

APPEAL NO. 001064

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 20, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury and had disability arising from an assault at work which was not for personal reasons but arose out of the employment.

The appellant (carrier) appeals, stressing that the incident was unwitnessed, and reciting evidence that it believes points to an incredible account of events by the claimant.

DECISION

Affirmed.

The claimant was employed at the (employer) as a barber teacher. She was employed for six months at the time of the claimed injury on _____. She contended she was attacked by supervisor Ms. G in the employer's supply room.

The claimant said she had not talked to Ms. G before entering the supply room but determined that Ms. G was "angry" because she overheard a conversation between Ms. G and Mr. C in which Ms. G was "hollering" when the claimant passed Mr. C's office. The claimant said the conversation was about her because she heard her name called. She said she had been in the supply room only a few moments before Ms. G followed her in and began arguing with her about the work. The claimant told her that she did not wish to discuss the matter. The claimant stated that Ms. G became angry "and started slamming me into the shelves in the supply room," apparently with her shoulder. She denied that she yelled at Ms. G.

Upon further questioning, Ms. G was revealed to be the claimant's supervisor, with whom the claimant stated she had been on good working terms. The claimant said that they had never had a confrontation before. She said that no one had talked to her about her performance and she had, in fact, been complimented several times.

The claimant thereafter was treated by Dr. M on January 7th and taken off work, and had not since returned to work. She said her injuries involved her knee, for which she had surgery on February 28, 2000; a right-sided neck injury; and problems with her upper right extremity. The claimant said she had never had physical problems or any personal injuries before or ever filed a workers' compensation claim. While she recalled having told the adjuster during a post-injury interview that she had been previously injured in 1974 while working for another employer, she denied at the CCH that any of this was true. She also denied telling the adjuster that she had three previous knee operations.

The supply room was described as 3-1/2 feet wide and 12 feet long. The claimant indicated that the door was locked, and that after the altercation, Ms. G unlocked the door and the claimant exited first. She said she went directly to Mr. C's office, but he was not there and she went instead to the parking lot where he was.

Ms. G had a different account of what happened. She no longer worked for the employer because she had taken another job. She said that on the day in question, she attempted to talk with the claimant about her particular job, and that the claimant seemed very angry and very aggressive. Ms. G said that she was attempting to talk with the claimant to find out what she Ms. G did to make the claimant angry.

Ms. G said that her employer was also concerned because the claimant's class had been falling behind and that this was the main reason that Ms. G was trying to talk to her. She said that the claimant cursed at her in front of a student, Ms. S. A second cursing incident occurred later and the claimant walked away.

Ms. G said that while she was talking with Mr. C about the situation, the claimant entered the room, opening the closed door, and was invited to talk the situation over. She said that the claimant cursed again, left the office, and slammed the door hard behind her. Ms. G followed the claimant into the supply closet. She described the size of the closet, noting it was 15 feet long but not very wide, and said that her body would take up most of the closet. She said that this was very near the end of the workday.

Ms. G's professed purpose for entering the closet at such close quarters to the claimant was to "make some sense out of this." Ms. G agreed that she and the claimant had previously had a good working relationship. She agreed that she shut, but did not lock, the supply room door for privacy. Ms. G agreed that things escalated from this point, with each party growing loud. She said that the claimant was "hitting up against the shelf so I could really hear her point." Ms. G said that her response also involved hitting. Ms. G agreed that she at one point "walked through" the claimant to get her purse (kept on the back shelf of the closet) and that some "touching" may have occurred at this point, involving her shoulder. Ms. G said that she had found out she was pregnant and may have thus been "kind of emotional."

Although the Appeals Panel obviously cannot see the witnesses as could the hearing officer, reference was made in the evidence to the fact that Ms. G was somewhat larger, and the claimant somewhat smaller, than the average woman.

An assault charge was filed the next day by the claimant. Ms. G said she talked to a detective but that nothing further came of this so far as she was aware.

A statement from Ms. S confirmed the cursing by the claimant and said that later, as she was leaving, she saw the claimant burst out of the closet, with Ms. G following. While the claimant did not look disheveled, she was visibly upset, as was Ms. G. When

asked if she had ever seen the claimant come to work beaten up, Ms. S said she would rather not answer the question.

WHETHER A COMPENSABLE INJURY OCCURRED

When an altercation has occurred, and each participant presents herself as the blameless party who is bewildered by subsequent events, it then falls to the trier of fact to determine what was likely to have actually happened and to resolve embellished testimony on both sides. The hearing officer is the sole judge of the weight and credibility of the evidence and believed different portions of each witnesses' testimony. His determination that a compensable injury occurred is supported by the evidence.

WHETHER THE CLAIMANT HAD DISABILITY

Although the claimant stated that she had not worked since the injury, there was no testimony from the claimant, per se, about whether she had the inability to work as a result of her compensable injuries. At the time of the CCH, Dr. M was deceased. A letter from Dr. M summarizing his January 7th examination of the claimant recited a history of a fairly dramatic fight in which the claimant was thrown to the ground eight or nine times and beaten. He noted that she had three previous knee surgeries. On physical examination, Dr. M found a large bruised area on the side of her right thigh. He diagnosed acute upper and lower back strain and shoulder strain, along with acute anxiety. He took the claimant off work that date, pending therapy.

On February 19th, Dr. M wrote the carrier that the claimant had complaints of pain in her left knee, right leg, and mid and lower back. He voiced the desire to perform diagnostic studies. He said that a functional capacity study on January 22, 1999, placed her in the sedentary work category. On February 25th, he noted that her right hand had begun to swell. Dr. M continued to express frustration to the carrier in April 1999 over the lack of approval for studies.

Handwritten notes from Dr. M show that in May or June 1999, he noted that the claimant told him that she had hired an attorney to pursue a workers' compensation claim and that there would be a lot of money in it for her. A letter that Dr. M wrote to the adjuster on June 24, 1999, states that Dr. M has not been able to get diagnostic studies because the injury was not compensable at that point. Dr. M noted that the claimant told him she was "afraid to make progress" in her therapy. On July 20, 1999, he wrote that the claimant complained of "generalized" pains and was somewhat depressed. Dr. M indicates some uncertainty as to why the claimant would still be having pain and he recommended pain management. There is nothing in his records indicating his belief that the claimant injured her knee. There are no medical records in evidence for the claimant's surgery. Nor are there records of any kind from the county hospital to which she was referred (according to the hearing officer's findings) for further treatment by Dr. M.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, 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); American Motorists Insurance Company v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). Although this is plainly a case where different inferences could be drawn as to the extent of disability, Dr. M opined that only a sedentary work level was achieved by the claimant and kept the claimant off work on that basis. The case is clearly hampered by the lack of results of diagnostic testing which might have more clearly focused on the cause of the claimant's pain. We cannot agree that the evidence against the hearing officer's finding amount to the great weight which will cause us to reverse. We accordingly affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge