

APPEAL NO. 990050

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 4, 1998. The issues at the CCH were whether the appellant's (claimant) injury was caused by the claimant's wilful intent to unlawfully injure another person; whether the claimant's injury was caused by the act of a third person intending to injure the claimant because of personal reasons and not because of the employment; and whether the claimant had disability resulting from the injury. The hearing officer determined that the claimant's injury was caused by the claimant's wilful intent to unlawfully injure another person; that the claimant's injury was caused by the act of a third person intending to injure the claimant because of personal reasons and not because of the employment; and that the claimant did not have disability. The claimant appeals, challenging a number of the findings of the hearing officer and arguing that he was injured when he was attacked for reasons relating to his employment. The respondent (carrier) replies that the findings and decision of the hearing officer are sufficiently supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

We adopt the hearing officer's Statement of the Evidence which is as follows:

All witnesses testified concerning the events of _____, when a fight among several persons ensued on the Employer's premises. Knives were used; stones were thrown; hammers were wielded; one worker sustained an abdominal knife wound; and another of the workers expired from stab wounds. Testimony varied among the witnesses regarding who was the initial aggressor, the Claimant or [WG], in the specific part of the altercation which led to the Claimant's alleged injuries, but none of the witnesses could connect the employment duties of the Claimant or the two men, whom he stabbed, as being the cause of this violent altercation. Likewise, none of the witnesses told the same story concerning who hit whom. Only one of the witnesses, [AT], actually watched the entire fight.

Together with his three (3) brothers, the Claimant worked for the Employer. One of the Claimant's brothers, [MV], entered the Employer's premises on _____, to retrieve pay checks for himself and his brothers. At some point, he and [WG] became embroiled in a fist fight; this fight ceased at the command of [SC]. Neither the Claimant nor his other two (2) brothers were positioned to observe this activity. Apparently, [MV] motioned for the Claimant, [AV], and [JV] to join him. When they arrived, [WG] produced a knife and came toward the Claimant who produced his own knife. The

Claimant also stated that [WG] was brandishing a hammer and struck the Claimant on the back of his skull.

After observing that [WG] and [MM] were on the brink of attacking another of his brothers with knives, the Claimant entered the fray, fatally stabbing [MM] and seriously wounding [WG]. [LS] ordered the four (4) to leave the premises and notified the police and emergency medical personnel. [MM] died at the scene, and [WG] was transported to the hospital. All persons involved in this conflict were terminated by the Employer. No benefits have been paid on this claim.

The hearing officer made the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Claimant lived within seventy-five (75) miles of the Field Office on _____, and was an employee of the Employer.
2. The Employer was a subscriber to a policy of workers' compensation insurance issued by the Carrier on _____.
3. On _____, the Claimant, along with his three (3) brothers arrived at the Employer's premises to collect their paychecks thirty (30) minutes prior to the end of their workday.
4. [MV], the Claimant's brother, entered the Employer's premises to retrieve the paychecks for himself and all of his brothers; while there, he became involved in a fist fight with co-worker [WG].
5. The cause of the physical confrontation between [MV] and [WG] cannot be determined from the evidence presented, but as a result of this confrontation, [MV] had an obvious black eye.
6. After [MV] and [WG] had ceased fighting, the Claimant and his other two (2) brothers entered the Employer's premises upon a signal from [MV].
7. When the Claimant entered the Employer's premises, [WG] attacked him with a knife and a hammer.
8. The Claimant produced his own knife and he and [WG] became entangled in an altercation of their own.
9. Further fighting ensued as a consequence of the actions of the other two (2) brothers of the Claimant, including [JV], who became

embroiled in a fist fight with co-worker [MM], and [AV], who was throwing rocks at [MM] and [WG].

10. During the fight with [WG], the Claimant was struck on the head, either by the hammer wielded by [WG] or by a rock thrown by [AV], and his face was cut by the knife wielded by [WG].
11. After being struck on the head and cut by [WG]'s knife, the Claimant stabbed [MM], mortally wounding him, and stabbed [WG] in the abdomen, inflicting serious injury.
12. The Claimant was attacked by [WG] for personal reasons and not because of the work that either of them performed for the Employer.
13. Before the Claimant was struck on the back of his head and prior to receiving the knife cut on his face, the Claimant intended to injure [WG] when he initially began fighting with [WG].
14. The Claimant has not worked since _____.
15. The medical records placed into evidence are insufficient to show by a preponderance that the Claimant was unable to work because of any injuries he sustained as a result of the altercation of _____.

CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission [Commission] has jurisdiction to resolve this case.
2. Venue is properly placed in the Field Office.
3. The Claimant's claimed injury was caused by the Claimant's wilful intent to unlawfully injure another person, [WG], and not because of the employment, thereby relieving the Carrier of liability for compensation.
4. The Claimant's claimed injury was caused by the act of a third person intending to injure the Claimant because of personal reasons and not because of the employment, thereby relieving the Carrier of liability for compensation.
5. The Claimant did not have disability resulting from an injury sustained on _____.

The claimant challenges a number of the hearing officer's findings of fact. Section 410.165(a) provides that the 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). We will review the claimant's challenges to the hearing officer's findings of fact applying this standard.

First, the claimant challenges the hearing officer's Finding of Fact No. 1, arguing that he lives closer than 75 miles to the field office. The claimant's position is consistent with the hearing officer's finding that the claimant lives *within* 75 miles of the field office. This finding is to support the hearing officer's conclusion that venue was proper in the field office and venue is not disputed.

Second, the claimant challenges hearing officer's Finding of Fact No. 2, contending that the employer was not a subscriber to workers' compensation insurance at the time of the incident as the employer's workers' compensation coverage had expired the day before. This matter was not raised or discussed at the CCH. While it could arguably be first raised on appeal because it could be jurisdictional, we find no reason to believe that the parties would have submitted this case to the Commission if the Commission lacked jurisdiction because there was no coverage. We do think that the hearing officer would have been better advised to have entered a stipulation on this point, but we do not find a sound basis to reverse this challenged finding under the facts of this case.

The claimant's challenge as to Finding of Fact No. 3 only deals with a difference as to factual details. The claimant obviously has a different interpretation of some of the conflicting evidence than the hearing officer. The hearing officer is the finder of fact and we do not find that her Finding of Fact No. 3 was contrary to the overwhelming evidence. The same is true regarding the claimant's challenge of Findings of Fact Nos. 5, 6, 8, 9, and 10.

In regard to Finding of Fact No. 12, the claimant argues that WG could not have attacked him for personal reasons because he had never seen WG before the fight in his

life so there could not have been personal animosity between them. However, this argument would equally apply to why there would have been no conflict between them due to work. It was essentially claimant's position at the CCH and on appeal that there was animosity between WG and his brothers due to the fact that WG had fired his brothers and WG had been demoted for taking this action, while his brothers had been rehired at a higher wage than before the firing. There was evidence contrary to this in the testimony of the owner of the employer that WG's demotion had nothing to do with the firing of the claimant's brothers. Even were the claimant correct in the reason for WG's animosity toward his brothers, it would not apply to the claimant. Even under the claimant's theory, the only reason that WG would have acted against him was that he came to the defense of his brother and doing this was not related to the work.

This same analysis applies to Finding of Fact No. 13. The claimant testified that he stabbed MM and WG to defend his brother, who, he testified, WG and MM intended to kill. Thus, by his own testimony, he fought to defend himself and his brothers and not due to anything related to the work. The fact that the fight took place on the employer's premises does not necessarily make it related to work.

We thus find no legal basis to overturn either Finding of Fact No. 12 or Finding of Fact No. 13. We also reject the claimant's challenge of Finding of Fact No. 15. The claimant argues that he presented medical evidence of disability. While this is true, it was up to the hearing officer to determine what weight to give the testimony of the claimant and the medical evidence regarding disability. We do note that the medical evidence in the record was rather sparse. None of the findings of fact not discussed were challenged by the claimant and have become final pursuant to Section 410.169.

Section 406.032 provides as follows, in relevant part:

An insurance carrier is not liable for compensation if:

(1) the injury:

* * * *

(B) was caused by the employee's wilful attempt to injure himself or to unlawfully injure another person;

(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;

* * * *

Applying these provisions to the hearing officer's factual determinations, we find that her findings of fact support both her conclusions of law and her decision. Thus, the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge