APPEAL NO. 93772

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 22, 1993, in (city), Texas, (hearing officer) presiding. The issues at the CCH were: 1. whether there was a causal connection between the original injury of (date of injury), and the mental problem suffered by the appellant (claimant herein) and 2. if so, whether the claimant suffered disability after August 19, 1992, the date she was terminated from employment. The hearing officer concluded that there was no connection between the incident of (date of injury), and the mental trauma alleged by the claimant. The hearing officer also concluded that the claimant did not suffer disability as a result of the incident of (date of injury).

The claimant appeals arguing that the evidence, including the medical evidence, supported the contention that the claimant suffered an injury on (date of injury), that resulted in post-traumatic stress disorder. The claimant contends that the hearing officer committed error in overruling her objections to leading questions and to claimed violations of the Rule of Sequestration. The respondent (carrier herein) replies the there is sufficient evidence to support the decision of the hearing officer without considering the evidence objected to by the claimant and that the determinations and evidentiary rulings of the hearing officer were within his statutory authority.

DECISION

After reviewing the record and finding sufficient evidence to support the decision of the hearing officer and no reversible error, we affirm.

The claimant had worked beginning in November 1987 for the (employer) as a camera clerk. Her job duties included running the cash register, customer service and stocking merchandise. During the time she worked for employer the claimant had the same duties but had worked at several different locations. Prior to her accident she had been transferred to the employer's store on (L-S store) where her supervisor was (Mr. M), the store manager. The claimant testified that when she first started working at the L-S store, Mr. M was nice to her, but after a time he started being "mean" to her, yelling at her and getting angry with her.

It is undisputed that on (date of injury), the claimant hurt her hand while moving a bundle of magazines. Mr. M told her to go to the doctor and the claimant did. The claimant testified that the doctor put a splint on her hand and put her off work. The claimant testified that Mr. M told her to take the time off as she would be paid both her salary by the employer and workers' compensation benefits during the time she was out. The claimant testified that Mr. M called her at home the next day to tell her she needed to come back to work as she would receive neither salary nor workers' compensation benefits for the time she was missing. The claimant returned to work on (date of injury). After the claimant returned to work she and Mr. M had a discussion concerning whether she would be paid for the time

she had missed. The claimant apparently felt that Mr. M had told her she would be paid, while Mr. M stated in his testimony that he attempted to explain to the claimant that she would not be paid by either the employer or by workers' compensation for the time missed. Mr. M testified that he had not told the claimant earlier that she would be paid for this time and he was trying to explain to the claimant that she would have to miss eight days to qualify for workers' compensation benefits.

There is conflicting testimony as to what happened during the discussion. According to the claimant, Mr. M became angry, raised his voice and, when she threatened to call a lawyer, moved toward her in a threatening manner causing her to fall behind the counter and hit her head on the floor. According to Mr. M, while the claimant was angry and argumentative, he never raised his voice, and when he was unable to get her to understand his explanation concerning why she was not entitled to workers' compensation benefits he told her to call the employer's human resource department for an explanation. Mr. M stated he did not approach the claimant, but in fact had turned to move away from the claimant and when he turned back around, he could not see the claimant, who had been behind the counter. Mr. M testified that he walked to the counter where he saw the claimant lying on the floor behind the counter.

Both the claimant and Mr. M agreed that while the claimant was on the floor a co-employee said "What did you do to her?" They also agree that Mr. M helped the claimant up, took her outside of the store, and offered her water. The claimant testified that Mr. M also offered her a cigarette, which Mr. M denies. Both agree that Mr. M then took the claimant to the bank with him to make a deposit. The claimant testified that upon returning to the store Mr. M gave her a plant and sent her to lunch. The claimant testified that later that afternoon Mr. M's wife came to the store and told her she was sorry for what had happened. Mr. M denied giving the claimant a plant or that his wife came by the store that day.

The claimant testified that after the fall Mr. M was nice to her, but she was plagued by headaches, depression, crying spells, as well as recurrent nightmares and flashbacks of Mr. M coming at her. The claimant continued to work, and sometime after the incident, as a result of the request of (Mr. G), who was the manager of another one of the employer's stores, and who, according to the testimony of the claimant, was a personal friend of both her and her family, the claimant was transferred to his store. Mr. M testified that the claimant told him that she desired to transfer because the store managed by Mr. G was closer to her home, and that he regretted losing the claimant because she was such a good employee. Mr. G testified that his store was much larger that the L-S store with a customer count three times as large. Mr. G testified that the claimant seemed to have no problem with the increased work load and he saw no indication that the claimant suffered from a debilitating mental or physical condition. The claimant testified that she had difficulty doing the job because of headaches, memory loss and depression and that Mr. G would tell that

she was "losing it." Mr. G testified that he was contacted by the employer's security division who told him that the claimant had been filmed by the store's security cameras giving away merchandise to customers and taking merchandise or money. The claimant was terminated on August 18, 1992, but denied that she could recall giving away or taking anything.

In September 1992 the claimant was hospitalized for depression by (Dr. B), a psychiatrist and was referred by Dr. B to a psychologist, (Dr. WG), for individual therapy. Dr. WG testified live at the CCH. Dr. WG diagnosed the claimant as suffering from post traumatic stress disorder. Dr. WG testified that the claimant was 100% disabled as a result of this post traumatic stress disorder and that she suffered from this disorder due to the trauma from the incident of (date of injury), when she felt her life was threatened when Mr. M moved toward her. Both Dr. WG and the claimant emphasized the size of Mr. M, who testified that he was 6'5" and weighed 250 pounds, in contributing to the perceived threat during the confrontation. Dr. WG testified that a criterion for a diagnosis of post traumatic stress disorder is a trauma beyond the realm of human experience, but testified that in determining whether a trauma meets this criterion depends upon the subjective perception of the patient of the event. He testified that the claimant perceived the threat from Mr. M as endangering her life, thus meeting the criterion.

(Dr. A), a forensic psychiatrist and assistant professor at the University of Texas Medical School, testified that in determining whether an event met the criterion of being beyond the realm of human experience to support a diagnosis of post traumatic stress syndrome was an objective test--that is the event must be considered outside the realm of human experience as to be markedly distressing to anyone. Such an event would include things like battlefield experiences, rape, fire, flood and concentration camp experiences. In his opinion the events described by the claimant in regard to her confrontation with Mr. M did not meet this criterion.

Medical records from Dr. B originally questioned as to whether the event described by the claimant met the above described criterion, although she later made a diagnosis of post traumatic stress syndrome. (Dr. H), a neuropsychologist to whom Dr. B had referred the claimant did not diagnose post traumatic stress syndrome, but diagnosed the claimant's condition as depression. The designated doctor selected by the Texas Workers' Compensation Commission, (Dr. T), stated that he did not believe that the event described by the claimant was sufficiently traumatic to support a diagnosis of post traumatic stress syndrome. Dr. A testified that he believed that the claimant suffered from depression and that this depression was caused by a number of factors including unrelated health problems (there is evidence in the record that the claimant suffered from glaucoma, sinus problems, and gynecological problems that required hormone treatment), family problems, financial problems and the termination of her employment. Dr. A also testified that her glaucoma accounted for her headaches. Dr. A stated that in his opinion there was no connection

between her current mental problems and the incident of (date of injury).

It is obvious that there is conflicting testimony as to the events of (date of injury). There is also conflict in the medical testimony as to whether the events of (date of injury), if they took place as described by the claimant, could have caused her mental problems. 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 as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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, 161 (Tex. Civ. App.-Amarillo 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 619, 620 (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, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard of review, we cannot say that the findings of the hearing officer in the present case were not supported by sufficient evidence. There is ample evidence in the record to support his findings. While there is also a great deal of evidence contrary to his findings, it would be inappropriate for us to substitute our judgment for that of the hearing officer in making factual determinations, and we will not do so.

As to the evidentiary rulings of the hearing officer appealed by the claimant, we must also apply the proper standard of appellate review. To obtain reversal of a decision based on error in the admission or exclusion of evidence, an appellant must show that the ruling below was in error and that the error was calculated to cause and probably did cause rendition of an improper decision. Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989); Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394, 396 (Tex. 1989). Reversible error does not usually occur in connection with evidentiary rulings unless the appellant can demonstrate that the whole case turns on the particular evidence admitted or excluded. Texaco Inc. v. Penzoil Co., 729 S.W.2d 768, 837 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.); *see also* Atlantic Mutual Ins. Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Conformance with the legal rules of evidence is not necessary at a CCH. Section 410.165(a). Applying these standards we do not find the

evidentiary rulings of the hearing officer on the objections of the claimant as to leading questions or as to allowing carrier's counsel to allude to the testimony of prior witnesses in questioning his witnesses constitute reversible error. *See generally* Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992; Texas Workers' Compensation Appeal No. 93337, decided June 10, 1993.

We, therefore, affirm the decision of the hearing officer.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge