability, and that claimant had disability from the date of his injury through April 1, 1993. The hearing officer found that claimant had disability from the period of January 20, through April 1, 1993, but did not expressly award benefits for that period.

The appellant (carrier herein) in its request for review disputes the finding of the hearing officer as against the great weight and preponderance of the credible evidence. The carrier discusses at length the lapses in credibility in claimant's testimony. The carrier also notes that the hearing officer erred in awarding temporary income benefits past the date of undisputed maximum medical improvement. The claimant responds that issues of credibility are up to the hearing officer, and that there is no support in the evidence for carrier's arguments on a alternative theory of claimant's injury.

DECISION

Finding no reversible error on the matter of injury, we affirm the decision of the hearing officer. We reform the hearing officer's order to make clear that temporary income benefits are due for the period of disability that the claimant had not reached MMI.

The claimant was a sales and service representative for (employer). He stated that in the early evening hours of (date of injury), he had left the house of a prospective customer and was returning to the employer's location for an evening of telemarketing, which was routinely conducted on Mondays and Tuesdays from 6:00 to 8:00 p.m. He stated that he went to visit the customer, whose identity or residence address he could not recall, when he was called out on a "lead" in order to pitch a "yard control" contract to that customer. He indicated that when he arrived at the customer's house he already had a completed "pest control" contract for that customer prepared. He stated that the customer did not agree and stated that he was in a hurry to go somewhere.

Claimant testified that one means by which a customer would be sold a contract would be for the supervisor, (Mr. R), to call back and offer a greater discount. Claimant stated that to this end, and because his percentage of consummated contracts was down, he felt it desirable to supply Mr. R with a filled out contract so that Mr. R could place the call. The claimant stated that filling out a contract with the required information would take perhaps thirty seconds. He stated that he did not fill it out at the customer's house because

the customer was leaving. He left the customer's house at 5:45 p.m.

Claimant stated that he got off the highway down a feeder road, and pulled onto H Street, which he characterized as dark and deserted. Although there were street lights, claimant stated he was not aware that he parked under a street light. The only lighting he had was the vehicle dome light. This location was seven miles from the employer and one-and-one half miles from the claimant's parents' house, and he estimated it was 11 or 12 miles from the customer's house. He stated that he reached into his "filing cabinet" to pull out a yard control contract, and as he reached for his clipboard, the driver's side door was pulled open, he was pulled out, and shot. He stated that the assailant said nothing to him, and as he lay on the street, stole six dollars from his wallet, searched the company truck, and then jumped into a vehicle which pulled up from behind the claimant's truck and sped away. Claimant said he had been parked by the roadside about 30 seconds before this occurred, and it happened about 6:45 at night.

He stated that after this, he walked to an area where he was able to hail a passing car that eventually assisted him with getting emergency medical treatment. Claimant was shot in the upper left chest, and the bullet exited next to his armpit in the back. Claimant eventually returned to work for another employer on April 1, 1993. Claimant indicated that he had a personal pager as well as the company pager. He denied that he had told any coworker he was on the way to his parents' home for dinner.

The claimant said he had attended a meeting that morning where Mr. R spoke. He recalled that the topic of conversation was encouragement to increase sales.

The incident was reported to the police. Claimant stated that he did not know the assailant, and that he told the police that he was afraid and would not identify the assailant. Claimant stated that as a result of his injury, he had not worked again until April 1, 1993, and then went to work for another employer.

Mr. R testified. He said that he had been the branch manager of employer on (date of injury) (and at the time of the hearing worked for another employer). He stated that at the morning meeting, he announced that telemarketing for that night was cancelled. He was unable to say for sure whether claimant was there or not. Mr. R heard about the shooting the next day from claimant's mother and went to visit claimant in the hospital. He stated that claimant reported to him he had been hurt while doing paperwork at the side of the road and while heading to telemarketing.

Mr. R stated that a security guard for the nearby neighborhood had called the employer's corporate office the night before to report an abandoned company vehicle in an area where vehicles had been stripped. Mr. R stated that the truck was impounded by the police, and that he went to recover the vehicle and saw only one bullet hole in the front grill. Photographs of this hole are in the record. Mr. R stated that there were no bullet holes in the interior, and no blood. Mr. R testified as to conversations he had with unnamed police officers and investigators, to the effect that they viewed claimant's story as inconsistent with

the physical evidence. He indicated that a sales transaction that would involve him offering a greater discount typically took place from the customer's home with a phone call to him. Mr. R stated, however, that he had on occasion, for the claimant's customers, made such calls from the office, but generally involving telemarketing contacts. Mr. R's opinion was that there would have been no need for claimant to complete the contract in the area claimant was shot as opposed to the customer's residence or the office. Mr. R stated that claimant's paperwork was kept in a locked metal box, which was still on the floorboard in its normal position, locked, when he picked up the vehicle from the police. He said that claimant was a good, hard worker.

Although Mr. R stated the police told him a shell casing was found 20 feet in front of the truck, there was no testimony brought forward that this had been linked to the bullet. The bullet itself was apparently not found, according to what Mr. R stated he was told.

(Mr. T), the corporate CEO of employer, testified in several respects similar to Mr. R, adding that claimant told him when he saw him a few days after the accident that he had completed work and was on the way to his parents' house for dinner when the shooting occurred. Mr. T also stated that it made "zero" sense in terms of business requirements for claimant to fill out the contract as he stated he did.

Both Mr. R and Mr. T testified as to police suspicions conveyed to them that claimant may have been engaged in an illegal activity at the time of the shooting. However, neither person identified the persons who reported such suspicions, nor did carrier put into the record any direct evidence, in the form of affidavits or police reports.

A Report of Medical Evaluation (TWCC-69) in evidence certifies that claimant reached maximum medical improvement on March 8, 1993, with a 0% impairment. This was put into evidence by the carrier, with no objection from the claimant. In opening statement, claimant's attorney indicated that claimant had recovered from his accident and reached MMI. There is no indication that claimant disputed that MMI was reached.

In closing argument, carrier's attorney conceded that if claimant was involved in the activity that he stated he was, he was probably in the course and scope of employment. The appeal is premised solely upon credibility. Along that line, we note that we have observed many times that we will decline to substitute our judgment for that of the hearing officer.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence, as well and the weight and credibility that is to be given the evidence. It was for the hearing officer, the trier of fact, to resolve the obvious inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company 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. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Fort Worth 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An

appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 286 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

While we do not agree with claimant's assertion that there is "no" evidence in support of an alternative theory of how claimant's injury occurred, we would note that such evidence is exclusively in the form of carrier's witnesses reporting what they were told by the police at an unspecified point after the injury. There are no police reports or affidavits lending support to these recollections. While we note that conformity to the rules of evidence is not necessary, Section 410.165(a), and hearsay can be admitted by a contested case hearing officer in our proceedings, there is no requirement that a hearing officer weigh hearsay as if it were not hearsay, or consider all forms of hearsay of equal value. Even a good-faith report of what one believes one was told by unnamed police officers does not rise, we believe, to the same level as direct evidence of police findings, although both would be "hearsay" if made by declarants not present in the hearing. We cannot, under the circumstances, find error if the hearing officer credited claimant's testimony over second and third hand hunches and suspicions. There was no evidence produced to show that claimant's last customer of the day lived at any other location other than the area of town where claimant said he was before he went to the location where he was injured.

On the issue of the hearing officer's award of temporary income benefits, we note that clarification is needed. The hearing officer's order states that temporary income benefits accrued but not paid must be paid in a lump sum, and it finds that claimant had a period of disability. However, no "order" to pay benefits of temporary income benefits is made, as such. We observe that "disability" is only one of the eligibility criteria for temporary income benefits; the other is that the employee has not reached MMI. Section 408.102. When confronted with evidence that is not disputed by either party that claimant has indeed reached MMI, it would be error for a hearing officer's order to expressly award temporary income benefits beyond that period, even if a claimant had "disability." (Although the claimant's attorney in response argues the underlying merit of the MMI, this was not raised at the hearing.) In this case, where no order is made, we do not assign error, as such, but agree that ambiguity should be clarified. Therefore, we reform the hearing officer's order to order that temporary income benefits are due for the periods of time in which the hearing officer determined that claimant had disability, until the claimant reached MMI.

With the clarification described, the hearing officer's decision is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge