APPEAL NO. 000700

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 February 11, 2000. The hearing officer determined that on May 8, 1999, the appellant (claimant) was not in the course and scope of employment when he was attacked; that the respondent (carrier) is relieved of liability for the claimed injury; that the claimant did not sustain a compensable injury; and that, because there is no compensable injury, there is no disability. The claimant files a request for review, arguing that the evidence showed he was injured and had disability. The claimant also argues that the carrier should not be relieved of responsibility because he was attacked by a fellow employee for making a comment that was not illegal to make. The carrier responded, contending that the decision of the hearing officer was supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he was injured on _____, while he was employed as a car salesman, when he was assaulted by a coworker. The claimant described the incident as taking place when a manager was sending an employee to buy malts for the workers of the employer and a coworker stated that the employee should not buy one for the claimant. The claimant testified that while walking away from the coworker, he said "that fat ass" under his breath and the coworker then assaulted him by running into the claimant. The claimant testified that he was stunned at the time, later felt various pains, and consulted a doctor a month later. The claimant complained of pain in his ankles and legs, tingling in his left ear, and pain and numbness in his face. The claimant, who testified that he continued to work after the incident, was taken off work on June 30, 1999, by one of his doctors. The claimant testified that he had disability as a result of the incident from June 19, 1999, through October 31, 1999.

The following findings of fact and conclusions of law are found in the decision of the hearing officer:

FINDINGS OF FACT

2. On _____, the attack of Claimant occurred while Claimant was not in the furtherance of the affairs of the Employer in that Claimant was attacked for personal reasons as the result of a derogatory personal remark to the assailant.

3. On _____, the Claimant sustained no injury to any part of his body as a result of an attack that took place while he worked for Employer.

4. The inability of Claimant to obtain and retain employment at wages equivalent to the pre-injury wage from June 19, 1999, through October 31, 1999 was the result of something other than an injury occurring while Claimant worked for Employer.

CONCLUSIONS OF LAW

4. Carrier is relived [sic] of liability to the claimed injury of _____.

5. Claimant did not sustain a compensable injury.

6. Since there is no compensable injury, there is no resultant disability.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and 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).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case, the hearing officer found no injury contrary to the testimony of the claimant and which was supported by some medical evidence. The claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ.

App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden.

Nor do we find error in the hearing officer's finding that the carrier is relieved of liability. Section 406.032 provides as follows in relevant part:

> An insurance carrier is not liable for compensation if:
>
> (1) the injury:
>
> * * * *
>
> (C) arose out an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment[.]

The claimant argues that this provision should not apply because the incident took place on the employer's premises and because it involved another employee. These are simply not factors in determining whether or not Section 406.032 applies. The relevant fact is whether the assault took place for a personal reason. We find no error in the hearing officer's finding that the attack took place due to the derogatory remark by the claimant. While the claimant argues that he had a constitutional right to make the remark, this is not the question before us. The question is the reason for the attack and there is sufficient evidence to support the finding of the hearing officer regarding this.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge