APPEAL NO. 990167

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 5, 1999, a contested case hearing (CCH) was held. At issue was whether the respondent, SB, who is the claimant, sustained a compensable injury on _____, and had disability from that injury for a period ending on May 1, 1998, when he obtained other employment.

The hearing officer, considering both defenses raised by the appellant (carrier), that the injury occurred through horseplay or in an earlier automobile accident, nevertheless believed that the claimant hurt himself as he contended, while washing trucks for the employer.

The carrier has appealed. The carrier argues that claimant's account of a compensable injury was not credible, and that the medical evidence supports that claimant sustained an injury to his back and neck as a result of an automobile accident. The carrier argues that the hearing officer's finding of a shoulder injury by aggravation takes medical evidence out of context. The carrier asserts that claimant never claimed a shoulder (as opposed to a back) injury until the benefit review conference (BRC). The carrier also asserts that the scuffling match at work with a coworker was a plausible source of injury. Finally, the carrier argues that claimant was terminated for cause when he failed to report to the employer for three days, and, if it were known he was injured, he could have been assigned light duty. The claimant did not file a response.

DECISION

Affirmed according to our standard of review.

The claimant, 18 years old, was employed by (employer) to wash and refuel rental trucks. The employment was through a work-study program at school. He said that he injured his shoulder, stretching around to his scapula area, on _____, as he was stretching to wash some trucks and pressing with a scrub brush.

Other plausible alternatives of injury were advanced. Earlier in the day, the claimant was engaged in a friendly scuffling match with coworker Mr. P, which entailed being thrown to the ground by Mr. P. This had apparently followed periodic "head locks" through the day being initiated by the claimant. Mr. P testified that claimant complained later that day about upper back pain and said he thought this happened when Mr. P threw him to the ground.

Also, it was brought out that the year before, the claimant was involved in an automobile accident while riding with his girlfriend's mother. He denied that he ever told Mr. P that he was driving, but switched places with her in order to make a claim on her insurance policy. Mr. P testified to the contrary.

The alleged accident happened on a Saturday. Claimant said his girlfriend called in sick for him on Monday, and he went to the doctor on Tuesday and reported his injury to his employer on that day. Mr. G, in charge of the employer's shop operations, said that he directly asked the claimant if he had been hurt at work and claimant assured him that he had not and was not going to make a worker's compensation claim because it was an old injury from a car accident. Mr. G said that claimant was reported by his girlfriend to only be "sick" on Monday. Mr. G counseled claimant about the wrestling/horseplay incident that had come to his attention.

After sporadic attempts to work the week of January 26th, claimant went home because he could not perform his work. Mr. G stated that claimant was supposed to fax his doctor's restrictions but never did. Mr. G said that after coming by for his check on February 5th, claimant did not return again. Claimant was terminated on February 12, 1998, for not reporting in for three days in a row. Mr. G said that light duty work could have been made available to the claimant.

A chart of restrictions from the claimant's doctor dated February 26, 1998, proscribes claimant from lifting overhead, lifting over 10 pounds, or operating heavy equipment. There were no restrictions on walking, standing, sitting, and climbing. (A month earlier, claimant was restricted from any lifting.) An August 1998 MRI of the left shoulder indicated an impingement syndrome in the shoulder. In an independent medical examination, Dr. B stated that the impingement would represent the aggravation of an underlying condition, and that it was possible claimant could have aggravated the condition by using a scrub brush while washing. Records produced for treatment of claimant's 1997 injuries show that in February 1997 he was treated for closed head injury, neck pain, and low back pain. Claimant said he returned to work at another job on May 1, 1998.

This claim appears to be plausibly explained by the fact that claimant was involved in a rough-and-tumble horseplay incident involving claimant's upper body which gave rise to pain later that day. However, the Appeals Panel does not have the opportunity, as does the trier of fact, to observe the demeanor and the tenor of the live testimony given in such a case. The hearing officer's decision indicates that he considered the wrestling incident as well as the 1997 car accident and was nevertheless persuaded that the claimant was injured as he said he was. He could further believe that the restricted release was probative of the physical effects of the injury and its impact on claimant's ability to obtain and retain employment. 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). Applying this standard of review to the case at hand, we affirm the decision and order on injury and disability in this case.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge