

APPEAL NO. 001176

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 May 4, 2000. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; and that she did not have disability. In her appeal, the claimant essentially argues that the hearing officer's determinations that she did not sustain a compensable injury and that she did not have disability are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, she was working as a cashier at a horse race track. She stated that she and her supervisor, Ms. S, became involved in an argument in Ms. S's office. The claimant testified that Ms. S grabbed her right arm below the elbow and that the claimant "yanked her arm back" to get it away from Ms. S. The claimant stated that she did not know if her injuries occurred when she was grabbed or when she pulled her arm away from Ms. S. She further stated that she was fired following the incident; that she went to count her drawer; and that she then went to a clinic to seek medical treatment.

The clinic notes from _____, reflect complaints of pain in the right shoulder down to below the right elbow and swelling below her right elbow. X-rays of the right shoulder and right elbow were negative. The diagnostic impression was "[right] arm pain–muscle bruise/pulled." February 19, 1999, treatment notes from Ms. O, a physician's assistant, provide an assessment of "rotator cuff strain secondary to injury." Progress notes from a March 12, 1999, appointment state that the claimant was examined by Dr. G, and that she was diagnosed with subacromial bursitis and lateral epicondylitis. In a letter dated April 17, 2000, Dr. G stated that the claimant has "subacromial bursitis, possible torn rotator cuff, chronic lateral epicondylitis, and ulnar neuropathy suffered from her [_____] injury . . .".

The carrier introduced several statements from the claimant's coworkers which provided that the claimant did not give any indication of having been injured following the incident with Ms. S and that she did not seek medical attention at the race track even though emergency medical services were available. In her recorded statement, Ms. S acknowledged that her hand touched the claimant's right arm; however, she denied that she had grabbed the claimant's arm, insisting that her hands were in front of her, palms out, and one of them came in contact with the claimant's right arm.

The carrier also introduced the transcripts from an administrative hearing of the Board of Stewards of the Texas Racing Commission and from Ms. S's criminal assault trial. The Racing Commission did not take any action and Ms. S was acquitted of assault charges in her criminal trial.

The claimant 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). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. Generally, the existence of an injury can be established by the claimant's testimony 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 the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos, supra; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury on _____. A review of the hearing officer's decision demonstrates that he was not persuaded that the claimant sustained damage or harm to the physical structure of her body as a result of the incident with her supervisor at work on _____. The hearing officer stated that the claimant and Ms. S agreed that they had an argument "but there is total disagreement about the nature and extent of their touching." In addition, the hearing officer noted that the claimant's "testimony is not consistent with the claimed mechanism of the injury." The hearing officer resolved the conflicts and inconsistencies in the evidence against the claimant and he was acting within his province as the fact finder in so doing. Our review of the record does not reveal that the hearing officer's injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge