

APPEAL NO. 950111
FILED MARCH 9, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 29, 1994. With respect to the only issue before him, the hearing officer determined that the claimant was not injured in the course and scope of employment on _____. The appellant (claimant) requested review urging that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant was injured in the course and scope of employment or in the alternative that we reverse the decision of the hearing officer and remand for additional evidence to establish that the claimant suffered an injury in the course and scope of employment. The respondent (carrier) argues that the decision of the hearing officer is supported by sufficient evidence and urges that we affirm the decision of the hearing officer.

DECISION

We affirm.

On _____, the claimant sustained serious injuries including a collapsed lung when she was stabbed five times by (Mr. V), her former boyfriend. On that date, the claimant was assistant manager of a finance company that made small loans ranging from \$75.00 to \$400.00. (Ms. R) was the manager and (Ms. S) was the other employee of the finance company. All three testified at the hearing. They stated that prior to _____, Mr. V had called the claimant at work, had come to the finance company, and on one occasion talked with the claimant in front of the finance company. They also said that on the day of the stabbing Mr. V came to the finance company after it was closed and the door was locked, and he motioned for the claimant to come out. They related that she did not go out and told him that she was going to call the police. They said that he started kicking the glass door, they tried to call the police or a security guard in the area, but before they were able to complete calls he broke the door. They agreed that he had a butcher knife with a six or eight inch blade. They left the office of the finance company, went into a common area of the building, and then into a hall that led to an exit from the building.

The claimant testified that she dated Mr. V from January 1993 until the end of July 1993 when they broke up. She said that she became pregnant with his child, and the pregnancy was terminated. Mr. V's mother died in September, and she went to the funeral with him. The claimant said that she told him that she did not want to see him anymore. She said that things got bad the end of November or the first part of December.

She testified that he called her at home and at work, threatened her, and stalked her. The claimant said that on _____, the finance company had closed for the day and the door was locked, she had counted the money to make a bank deposit, and had put the money in a bag when Mr. V showed up. She said that Ms. S saw Mr. V; that she, the

claimant, was going to go to the door and Ms. S said that he had a knife; and that she, the claimant, went to call the cops. The claimant stated that Mr. V went into a rage; that he was crazy; that he yelled calling her names, said that he was going to kill her, banged the door, kicked the door, and broke the door. She said that she, Ms. R, and Ms. S were scared, went out the back door of the office into a small kitchen, then into a long hall that goes to a door to the parking garage, and outside those doors. Claimant said that then she did not remember whether she had put the money in the safe, the other two went to call security, she went back in to check on the money, she did not explain why she was going back in, and no one tried to stop her. She testified that she knew Mr. V and she would not put it past him to steal the money. She said that she ran into Mr. V in the second hall; that he had not calmed down and was not rational; that he yelled that everything was her fault, he was going to kill her and then go after Ms. R; and that he stabbed her. She testified that Mr. V appeared to be insane and not capable of rational reason. She said that they went to the garage, he said to Ms. R "now its your turn," Ms. S got in the way and tried to reason with him, and he laid down in the garage in front of a car but it stopped and did not run over him. Claimant said that she was placed in an ambulance and the first thing that she said was "[i]s everything OK inside, is the money there?" She stated that she was concerned about the money because she has a daughter, needs her job, and did not want to lose her job. She said that on the day she was stabbed she did not talk with a police officer but did talk with the people from EMS and the fire department.

(Mr. RA), the owner of the finance company; Ms. R; and Ms. S were called as witnesses by the carrier. Mr. RA testified that employees are instructed in writing and orally that if someone tries to take money to give them the money and run. He said that he was not present at the time of the incident and that he had heard about the claimant's problems with Mr. V. On cross-examination he testified that he thinks that the claimant is an honest person, but he does not think that she is being truthful about what happened on _____. Mr. RA said that he questioned Ms. R and Ms. S about what happened, and his testimony about what they told him is consistent with their testimony given later in the hearing. He said that he concluded that the claimant did not go out the door into the garage and back in to hide.

Ms. R testified that she worked for the finance company for eight years and had been the manager for six years. She said that in case of a robbery the company policy is to give up the money. She said that they closed the door at about 6:00 P.M. and that the incident took place at about 6:45 P.M. Ms. R said that she had put the money in the safe. She said that Mr. V knocked on the door and motioned for the claimant to come out; that the claimant took her time going to the counter and said that she was not going to go out and was going to call the police. Ms. R stated that Mr. V pounded on the door and kicked on the door. She said the money was in the safe and that she spun the dial to make sure the safe was locked. She stated that when the glass in the door broke she, Ms. S, and the claimant ran out the office and down the hall to the back door that goes to the garage. Ms.

R said that the claimant said that he is going to come around to the back and said that we should call security. She stated that she did not hear the claimant say anything about safety of company assets or company money. Ms. R said that she never saw the claimant go outside the door and that the claimant stayed in the hall. Ms. R remarked that the man in the garage called the police, that he handed her the telephone, and that she talked with the police woman. She said that Mr. V came out the door first and that the claimant later came out the door holding her chest. She stated that she did not hear the claimant say anything and did not hear her talk with the police. On cross-examination Ms. R said that she did not see the claimant come out the door to the garage, that the claimant stopped about six or eight feet from the door, and that she did not hear the claimant say that she was going to hide. Ms. R said that she worked with the claimant for three years and that the claimant was honest.

Ms. S testified that she worked for the finance company until about two months ago. She said that it was her job to answer the telephone, and that Mr. V had called to talk with the claimant at work and used every cuss word in the book. Ms. S stated that she saw Mr. V at the door at about 6:45 to 7:15 P.M. She remarked that Mr. V looked angry and motioned for the claimant to come out. Ms. S said that the claimant went to the counter and said that she was going to call the police. She said that Mr. V started kicking the door; she, Ms. S, picked up the telephone, but did not get to dial before Mr. V broke the door. Ms. S testified that Ms. R, the claimant, and she went out the office and into a hall that goes to the garage. She said that she thought that all three of them would go out. She testified that the claimant said that she knew him, that he is going to go around to the back through the garage. She said that she and Ms. R got out, but the claimant did not. Ms. S stated that the claimant turned toward stores on the other side of the building. She said that the door to the garage locks and that after it closes you cannot go back in through that door. Ms. S testified that she did not hear the claimant say anything about staying to protect company assets. She stated that it was company policy to let people have money if they demanded it. Ms. S said that after the claimant had been stabbed Mr. V said "[w]here is (Ms. R), she is next." She testified that Mr. V went at Ms. R, and that she, Ms. S, positioned herself in front of her. She said that he did not have the knife at that time. She said that Mr. V laid on the floor motioning for a truck to run over him, but the truck stopped. On cross-examination Ms. S testified that she did not hear the claimant say "who is going to close" but that she could not deny that the claimant may have said those words, but that she did not hear them.

The police report indicated that the incident started at 6:15 P.M. The investigating officer reported that he spoke with the claimant who had several stab wounds on her upper torso. He reported that the claimant said that her ex-boyfriend taunted her through a locked glass where she works, that he broke the glass door, that the three employees left the office, that the other two employees escaped, and that the man caught up to her in a hall, stabbed her, and ran out the back. The reporting officer wrote that the claimant could not speak any further because EMS took her to the medical center. The officer went on to

report that Mr. V asked "[d]id I stab her real bad?" After being told that she would be alright he said "[y]ou mean, the b - - - didn't die." He also reported that Mr. V said that he would kill himself when he got to jail.

After an extensive Statement of Evidence and an extensive Discussion of Evidence, the hearing officer made the following findings of fact and conclusions of law pertaining to the issue of injury in course and scope of employment:

FINDINGS OF FACT

5. On the date of injury, the Claimant was assaulted by [Mr. V], a former boyfriend of the claimant.
6. On the date of injury, the assault on the Claimant resulted in serious bodily harm including five stab wounds to her body.
7. At the time of the assault, the Claimant was attempting to hide from her assailant.
8. The assault was not incident to the Claimant's duty to protect the assets of the Employer.
9. At the time of the assault, the actions of the assailant were irrational.
10. No evidence exist [sic] to indicate that at the time of the assault, the assailant was incapable of forming a rational intent.
11. No evidence exist [sic] to indicate that at the time of the assault the assailant was incapable of rational reasoning.

CONCLUSION OF LAW

* * * * *

3. The claimant was not injured in the course and scope of employment in that her injuries arose out of the acts of a third person intending to injure her for personal reasons not related to employment.
4. The assailant, [Mr. V], was not insane at the time of the assault, and thus the insanity exception to the personal animosity exception to liability as stated in Nasser, supra [Security Insurance Company v. Nasser, 704 S.W.2d 390 (Tex. App.-Houston [14th Dist.] 1984, rev'd

712 S.W.2d 17 (Tex. 1987), on Remand 755 S.W.2d 186 (Tex.App.-Houston [14th Dist.] 1988, no writ)] does not apply.

Section 406.032 provides in part as follows:

An insurance carrier is not liable for compensation if:

(1)the injury:

- (C) arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment.

Nasser, *supra*, provides an exception to this statutory exception. Both the claimant and the carrier argued at the hearing and on appeal that Nasser, is controlling and that based on that case each should prevail. In his Discussion of Evidence the hearing officer reviewed the Nasser case and stated "[t]his case revolves entirely upon the credibility of witnesses." In the Nasser case the jury was presented a special issue that included the instruction that "[a] person cannot intend to injure as employee if the person is incapable of entertaining a rational intent or is incapable of rational reasoning." The jury's answer to the special issue incorporated a finding that the assailant was incapable of entertaining a rational intent or was incapable of rational reasoning. The Texas Supreme Court at 724 S.W.2d 19 wrote "[t]here was evidence that Daryoush had been released recently from a mental hospital. More importantly, however, there was no evidence that there was any rational basis for Daryoush's belief that Nasser had any romantic interest in Dawes." On remand, the circuit court found the evidence to be sufficient to support the jury finding on the special issue. Nasser. In the case before us, the hearing officer made findings of fact using the phrases "incapable of forming a rational intent" and "incapable of rational reasoning" that were used in the special issue in the Nasser case.

The claimant also urges that Finding of Fact No. 9 is inconsistent with Findings of Fact Nos. 10 and 11. Finding of Fact No. 9 is not necessary to decide the issue of whether the injury sustained on _____, is compensable. Also, a finding that the actions of Mr. V at the time of the assault were irrational is not necessarily inconsistent with findings that Mr. V was capable of forming a rational intent and capable of rational reasoning. A person can be capable of forming a rational intent and capable of rational reasoning and act irrationally.

The hearing officer is the trier of fact and is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to their testimony, and resolves conflicts

and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In a case such as the one before us where both parties presented evidence on the issue of compensability of the injury, the hearing officer must look to all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its judgment for that of the fact finder, 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). The hearing officer stated that the case revolved entirely upon credibility of witnesses. The evidence is sufficient to support the finding of the hearing officer that the claimant was attempting to hide from Mr. V at the time of the assault. The hearing officer correctly applied the law, and just as in Nasser, *supra*, where the evidence was found to be sufficient to support findings that the assailant was incapable of forming a rational intent and incapable of rational reasoning, the evidence in the case before us is sufficient to support findings that Mr. V was capable of forming a rational intent and was capable of rational reasoning. Accordingly, the decision and order of the hearing officer are affirmed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge