

APPEAL NO. 990523

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The contested case hearing was held in three sessions, on October 1, 1998, December 4, 1998, and February 9, 1999. With respect to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) sustained a compensable injury to her chest on _____, but that she did not injure her neck, back, or shoulder in the incident; that the claimant's injury was not caused by her wilful attempt to unlawfully injure another person, thus, respondent/cross-appellant (self-insured) is not relieved of liability for workers' compensation benefits under Section 406.032(1)(B); and that the claimant has not had disability as a result of her compensable injury. In her appeal, the claimant asserts error in the hearing officer's determinations that her compensable injury did not extend to her neck, back, and shoulder and that she did not have disability. In addition, the claimant asserts that the hearing officer erred in not resolving the question of whether her compensable injury extends to the psychological components of her injury, namely anxiety and depression. In its response to the claimant's appeal, the self-insured urges affirmance. In its cross-appeal, the self-insured argues that the hearing officer erred in her determinations that the claimant sustained a compensable injury and that the claimant's injury was not caused by her wilful attempt to unlawfully injure another person. In her response to the self-insured's appeal, the claimant urges affirmance.

DECISION

Affirmed, as modified.

The claimant testified that on _____, she was employed as an elementary school teacher for the self-insured school district. She stated that on November 7, 1997, she had a meeting with Ms. S, the principal of the school. At that meeting, the claimant was transferred to a teaching position at a different school. The claimant was given the opportunity on November 7th to take her belongings out of her classroom but she explained that she did not do so because she did not have enough time to clean out all of the things that afternoon. On _____, Ms. L, the claimant's sister, was going to school to pick up her daughter and the claimant asked Ms. L to get three files from her room. The claimant stated that after the meeting on November 7th, she understood that she could go back at any time in the next week to get her things; however, she advised Ms. L to go to the office and ask Ms. H, the vice-principal, to escort her to the claimant's classroom. The claimant testified that one folder contained letters she gave to the parents of her students at open house, the second contained computerized grade sheets that she had created, as well as district progress reports, and that the third contained letters to the claimant from parents of her students. She stated that Ms. H looked in the folders and saw that some of them pertained to the student's grades and told Ms. L that she needed to make copies of those documents. Ms. L contacted the claimant, who spoke to Ms. H and gave her permission to copy the district progress reports but not to copy the other papers. The claimant stated that Ms. H agreed that she would not copy the claimant's personal papers. She testified that

shortly thereafter her sister called her again and told her that Ms. H was copying all of the documents so the claimant decided to go to the school herself and retrieve the files.

The claimant stated that she went to the office and found the files in the copy room, that she and Ms. H walked into the hall and Ms. S came up to them. The claimant described Ms. S as angry and very rude. She testified that Ms. S told her that the things at the school belonged to the school and Ms. S took the files out of Ms. H's hands. She stated that Ms. S walked into Ms. H's office and told the claimant that she was going to have to go through the documents in the files page by page. The claimant responded that she did not have time for her to do that. She maintained that Ms. S grabbed the files and held them over her head so that the claimant could not reach them; that she reached up to grab the files, making sure that she did not touch Ms. S as she did so; that Ms. S cried out "don't you hit me"; and that Ms. S then pushed the claimant in the chest almost knocking her to the floor and released the files to her. The claimant stated that she left the school and called the police. She stated that she had a police officer come to her home and told him that she wanted to file assault charges against Ms. S. The policeman called the ambulance and the claimant was taken to the emergency room, where she was diagnosed with a mild chest contusion and a mild lumbosacral strain. The claimant's charges against Ms. S were not pursued; however, criminal assault charges were filed against the claimant. The claimant's trial was held on January 12 and 13, 1998. The jury returned a not-guilty verdict.

Dr. M became the claimant's treating doctor. Dr. M testified at the hearing that the claimant sustained injuries to her chest, upper back, lower back and neck in the altercation with Ms. S. He stated that he sent the claimant for physical therapy but she responded poorly to the therapy because of the nature of the trauma. Dr. M testified that he referred the claimant to Dr. P, a psychiatrist, for depression. Dr. M testified that he was aware that Dr. P had advised the claimant to play softball as part of her treatment. Dr. M explained that work and play are separate things and that it is not unusual to keep a patient off work while still prescribing recreational therapy. Dr. M stated that he had the claimant off work for her "physical aches and pain" and that he has released her to return to work from the standpoint of her physical injuries.

Dr. P testified that he began treating the claimant on February 19, 1998, after she was referred to him by Dr. M. He diagnosed depression and began treating her with anti-depressant medications. Dr. P also testified that he advised her to reduce her stress level and to engage in more pleasurable activities. He stated that he agreed to her playing softball because she enjoyed it. Finally, Dr. P testified that he still has the claimant off work because of her depression, noting that she cannot handle the stress of working.

Ms. H testified that when Ms. L came to pick up the files from the claimant's room, she spoke to the claimant and agreed to copy the documents pertaining to grades but not the personal papers. Ms. H stated that she went to the copy machine and made the copies but then she noticed that the pages were blank and she had to recopy them. Ms. H stated that the claimant came rushing into the office yelling that she did not want copies made of her personal documents. Ms. H testified that at that point, Ms. S joined her and the

claimant and they went to Ms. H's office, that Ms. S told the claimant that she had to go through the documents page by page to see what she had to make copies of and what she did not, that the claimant became angry and stated that she did not have time for Ms. S to do so, that the claimant grabbed for the papers several times and then the claimant grabbed Ms. S's forearm and Ms. S released the files. Ms. H stated that the claimant yelled that Ms. S had pushed her and that Ms. S would hear from the claimant's lawyer. Ms. H testified that she had a clear view of the entire incident, that the claimant was the aggressor in the altercation and that she did not see Ms. S push, shove, or touch the claimant.

Ms. S testified that when she heard the claimant come into the office on _____, she was "loud, angry, and full of temper." She stated that she went to the copy room; that Ms. H gave her the files; that she, Ms. H and the claimant went to Ms. H's office to go through the papers because they needed to keep a copy of papers pertaining to grades; that the claimant became very angry and began screaming at her; that she picked up the files and held them against her chest with her arms crossed in front of her; that the claimant grabbed her arm a couple of times; and that the claimant forcibly removed the files from her hands. Ms. S maintained that the claimant was the aggressor and that she did not push, shove, or touch the claimant.

Initially, we will consider the self-insured's assertion that the hearing officer erred in determining that the claimant sustained a compensable chest injury on _____. That question presented a fact question for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence under Section 410.165(a). As such, it was her responsibility to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will not reverse a hearing officer's factual determinations unless they are so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In this instance, the hearing officer considered the testimony and evidence before her and determined that the claimant sustained a compensable injury, a chest contusion, in the altercation with Ms. S over the files. That determination is supported by the claimant's testimony and the emergency room records, which diagnose a chest contusion. Our review of the record does not demonstrate that that determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, we will not reverse it.

Next, we will consider the claimant's assertion that the hearing officer erred in determining that her injury did not extend to her neck, back, or shoulder. The question of the extent of the claimant's compensable injury was also a fact question for the hearing officer. In her discussion section the hearing officer noted that the claimant did not fall or strike any object in the altercation and that Dr. M's records do not provide an explanation for how body parts, other than the claimant's chest, had been injured in the struggle over the files. The hearing officer stated "[t]here was insufficient evidence that Claimant injured any other body part other than the chest contusions." It is apparent that the hearing officer

simply was not persuaded by the claimant's evidence that she sustained any injury other than a chest contusion in the _____ incident. She was acting within her province as the fact finder in so finding. Nothing in our review of the record demonstrates that that determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to disturb it on appeal. Pool, supra; Cain, supra.

In her appeal, the claimant also asserts error in the hearing officer's failure to resolve the question of whether she sustained a psychological injury. The hearing officer did not include a psychological injury in her finding that claimant did not injure her neck, back or shoulder on _____. However, it is apparent from her discussion section that the hearing officer determined that the claimant did not sustain a psychological injury as a result of the _____ incident. Specifically, the hearing officer stated:

In February of 1998 [Dr. M] referred Claimant to [Dr. P] for psychological treatment. Dr. P continued to keep Claimant off work. It is of note that [Dr. P] repeatedly stated that he kept Claimant off work because Claimant stated that she was not able to work due to stress. It cannot be overlooked that during this same time period Claimant was also undergoing a criminal trial and administrative hearings with the [self-insured]. In fact, the referral to [Dr. P] did not take place until after the criminal trial. There was insufficient evidence that Claimant sustained a psychological injury from the incident of _____.

Based upon this language it is apparent that the hearing officer determined that the claimant did not sustain a psychological injury as a result of the altercation with Ms. S. As with her other extent-of-injury determinations, the hearing officer was acting as the sole judge of the weight and credibility of the evidence in determining that the claimant did not present sufficient evidence to demonstrate a causal connection between her anxiety and depression and her compensable injury. We believe that the hearing officer's failure to include a psychological injury in her Finding of Fact No. 9 was in the nature of a clerical error. As such, we will modify that finding, as follows:

FINDING OF FACT

9. Claimant did not injure her neck, back, shoulder, or sustain a psychological injury on _____.

The claimant also asserts error in the determination that she did not have disability as a result of her compensable injury. The existence of disability is a question of fact for the hearing officer. It is well-settled that disability can be established by the testimony of the claimant alone, if it is believed by the hearing officer; however, the hearing officer is not bound by that testimony. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). In this instance, the hearing officer found, and we affirmed her determination, that the claimant's injury was limited to chest contusions. Based upon that determination, the hearing officer simply was not persuaded that the compensable injury precluded the

claimant from obtaining and retaining employment at her preinjury wage. That is, she determined that the claimant did not present sufficient evidence to demonstrate that her injury prevented her from working and, thus, she did not have disability. That determination is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, we will not disturb it. Pool, *supra*; Cain, *supra*.

Finally, we consider the self-insured's assertion that the hearing officer erred in determining that the claimant's injury was not caused by her wilful attempt to unlawfully injure another person. The hearing officer considered the conflicting testimony from the claimant, Ms. H and Ms. S and determined that the claimant grabbed Ms. S's arm in the altercation but she did not intend to injure Ms. S when she did so and that there was "unintentional mutual contact between Claimant and [Ms. S] when the files were taken from Ms. S which resulted in bruising on Claimant's chest." As the fact finder and the sole judge of the evidence before her, the hearing officer was free to determine, based upon her review of the evidence, that the self-insured had failed to sustain its burden of proving that the claimant's injury was caused by her wilful attempt to injure another person. That determination is not so contrary to the overwhelming weight of the evidence as to compel its reversal on appeal. Pool, *supra*; Cain, *supra*. As such, the hearing officer properly determined that the self-insured was not relieved of liability in this instance under Section 406.032(1)(B).

As modified, the hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge