

APPEAL NO. 990073

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 15, 1998. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that he had disability as a result of his compensable injury from September 4 through October 28, 1998. In its appeal, the appellant (carrier) argues that the hearing officer's injury and disability determinations are against the great weight and preponderance of the evidence. In his response, the claimant urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was employed as a plumber for (employer). He stated that he was outside talking to Mr. W, when Mr. B came up and started yelling and cussing at him. The claimant testified that Mr. B was angry with him because the claimant had told Mr. M, employer's vice-president, about performance problems the claimant had been having with Mr. B. The claimant stated that he was Mr. B's supervisor on after-hours projects and that Mr. B did not want to take orders from the claimant because the claimant is Hispanic and because Mr. B is older than the claimant and believed he had more experience in plumbing. The claimant testified that Mr. B started hitting and kicking him and that to the extent that he became involved in a fight with Mr. B, he was "just defending [himself]." He stated that the fight eventually broke up and that he went into the shop to advise Mr. M about the incident. He stated that as he was discussing Mr. B's job performance problems with Mr. M, he was struck on the back of his head with a coffee cup. The claimant stated that after he was hit on the head, he went outside to his truck to get a pipe wrench in order to protect himself from Mr. B. He testified that as a result of being hit with the coffee cup, he suffered a cut on his head which required some nine stitches, neck and neck spasms, a stiff neck and shoulders, and excessive pain in his neck and shoulders. The claimant also maintained that he was not a personal friend of Mr. B, that they did not socialize, and that all of his conversations with Mr. B were related to work.

Concerning disability, the claimant stated that he was taken to the hospital after the incident for stitches and that later that day he saw Dr. I, a chiropractor. There are no medical records from Dr. I in evidence. The claimant stated that Dr. I offices with Dr. B, another chiropractor. Records from Dr. B reflect that the claimant began treating with him on either September 15 or 16, 1998. The claimant maintained that he had continuous treatment from _____, until November 24, 1998, when he was given a full-duty release by Dr. B, which is likewise not in evidence. Dr. B's records reflect that the claimant's treatment ended in October 1998. On cross-examination, the claimant acknowledged that after his full-duty release, he applied for and began receiving unemployment benefits. He stated that he was treated as having resigned by his employer for not having returned to work, but

he explained that he did not return to work because he was not able to perform his job duties due to his injury.

Mr. M testified that he is the vice-president of the employer. He stated that prior to _____, the claimant had complained to him that Mr. B would not do the things the claimant told him to do; that as a team leader it was the claimant's responsibility to give instructions concerning the jobs to Mr. B; and that Mr. B had also complained to him about the claimant.

Mr. M testified that he saw the claimant and Mr. B fighting outside on _____; that he did not see who threw the first punch; and that he could not tell who was the aggressor. Mr. M testified that when the fight was over Mr. B came into the shop and sat down in the corner and the claimant came in and began to "scream and holler" at him, threatening to sue everybody. Mr. M stated that Mr. B came toward the claimant with a coffee cup in his hand.

Another employee grabbed Mr. B's hand and the cup came out of Mr. B's hand, glanced off the wall, and hit the claimant on the back of the head. Mr. M testified that after the claimant was struck in the head with the cup, he went out to his truck, got a pipe wrench, and went after Mr. B. Mr. M stated that other employees were able to get the wrench away from the claimant and then Mr. M called the police and an ambulance. At one point in the hearing, Mr. M testified that the claimant got the wrench prior to his having been hit with the coffee cup; however, on cross-examination, when he was asked about his recorded statement where he said the claimant was hit in the head prior to going for the wrench, Mr. M corrected his testimony saying that he remembered that the claimant had been hit before he went out to get the wrench.

The carrier introduced the recorded statements of several people, who worked for the employer on _____. Mr. AM, a plumber, stated that he saw Mr. B and the claimant fighting outside on _____; that he did not see who threw the first punch; that Mr. B was mad at the claimant; that after the fight, the claimant went into the shop and began yelling at Mr. M; and that Mr. B "did not like the conversation that was going on [between the claimant and Mr. M] and uh got up from his seat with a hot cup of coffee proceeded uh in the direction of [claimant] and [Mr. M] . . . and uh hit, hit [claimant] in the back of the head with a cup of coffee." In his recorded statement, Mr. W stated that he was outside talking to the claimant when Mr. B walked up and said that if they were going to talk about him, they needed to do it to his face. Mr. W stated that he did not see who started the fight; that the problems between the claimant and Mr. B had "been boiling for a long time"; and that Mr. B did not want to take orders pertaining to the job from the claimant.

The carrier argues that the hearing officer's injury and disability determinations are against the great weight and preponderance of the evidence. Those issues presented a question of fact for the hearing officer to resolve. Generally, injury and disability issues can be established on the basis of the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). As noted above, there were conflicts and inconsistencies in the testimony and evidence before the hearing officer, concerning whether the claimant was the aggressor in the ongoing conflict between him and Mr. B and whether the conflict was related to the employment. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence under Section 410.165(a). She could believe all, part, or none of the testimony and evidence

before her. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). It was her responsibility to consider the testimony and evidence and to determine what facts had been established. After reviewing the hearing officer's decision it is apparent that she resolved those conflicts and inconsistencies in favor of a determination that the claimant was in the course and scope of his employment at the time he was hit with the coffee cup. The hearing officer noted that the evidence demonstrated that the ongoing confrontation between the claimant and Mr. B on _____, was related to the problems the claimant had been having with Mr. B's not following his work orders and that Mr. B was the aggressor. With respect to disability, the officer noted that the medical evidence was sparse and that the claimant's testimony that his disability continued after he stopped receiving medical treatment in October 1998 was not credible. The hearing officer was acting within her province as the fact finder in so assigning weight and credibility to the testimony and evidence. Our review of the record does not demonstrate that her injury and disability determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse her decision on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We reject, as without merit, the carrier's assertion that because the hearing officer noted that the claimant was not credible with respect to his assertion of disability after treatment ended, she was somehow not permitted to credit his other testimony. Taylor, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge