

APPEAL NO. 991807

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 July 28, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on \_\_\_\_\_, and that she had disability as a result of her compensable injury from March 12 to March 26, 1999. In its appeal, the appellant (self-insured) argues that the hearing officer's injury and disability determinations are against the great weight of the evidence. In addition, the self-insured argues that the hearing officer "clearly erred in not allowing testimony of the claimant's abusive domestic situation" and that the hearing officer "erred in liberally construing the facts." The appeals file does not contain a response to the self-insured's appeal from the claimant.

DECISION

Affirmed.

The claimant testified that on \_\_\_\_\_, she was an Administrative Technician I at a state hospital. She stated that on that date she was standing next to the nurse's station when an agitated patient went by and struck her from behind on her left shoulder and upper posterior ribs. The claimant stated that she did not see what part of the patient's body hit her, explaining that she initially said that the patient kicked her based on Ms. V statement to that effect. She testified that she simply felt a "very powerful blow." She stated that she reported her injury to (Mr. S), her supervisor, shortly after it happened and that she left work to go to the doctor, who was treating her for carpal tunnel syndrome. The claimant was not able to get in to the doctor's office on \_\_\_\_\_, but was seen by Mr. PS, a physician's assistant, on day after injury date. Mr. PS reported a history of the claimant's having been assaulted by a patient, diagnosed a left shoulder strain and left rib contusion, and took the claimant off work for two weeks.

Ms. V testified that on \_\_\_\_\_, the patient elbowed the claimant in the shoulder. She stated that the patient also elbowed her. She stated that the impact to the claimant's shoulder was more like brushing than hitting. In a witness statement dated \_\_\_\_\_, Ms. V stated "Pt was returning to unit from staffing room yelling and threatening. Kicked on [claimant's] left shoulder very very forcefully." On the following day, Ms. V signed a "corrected" statement that provides "Pt was returning from staffing room to unit yelling and screaming. He elbowed [claimant] and brushed her [illegible] hand." Ms. V testified that the force of the impact to her and to the claimant was similar and that she would characterize it as a brush rather than a direct hit. Finally, in yet another handwritten statement, Ms. V stated that the patient elbowed the claimant in the upper right shoulder while she was sitting at the nurse's station.

Ms. R testified that she also witnessed the incident on \_\_\_\_\_. Ms. R stated that the patient elbowed the claimant as she stood next to Ms. R's desk and that the blow was not forceful in that it was not like the force of a punch. Mr. S testified that the claimant reported the incident to him shortly after it happened. Mr. S stated that the claimant told him that a patient had "bumped" in to her and that "it hurt." He stated that the claimant left work to go to the doctor.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The self-insured contends that the hearing officer's injury determination is against the great weight of the evidence. In so arguing, the self-insured emphasizes the evidence from Ms. V and Ms. R that the contact was not forceful and could be more properly characterized as a "brush" than a "blow." However, as noted above, Ms. V gave several statements that were somewhat at odds with each other and her testimony at the hearing. In any event, the question of whether the contact to the claimant's left shoulder was sufficient to cause an injury, that is, damage or harm to the physical structure of the claimant's body, was a matter left to the discretion of the hearing officer as the fact finder. It was solely the hearing officer's responsibility to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. He decided to credit the claimant's testimony and the evidence from Mr. PS that the claimant sustained a left shoulder strain and rib contusion. He was acting within his province as the fact finder in so finding. The hearing officer's injury determination is sufficiently supported by the claimant's testimony and the evidence from Mr. PS. Our review of the record does not demonstrate that that determination is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse the hearing officer's decision on appeal. Cain; Pool.

The self-insured's challenge to the disability determination is premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the injury determination, we likewise affirm the determination that the claimant had disability from March 12 to March 26, 1999.

In the discussion section of his decision, the hearing officer stated:

This case was apparently brought before the Commission [Texas Workers' Compensation Commission] because the State Office of Risk Management believes that the workers compensation law should be strictly construed. That is not and never has been the law with regard to workers' compensation in Texas. See, Albertson's v. Sinclair, 984 S.W.2d 958 (Tex. 1999).

The self-insured argues that the hearing officer erred in "liberally construing the facts." After carefully reviewing the record, we cannot agree that the hearing officer erred. There were conflicts in the evidence as to whether the impact from the patient was sufficient to cause an injury, as that term is defined in the 1989 Act, to the claimant. The hearing officer resolved the conflicts in the evidence in favor of the claimant as he was permitted to do in his province as the sole judge of the weight and credibility of the evidence. We note that in both his opening and closing statements the self-insured's attorney argued that the definition of injury should be given a "strict construction." Thus, it appears that the hearing officer's comments were in the nature of a response to the argument advanced by the self-insured, as opposed to an indication of error on his part.

Finally, the self-insured argues that the hearing officer "clearly erred" in not allowing testimony concerning the claimant's allegedly abusive domestic situation. In his examination of Mr. S, the self-insured's attorney asked a question about conversations Mr. S had with the claimant concerning domestic abuse. The ombudsman assisting the claimant objected to the question and the hearing officer overruled the objection. At that point, the self-insured's attorney withdrew the question. As such, the self-insured has no basis to complain on appeal, as it made the decision not to pursue the question at the hearing, rather than the hearing officer's having "not allowed" the testimony as it asserts.

The hearing officer's decision and order are affirmed.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge