

APPEAL NO. 991368

On June 9, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury on _____; (2) whether claimant's injury arose out of an act of a third person intending to injure claimant because of personal reasons and not directed at claimant as an employee or because of the employment; and (3) whether claimant has had disability, and if so, for what periods. Claimant requests that the hearing officer's decision that claimant sustained a compensable left cheek contusion on _____, and that she did not have disability resulting from the left cheek injury of _____, from October 7, 1998, to March 22, 1999, or from May 12, 1999, to the date of the CCH be reversed and that a decision be rendered that claimant sustained a compensable injury to her left cheek, neck, ear, jaw, tooth, brain, and sinuses and that she had disability from October 7, 1998, to March 12, 1999, and from May 12, 1999, through June 9, 1999. There is no appeal of the hearing officer's decision that claimant's injury arose out of an act of a third person intending to injure claimant because of her employment and was directed at claimant as an employee and, therefore, respondent (carrier) is not relieved of liability for compensation. Carrier requests affirmance.

DECISION

Affirmed.

Claimant testified that on _____, a supervisor named BM told her that a cabinet she made at work would not pass inspection, that she took the cabinet to quality control, and that BM got mad at her for taking the cabinet to quality control and hit her. Claimant said that "I don't [sic] if he hit me with his fist or hit me with something, he just hit me right here on the left side of my - - on the left side of my jawbone" and that BM hit her once. The hearing officer noted that claimant pointed to the zygomatic arch on the left side of her face in describing where BM hit her. Claimant said that her face was swollen and that she continued to work until her ride came to take her home. There was some conflicting evidence as to whether claimant hit BM in the parking lot prior to BM's hitting claimant. Claimant was terminated from employment for being in the altercation at work. Claimant said that ever since BM hit her, she has had pain in her jawbone, earaches, swelling, a broken tooth, and headaches; her "sinus" is "messed up"; her eyes "stick together"; and sometimes her face feels "paralyzed." Claimant also said that her face was swollen and that she had a black eye. Claimant said that she saw Dr. E about a week after her injury and that she told him that the left side of her face, eye, and neck were hurting. Claimant said she also saw Dr. W. She said that she has not been able to obtain further medical treatment because carrier denied her claim.

Claimant said that she obtained a written statement from BM because she wanted her job back. She said that she filed for unemployment and that, because she had to take care of her family, she told the Texas Workforce Commission that, for certain jobs, she was

ready, willing, and able to work. She said that she went to work for another employer doing full-time counter work at a bakery from March 26 to May 11, 1999, but that she was unable to continue her employment there because she was unable to lift, sometimes had headaches, sometimes could not hear, and was unable to perform her duties because of pain. She also said that she started "forgetting stuff."

ZW testified that he works for employer, that he did not see the altercation between claimant and BM, and that he investigated that matter. Claimant also said ZW was not present when BM struck her. ZW stated in a written statement that BM "punched" claimant in her face. Claimant said that HJ was not present when BM struck her. HJ stated in a written statement that BM struck claimant with his fist. Claimant said that PT, the night supervisor over everyone on the shift, was present when BM hit her. PT gave a written statement that claimant and BM had an altercation on _____, and that BM "hit her [claimant] in the jaw." In the October 11, 1998, written statement claimant obtained from BM in order to try and get her job back, BM states that he got mad after claimant talked to someone in quality control about the cabinet and "hit her."

Dr. E reported that when he saw claimant on October 12, 1998, claimant told him that she was struck in the left eye at work on _____, by a supervisor and that that caused injury to her neck and a contusion of the left eye. Dr. E noted that x-rays of claimant's skull and cervical spine were negative and gave diagnosis codes for a black eye and a displacement of a cervical intervertebral disc. Dr. E prescribed treatment and a cervical collar and wrote that claimant was to be excused from work from October 12 to October 26, 1998. Claimant was seen by Dr. W on October 15, 1998, and Dr. W reported that claimant told him that on _____, while at work, she was hit on the left side of her face by a fist; that her whole left side of her face was swollen; that she had a black left eye, that she jerked her neck and had neck pain; that pain radiates to her face, neck, shoulders, upper back, and left arm; and that she has headaches and blurriness in the left eye. Dr. W wrote that on physical examination claimant had a bruise under her left eye and that she had swelling of the left side of her face at the zygomatic arch and of the left ear. Dr. W also noted decreased cervical range of motion and that claimant complained of pain in her left shoulder and neck. Dr. W diagnosed claimant as having a left jaw sprain, left facial swelling and trauma secondary to "the fist injury," cervicobrachial neuritis versus radiculitis, posttraumatic cephalgia, headaches, left eye and left ear concussion, and a mild cerebral concussion. On October 15th and 22nd Dr. W recommended diagnostic testing. Dr. C reported that a CT scan of claimant's face done on December 28, 1998, was normal except for a mild nasoseptal deviation on the left, and he reported that a CT scan of claimant's head done the same day was normal.

Appealed findings of the hearing officer are that claimant sustained a contusion to her left cheek on _____, in the course and scope of her employment; that claimant did not sustain an injury to her neck, brain, ear, sinus, jaw, or tooth in the course and scope of her employment on _____; and that claimant was not unable to obtain and retain employment at wages equivalent to her preinjury wage as a result of her left cheek injury from October 7, 1998, to March 22, 1999, or from May 12, 1999, to the date of the CCH on

June 9, 1999. Claimant also appeals the hearing officer's conclusions that she sustained a compensable left cheek contusion injury on _____, and that she did not have disability resulting from the left cheek contusion injury from October 7, 1998, to March 22, 1999, or from May 12, 1999, to the date of the CCH on June 9, 1999. Claimant asserts that her injury to her left cheek was of greater severity than a mere bruise and that the on-the-job injury extended to her neck, brain, ear, sinus, jaw, and tooth. Claimant also contends that, as a result of her injuries, she was unable to work from October 7, 1998, to March 22, 1999, and from May 12, 1999, through the date of the CCH.

Claimant had the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Claimant had the burden to prove she had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. Claimant contended that she sustained serious injuries to her face and neck when struck by BM on _____, and that those injuries prevented her from working from October 7, 1998, to March 22, 1999, and from May 12, 1999, to the date of the CCH.

In determining the issues in this case, the hearing officer wrote that she was not persuaded that claimant sustained any injury other than a contusion when she was struck by BM on _____, and that she was not persuaded that claimant established disability from the compensable injury sustained on _____. The 1989 Act makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. A fact finder is not bound by the testimony (or evidence) of a medical witness where the credibility of that testimony (or evidence) is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. Rowland v. Standard Fire Ins. Co, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge