APPEAL NO. 991120

This appeal arises pursuant to the 1989 Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On May 3, 1999, a hearing was held. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, that the injury was not caused by claimant's attempt to unlawfully injure another or by a third person acting for personal reasons, but that claimant did not have disability. Appellant (carrier) asserted that the assault upon claimant resulted from the claimant's "verbal assault on [Mr. E] deceased mother." Carrier also asserts error in regard to a finding of fact that said carrier failed to provide enough evidence to shift the burden to claimant to show that he did not intend to unlawfully injure another person and in regard to a finding of fact that said claimant showed that he was not assaulted for personal reasons. Claimant responded that the decision should be affirmed. There was no appeal as to the decision of no disability.

DECISION

We affirm.

Claimant worked for (employer) as an assistant manager in the automotive service area for over two years when he was injured on _____. There was no question that claimant was injured when his head was slammed against a car by another employee, Mr. E. (Medical records showed that sutures were used in closing a three-centimeter laceration on the back of claimant's head.) The question basically was what caused claimant to be shoved against a car; did the dispute arise from the work or because of a personal reason of Mr. E or because of claimant's unlawful intent to harm Mr. E.

The evidence established that claimant was a low-level supervisor in a service area in which at least two different types of work were being done, tire work and lubrication work; the evidence did not uniformly show that claimant was directly over Mr. E, but there was some evidence that claimant could oversee employees in either of the two types of work. The evidence is also clear that Mr. E was late in arriving at work that morning (he testified that he was 10 to 15 minutes late), when both participants were to arrive at 8:00 a.m. The evidence was also overwhelming that claimant at some time in the course of the morning indicated to Mr. E that he, Mr. E, would have to wait to take lunch (or a break) until others had done so because he had been late. The conflicts in the evidence arose in regard to what happened as claimant announced the need for Mr. E to wait and what happened after that.

Claimant testified that he used no provoking words and said nothing about anyone's mother. Mr. E testified that claimant did start the cursing and he, Mr. E, "started defending myself with words." He also said that he was not concerned about when he ate lunch but took umbrage when claimant made a statement that included his deceased mother. He agreed that claimant did not hit him, but did testify that claimant grabbed his shoulder and he then grabbed claimant by the neck and threw him against the car.

The coworker who separated the two, Mr. G, testified that claimant and Mr. E "started arguing over lunch"; he said claimant then said something about Mr. E's mother and "that's when [Mr. E] jumped." He added that claimant then "stuck his arm out and [Mr. E] grabbed him and threw him on the hood." Mr. G described the discussion about lunch, in effect, as claimant telling Mr. E that he "wasn't going to lunch before him because he got to work late." Mr. G indicated that claimant did say something to Mr. E about Mr. E's deceased mother.

Mr. A testified that he got off work at 12:00 p.m. and did not see the fight. He heard claimant tell Mr. E, just as he was leaving (as written in the transcript), "don't go to 'f'ing [sic] lunch before me because you were late this morning." Mr. A also said that claimant's "mouth was bad in Spanish."

Mr. A's statement, undated, appears consistent with his testimony and referred to the same word used by claimant as is mentioned immediately above. Mr. E's statement, dated _____ (the day of the injury), said that claimant said he was going to lunch first. Mr. E said that he said, "ok," after which claimant started referring to him as being "an hour late" to which he, Mr. E, said he was "only 5 minutes late." Mr. E wrote that claimant next said (with continuing responses), "fucking bitches then I said fuck you mother fucker in spanish then he said I fuck your mother then I looked at him and said que puto que that's when I went at him." Claimant pointed out in closing argument that this statement does not say that claimant grabbed Mr. E, as Mr. E's testimony indicated.

The above evidence presented factual questions and conflicts for the hearing officer to answer and reconcile. She is the fact finder and the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Also see Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). While all other witnesses, Mr. G, Mr. A, and Mr. E said that claimant used language that could be considered to be provoking, the hearing officer could choose to believe claimant who said he did not. Carrier's assertion on appeal that "evidence presented established that the claimant was a supervisor with a foul mouth and disposition" is not reflected in any findings of fact; in addition, the hearing officer is not compelled to reach such a determination because three people provided evidence that could lead to such a conclusion. While another fact finder might reach that determination, that is no basis for the Appeals Panel to overturn the hearing officer on a factual determination. In addition, the hearing officer could consider from reading Mr. E's statement, given on the day of the event, that claimant and Mr. E had both used untoward language in discussing the sequence of lunch periods, that the only battery that occurred was that of Mr. E, and that Mr. E's late arrival and the subsequent order of lunch periods set forth by claimant were the underlying basis for the injury.

The evidence, as presented, also supports the hearing officer's findings of fact that carrier did not present evidence sufficient to require claimant to prove that he did not intend to unlawfully injure Mr. E, but that there was sufficient evidence presented to require claimant to show that Mr. E's battery upon him resulted from the work and not personal

reasons; the determination, as stated, that claimant met that burden and sustained a compensable injury was sufficiently supported by the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge