APPEAL NO. 001410

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 June 6, 2000. The hearing officer determined that on _____, the appellant (claimant) sustained an injury to his lip, but not to his back, while fighting with another employee; that the injury was caused by the claimant's wilful intent and attempt to unlawfully injure another person, thereby relieving the respondent (carrier) of liability for compensation; that the claimant did not sustain a compensable injury on _____, or on any other relevant date; and that the claimant did not have disability. The claimant appealed and urged that the evidence is not sufficient to support the decision of the hearing officer. The carrier responded, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a statement of the evidence. Only a brief summary of the evidence will be included in this decision. The claimant testified that Mr. B, a coworker, gave the claimant a difficult time because he did not make a sale; that Mr. B said that they could discuss it outside; and that Mr. B went outside to a break area. The claimant said that he went to take a break about five minutes later, that he tried to explain to Mr. B to leave him alone, that he did not intend to fight with or injure Mr. B, that Mr. B pushed him with both hands and punched him on the face, that he fell back against a truck, and that he injured his lip and back.

Two witnesses testified that Mr. B asked the claimant if he had made a sale; that they did not consider Mr. B's conduct to be out of line; that the claimant told Mr. B that it was none of his business; that the claimant did not want to talk with Mr. B; and that the claimant did not like Mr. B. They said that Mr. B went outside and they thought that Mr. B did that to defuse the situation. They stated that about five minutes later the claimant came to the break area, that the claimant's got close to Mr. B and put his finger on Mr. B's chest, that Mr. B pushed the claimant's hand away, that they went to get the marketing manager, and that they were not in the area when the fight started. The marketing manager said that he did not see the fight start; that the claimant and Mr. B were standing on their feet, wrestling, and throwing punches when he arrived; that he asked them to stop fighting and they ignored him; that the claimant's lip was bleeding; that he obtained statements; that he sent both of them home; and that he terminated both of them because fighting is not permitted.

The hearing officer made finding of fact in which he found that the claimant's testimony was not persuasive and pointed out inconsistencies between that claimant's testimony and the three other witnesses. In another finding of fact, the hearing officer found that the claimant willfully attempted to unlawfully inure Mr. B and included factual determinations to support that conclusion. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility

to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the evidence. Taylor v Lewis, 553 S.W.2d 153 (Tex. Civ.App.-Amarillo 1977, writ ref'd n.r.e); Texas Workers' Compensation Commission Appeal No. 9342, decided July 5, 193. In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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). The determinations of the hearing officer are not 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, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Gary L. Kilgore
Appeals Judge