APPEAL NO. 992036

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On August 20, 1999, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer determined that respondent (claimant) sustained a compensable (multiple contusions and abrasions) injury on _____, and that claimant had disability from _____, to the date of the CCH.

Appellant (carrier) appeals certain of the determinations, contending: 1) that claimant only experienced "pain" which did not amount to an injury; 2) that claimant did not have a cervical and lumbar strain; 3) that claimant did not have disability; and 4) that claimant "was placed at MMI [maximum medical improvement] on June 10, 1999, which would not allow a finding of disability" after that date. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds, urging that the evidence supports the hearing officer's decision and that we affirm the hearing officer's decision.

DECISION

Affirmed.

Claimant testified that she was a (residential) "counselor" at what was apparently a juvenile detention home (employer). Claimant testified that about 11:40 a.m. on _____, she was assaulted by a teenaged boy (L), who picked her up and threw her to the floor. Claimant testified that she called employer's director on the telephone for help and permission to call the police, but the director told her to remain on the premises and not to call the police. Claimant apparently continued her shift until 6:15 p.m. that evening, when another teenage boy (A), possibly with the assistance of L, assaulted her by picking her up again and throwing her to the floor. Claimant again called the director and a supervisor for assistance and, apparently this time, the police were called. In evidence is a statement from a coworker who said claimant "was also punched on the back" by A. (The relative sizes of claimant and L and A were not developed.) Carrier does not deny that such an incident or incidents took place, but principally argues that claimant did not sustain an injury. Claimant filled out an accident report. Claimant finished her shift and went home.

Claimant testified that she sought medical attention the next day, _____, from, D. C. Dr. O, her family doctor. Dr. O, in a Specific and Subsequent Medical Report (TWCC-64) of the _____ visit, notes the history and claimant's complaints and lists a diagnostic code for a cervical and lumbar strain/sprain (contrary to carrier's contention that Dr. O "made no diagnosis of lumbar or cervical strain"). Dr. O took claimant off work. There are subsequent off-work slips and, in a brief report dated March 17, 1999, Dr. O repeats the history of claimant's being "grabbed from behind her back, then thrown to the floor." Dr. O

states "[a]s a result of this attack, the patient's diagnosis consisted of Lumbar/Cervical Sprain." An April 21, 1999, note from Dr. O continued claimant off work. Although not clear, claimant next saw, D. C. Dr. P, who, in a report dated May 12, 1999, recites the history, the results of his testing, and diagnoses:

1. Rule out shoulder derangement.
2. Lumbar HNP [herniated nucleus pulposus].
3. Thoracic Segmental Dysfunction.
4. Cervical HNP.
5. Hip Derangement.
6. Lumbar radiculopathy.
7. Post traumatic stress.
8. Myofascitis to affected areas.

Claimant was examined by Dr. B, carrier's required medical examination doctor, who, in a report dated May 10, 1999, recited the history to include claimant "was thrown to the floor and struck repeatedly, sustaining multiple bruises and contusions." Dr. B recites that claimant has been seen by Dr. O three times a week for treatments due to this injury and that Dr. O has seen claimant for a past motor vehicle accident. Dr. B noted that claimant is scheduled to see Dr. P. Dr. B concludes:

> By history, this patient apparently sustained multiple contusions and abrasions associated with a physical attack. At the present time, she has multiple complaints of pain. I find no objective evidence to explain these complaints. I see no objective evidence of any residual injury that may have been sustained in that type of incident, as described in November 1998.

Dr. B placed claimant at MMI "as of this date," with a "no evidence of impairment."

Carrier's first point on appeal is that the hearing officer only found that claimant "experienced pain in her neck, low back, left hip and left shoulder," and that the Appeals Panel has said "that 'mere pain' does not equate to an injury," citing Texas Workers' Compensation Commission Appeal No. 981034, decided June 29, 1998. First, we note that carrier mischaracterizes the hearing officer's findings, which were:

FINDINGS OF FACT

3. Claimant suffered multiple contusions and abrasions, and she experienced pain in her neck, low back, left hip and left shoulder following the _____ attacks.

4. Claimant was diagnosed as having a cervical and lumbar strain, and multiple contusions and abrasions resulting from the _____ attacks.

Secondly, in Appeal No. 981034 noting that, while pain itself does not necessarily equate to an injury as defined in Section 401.011(26), we went on to specifically hold that "[s]trains and sprains are considered 'injuries' under the 1989 Act." We find no merit in carrier's appeal on this point.

Next, carrier states that Dr. O does not have any narrative report which diagnoses a cervical and lumbar strain, "separate and apart from the Claimant's history of the incident." Dr. O did make a diagnosis from the ICD•9•CM (International Classification of Diseases) of a cervical and lumbar strain, and Dr. O's notes, however brief they may be, do indicate that he examined claimant, commented on the musculoskeletal findings, gave a "guarded" prognosis and prescribed treatment. How thorough or detailed the examination was is a factual determination solely within the province of the hearing officer, as the sole judge of the weight and credibility of the evidence, to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Regarding Dr. B's examination, even Dr. B appears to agree that claimant "apparently sustained multiple contusions and abrasions" but just, on May 10, 1999, found no other objective signs of injury. That does not necessarily provide evidence that no injury occurred.

Regarding carrier's appeal on the disability issue, carrier again argues that pain does not equate to an injury (which we previously held has no merit in this case) and then cites two supplemental income benefits (SIBS) cases for the proposition that an inability to work "should encompass more than conclusory statements." Disability is defined in Section 401.011(16) as the inability because of a compensable injury to obtain and retain employment at the preinjury wage. We have further noted that the hearing officer, as the fact finder, can find disability based on claimant's testimony alone if considered credible. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394 (Tex. 1989), and Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist.] 1987, no writ). Consequently, while a checked block may not be sufficient in a SIBS case to prove a total inability to work (*see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(3) (Rule 130.102(d)(3)), it is not even necessarily required to prove disability pursuant to Section 401.011(16). Carrier's citation to SIBS standards applied to disability cases is not persuasive. In this case, the hearing officer's finding of disability is supported not only by claimant's testimony, but by the reports and off-work slips of Dr. O and Dr. P.

Lastly, carrier contends that claimant could not have disability to the date of the CCH because Dr. B had certified claimant at MMI on May 10, 1999, and claimant "did not sustain any additional disability or entitlement to temporary income benefits [TIBS] after that date." There are a number of problems with that statement. First, carrier's argument confuses the

issues of disability and MMI, which are distinct and different concepts under the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 91060, decided December 12, 1991. A claimant's disability (i.e., the inability to obtain and retain employment) may end before claimant reaches MMI and, conversely, disability may continue even after a claimant has reached MMI, although, pursuant to Sections 408.101 and 408.102, entitlement to TIBS ends where MMI is reached. *See* Texas Workers' Compensation Commission Appeal No. 991091, decided July 5, 1999. Secondly, simply because carrier's doctor was of the opinion MMI was reached does not make that so. Rule 130.5(e) was not an issue. The hearing officer's decision and order that claimant is entitled to TIBS "until disability ends or [MMI] is reached" is in accordance with the 1989 Act.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge