APPEAL NO. 94243

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 28, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented for resolution were:

1.whether claimant suffered a shoulder injury in the course and scope of his employment on (date of injury);

2.whether carrier contested compensability of this claim on or before the 60th day after being notified of the injury, and if not, whether carrier's contest is based on newly discovered evidence that could not reasonable have been discovered at an earlier date.

3.If claimant suffered a compensable injury on (date of injury), whether he has disability entitling him to temporary income benefits.

The hearing officer determined that claimant suffered a right shoulder strain in the course and scope of his employment on (date of injury), that carrier timely contested compensability of the claim and that claimant had less than eight days disability as a result of the (date of injury), injury and therefore is not entitled to temporary income benefits (TIBS). The hearing officer also noted that this case has two different docket numbers and stated:

The Commission established two separate claim files for this claim identified as TWCC No. (number) and TWCC No. (number), apparently because claimant's social security number in Employer's First Report of Injury (Form TWCC-1) differed from claimant's social security number in claimant's Notice of Injury (Form TWCC-41).

Without objection by the parties, the case was heard as involving only one incident, being that of (date of injury).

Both parities appealed. Appellant and cross-respondent, claimant herein, contends that the hearing officer erred on the determination of no disability based on the fact that the only medical evidence establishes a maximum medical improvement (MMI) date of December 3, 1993, and therefore claimant has established 14 months of disability. Claimant requests TIBS in a lump sum, plus interest, to the MMI date of December 3, 1993, and that we deny relief to the carrier. Claimant also contends that the hearing officer's conclusion that the carrier has timely contested compensability was in error and that carrier's appeal "is frivolous and not based in law nor based in truth."

Respondent/cross-appellant, carrier herein, contends that claimant's injury, if any, was not in the course and scope of employment or was subject to one of the exceptions in Section 406.032 (formerly TEX. REV. CIV. STAT. ANN. Article 8308-3.02 (Vernon Supp. 1992)) of the 1989 Act. Carrier requests that we reverse the hearing officer's decision as

to the injury, if any, being in the course and scope of employment, and render a decision in its favor.

DECISION

The decision of the hearing officer is affirmed.

Virtually all the material facts of what occurred on (date of injury) (dates are 1992 unless otherwise noted), are hotly disputed. As background, the parties do agree that claimant was employed as a "porter" at (employer), employer herein, and that (Ms. MW) was the manager and claimant's supervisor. Claimant's duties consisted of general maintenance of the grounds and make-ready of recently vacated apartments. The parties also agree that at some time before lunch on (date of injury), Ms. MW called claimant to her office. Ms. MW testified that she called claimant to the office because he had appeared to her to be intoxicated ("eyes were red," "irrational" and "irritable"), that she wanted to discuss tenant complaints against him ("leering") and to question him about the theft of a coworker's (T) vehicle. Besides claimant and Ms. MW, the assistant manager, a "courtesy" (apartment security) guard, and (Mr. OP), the coworker whose vehicle was stolen, were present. Claimant testified, through an interpreter, that Ms. MW accused him of stealing Mr. OP's vehicle. At this meeting Mr. OP served as the translator and Ms. MW testified that Mr. OP had recommended claimant for the job as a porter. Claimant testified that the manager called the courtesy guard and the city police in the course of the meeting while he voluntarily remained in the office with Mr. OP and the courtesy guard. When the police came, claimant variously testified, that they pushed him against the door of the manager's office and/or pushed him against a tree outside before handcuffing him, arresting him and taking him to jail.[1] Claimant was taken to jail and remained there overnight or about 23 hours. Claimant testified that all charges were dismissed and no criminal action was taken on the vehicle theft allegations. Claimant denied being intoxicated and testified that he did not drink or smoke.

Ms. MW testified that when she confronted claimant about his alcohol use and the tenant complaints, claimant ran out of the office with the apartments' master keys. At this point, Ms. MW called the police and sent Mr. OP (or the courtesy guard) after claimant. According to Ms. MW, claimant returned and then Ms. MW saw claimant had a master "scratch" key for (T)s on his key ring. Apparently, at some time, claimant gave Ms. MW the (T) key. The police arrived, and Ms. MW gave the T key to the police.[2] Ms. MW testified that when the police escorted claimant out of the meeting room to speak with him about

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[1]There is some confusing testimony about claimant seeing a judge on (date of injury), and the payment or nonpayment of some outstanding traffic tickets.

[2]Claimant denied the (T) key was a master key and testified it belonged to his sister's older (T).

signing employer's discipline/counseling report, claimant became agitated and hit his shoulder against the office door. Ms. MW testified that claimant called her "a liar" in English and then "lunged" for a screw driver which was on the desk. Claimant testified he was merely reaching to pick up either his keys or his screwdriver. According to Ms. MW, the police escorted claimant off the premises, under arrest for public intoxication. No police report is in evidence to indicate the police version and for what offense claimant was arrested. Ms. MW testified that claimant's left shoulder came in contact with the door.

Claimant apparently saw (Dr. P) on September 29th with complaints of right shoulder pain, "radiating to right arm." A very brief longhand history stated "[h]e was at work, he was pushed aside and his shoulder (R) hit to [sic] door." All tests were negative and claimant was released to full duty work on October 1st with a diagnosis of "sprain, Rt shoulder." The next entry in Dr. P's records is "12/4/93" for "pain rt shoulder." Dr. P filed an undated Report of Medical Evaluation (TWCC-69) certifying MMI on "Dec. 03, 93" with zero percent impairment.

The hearing officer found as fact that Ms. MW required claimant to attend a meeting in her office on (date of injury), to discuss "allegations of wrongdoing" related to his employment, that in the course of that meeting "the police pushed claimant or claimant bumped into employer's door" while the police were escorting him "to discuss signing employer's discipline report," that claimant suffered a right shoulder strain, that claimant was ordered off duty "for one day only," that carrier filed a Notice of Refused Disputed Claim (TWCC-21) in TWCC No. (number) on January 22nd, and that carrier was not required to file a TWCC-21 in TWCC No. (number) which had been established "by the Commission in error." The hearing officer did not make any determinations regarding intoxication or the exceptions in Section 406.032

Addressing claimant's appeal the principal thrust of which is that the only medical evidence establishes "December 3, 1993 as the MMI date in the TWCC-69." Claimant argues "that no one with a medical degree or with the proper background disputed the MMI date given by the . . . doctor." While claimant's contention may be true, the Appeals Panel has early on established that MMI is a separate issue from disability. Texas Workers' Compensation Commission Appeal No. 91014, decided September 20, 1991. Disability is defined in Section 401.011(16) as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." MMI is defined in Section 401.011(30)(A) as "the earliest date after which, . . . further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated . . . ." As can be seen by definition, it would be possible for an employee to continue to be treated, not yet having attained MMI, yet be able to work at the employee's preinjury wage and therefore not incur disability as defined by the 1989 Act. Consequently MMI and disability are not the same. Claimant may not have reached MMI until December 3, 1993, but there was no medical evidence and only minimal testimonial evidence, that he was unable to obtain or retain employment at his preinjury wage. *See also* Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991; Texas Workers'

Compensation Commission Appeal No. 931141, decided January 31, 1994. We would note carrier has contributed to this misunderstanding by referring to Dr. P's impairment rating as "a 0% disability rating." Nonetheless, we find claimant's appeal on this point without merit.

Claimant further contends that carrier did not timely contest because "the employer had knowledge way before 1993 to wit; Sept. 29 1992. And the employer notified the commission on the employer's first report of injury dated "12-22-92." Carrier, although not addressing this issue in its appeal, at the CCH pointed out that there were two different files set up and that carrier received its first written notice "on either December 22 or December 24." Although the file contains both Employee's Notice of Injury apparently completed by, or at least signed by claimant's attorney dated "29 Sep 92" and "Feb-1-93," there is no indication when employer and/or carrier became aware of them. Hearing Officer Exhibit 2 would indicate that a TWCC-21 on docket number 93-045597 was received on January 5, 1993. The hearing officer found, as fact, that carrier received its first notice of this injury on December 22, 1992, and hence a TWCC-21 filed on January 5, 1993, would constitute timely controversion.

Carrier's appeal is principally based on the premise that "claimant's injury, if any, arose from his state of intoxication and/or his wilful intention and attempt to injure himself or to unlawfully injure another person." Carrier cites "Article 8308 Sec. 3.02 (2)" which we note has since been codified as Section 406.032 and which states:

Sec. 406.032. EXCEPTIONS. An insurance carrier is not liable for compensation if:

(1)the injury;

(A)occurred while the employee was in a state of intoxication;
(B)was caused by the employee's wilful attempt to injure himself or to unlawfully injure another person; . . . .

Where intoxication is alleged, the burden is on the carrier to bring forth sufficient evidence to raise the issue of intoxication and then it is the claimant's burden to prove that he was not intoxicated at the time of the injury. Texas Workers' Compensation Commission Appeal No. 94137, decided March 17, 1994. Although the hearing officer makes no specific determinations on this point, one can reasonably infer from the hearing officer's determination that claimant injured his right shoulder in the course and scope of his employment on the day in question, that she was rejecting carrier's contention, concluding that carrier did not present enough evidence to raise the issue of intoxication or that claimant through his testimony proved he was not intoxicated. Carrier points to inconsistencies and contradictions in claimant's testimony and states that "claimant failed to show any evidence that he was not intoxicated at the time of his alleged injury." We note there is no definitive evidence of intoxication in this case, one way or the other. Ms. MW testified she believed

claimant was intoxicated because he was "irritable" and "irrational." Claimant denied he was intoxicated and testified he does not drink or smoke. These contradictions, as well as where claimant sustained his injury (in the office or outside against a tree), which shoulder struck the door, whether the (T) key in claimant's possession was a master key or the key to his sister's car and whether claimant was attempting to grab a screwdriver to injure anyone or was merely reaching for his keys, are all factual determinations for the hearing officer to decide. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determined what facts have been established. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The hearing officer could 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer apparently did not believe claimant was intoxicated and apparently did not believe the exceptions of Section 406.032 applied. What Ms. MW testified to is merely evidence for the hearing officer to weigh and does not constitute the irrefutable iron-clad truth as carrier would appear to have us believe. There is sufficient evidence to support the hearing officer's factual determinations.

An appeals level body is not a fact finder, and does not normally pass upon he 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 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). We do not so find. Having reviewed the record, we find no reversible error and sufficient evidence to support the hearing officer's decision.

Consequently the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge