APPEAL NO. 001892

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 June 28, 2000. The issues at the CCH were whether the claimant sustained a compensable injury on _____; whether he had disability; and whether the carrier waived the right to contest compensability by not disputing the compensability of the injury timely. In the last issue, the argument of the claimant's attorney was that there was a waiver pursuant to the case of Downs v. Continental Casualty Company, No. _____ (Tex. App.-San Antonio, January 26, 2000, opinion withdrawn and new opinion and revised judgment issued August 16, 2000) (the Downs case).

The hearing officer held that there was no waiver because the carrier had no obligation to dispute compensability. He further held that the claimant was injured due to personal reasons and that the injury did not arise out of the course and scope of his employment and was therefore not compensable. He found there was no disability since _____.

The claimant appeals generally these findings against him; his argument focuses on the applicability of the Downs case. The carrier responds that the decision is supported by the facts, and that the Texas Workers' Compensation Commission (Commission) has not given effect to the Downs case, pending resolution of appeal to the Texas Supreme Court.

DECISION

We affirm.

The claimant was employed for three or four months as the lead maintenance person for (employer). He said that on _____, he was paged on his beeper, which he carried 24 hours a day. He was summoned at night around 10:30 p.m. to an apartment with a wastewater problem and said he was assaulted as he was working near the back of the apartment. The claimant said his work boots and wallet were taken and he was beaten unconscious with tubes. The claimant said he had returned to work for another apartment company in May.

On cross-examination, the claimant said he was assaulted as he was going to a pay phone to answer his page. He said he was terminated because he did not take a drug test after the incident due to the prescription drugs he was taking. He denied that he knew either of the men or had business with them earlier that day.

Mr. J, who investigated the claim for the employer, said that employees were paged through an answering service. He said that there were no calls shown for the claimant on the answering service's records for the evening in question. Upon further questioning, it was brought out that Mr. J asked the answering service to check for calls "around 11:00."

Mr. J said that he was told (after the benefit review conference) by the employer's head of security, Mr. L, that the claimant and the assailants knew each other. He agreed he had no independent knowledge of the occurrence at all.

Officer F, one of the investigating officers of the assault, said he arrived on the scene when called to help break up an altercation. He interviewed the person who was arrested, Mr. A, who was in the ambulance. Officer F said that Mr. A appeared to be beaten worse than the claimant. The claimant was interviewed in his apartment by another officer. Officer F said that the claimant said he had been answering a page and saw some men breaking into a car, and when he went to investigate, the suspect approached him and asked for his boots, and a fight broke out when the claimant said no. Officer F said when the claimant was interviewed at the hospital after a translator had been obtained, he said he had been robbed.

A second officer, Officer E, testified that when he went to the apartment, he walked into the middle of a disturbance. The claimant said he was the victim of a robbery as he went to a pay phone to answer his page. The claimant had gotten hold of a beer bottle and used that to hit the man who was arrested, Mr. A. Officer E said that he understood that a truck had driven off with the assailants, but they returned after the ambulance was there and a new fight broke out when Mr. A showed up at the claimant's apartment.

Both Officer F and Officer E stated that they did not have the impression that the claimant and the assailants knew each other. However, Mr. L testified that when he investigated the next day, he was told by "several residents" that this was a drug deal gone bad. However, he was unable to recall any names of his sources for this information. Mr. L agreed he had no facts to substantiate this.

A deposition of Mr. A, the person described by the officers as the "arrested person," was put into evidence by the carrier. Mr. A, who said he had not met the claimant before, went to the claimant's house on March 7 with Mr. G just to “hang out” and drink beer. He said that his car broke down when they got there at around 3:00 o'clock in the afternoon. Mr. A said that the claimant drove him to the house of a mechanic and brought the mechanic back to the apartment. The next sequence of events is somewhat confusing from the deposition, but Mr. A was driven to his house by Mr. G, then Mr. G suggested returning to the claimant's home and they did. Apparently out of the blue, according to Mr. A, the claimant became belligerent when they returned and threatened to shoot Mr. G. He said the claimant pulled Mr. G from the truck. He said that the claimant then hit him with a bottle when he tried to intervene and grabbed his wallet.

Mr. A asserted that he passed out at the scene and was taken to the hospital. He said he was informed two days later that he was being charged with aggravated robbery against the claimant. Mr. A later explained that he had been drinking at Mr. G's house with the claimant after the mechanic had been taken home, and it was after this that Mr. G started to drive Mr. A home and then went back to the claimant's house. It was late at night by this time and Mr. A did not think the claimant was working.

Mr. A said that in looking back over the incident, he had concluded that Mr. G, who knew how much money he had, had taken him to the claimant's house in order to rob him. He said that he had $3,000.00 in his pocket that day, apparently in the form of a check from the Internal Revenue Service. He stated his belief that the claimant and Mr. G were conspirators.

The claimant was treated for facial contusions at the hospital the night of the assault. The claimant testified that he was supposed to have an operation on his brain which did not occur for reasons unknown to him. However, he had a CT scan of his head which essentially found nothing remarkable. Likewise, a left shoulder x-ray showed no abnormality. As part of his admission blood testing, the claimant was apparently screened for alcohol and none was found. On March 20, 2000, Dr. M took the claimant off work for an undetermined time pending consultation with another doctor. On that same day, Dr. B, D.C., diagnosed a number of injuries, including closed head injury, cervical strain, and a left shoulder strain with possible rotator cuff tear. X-rays taken the next day of the cervical, thoracic, and lumbar areas, and skull, however, found nothing out of the ordinary but for a grade I retrolisthesis of C4 on C5.

The record is plainly full of hearsay, rumor, and innuendo. However, it was not incumbent upon the hearing officer to sort out what actually happened, but to weigh the evidence for relevance and credibility on whether the claimant was injured while within the course and scope of his employment. Leaving aside witness speculation, there was legitimately conflicting evidence as to the sequence of events underlying the injury. Neither the claimant nor Mr. A gave a statement that explained or reconciled certain observations made by the investigating officers.

The carrier filed a dispute to compensability within 60 days, but after seven days, following its receipt of written notice of injury.

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 Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). While different inferences could have been drawn, there is sufficient evidence to support the hearing officer's finding that the claimant was not within the course and scope of his employment when injured, but was assaulted for personal reasons not arising out of the employment. Without a compensable injury, there can be no disability. Furthermore, the hearing officer could conclude from this record that the claimant was not able to continue working primarily due to his termination for not taking a drug test.

Although the claimant has generally appealed the fact findings against him, he has not argued alternative facts but based his appellate arguments on the Downs case. On August 28, 2000, the Executive Director of the Commission issued Advisory 2000-07

acknowledging the Downs decision. However, the advisory states that the decision in Downs should not be considered as precedent at least until it becomes final "upon completion of the judicial process." In addition, the Hearings Division Director has instructed that it is the Commission's position that a carrier has 60 days to contest compensability and that hearings staff are to follow this position pending final resolution of the Downs case. We will apply those directives here, and uphold the hearing officer's decision for the reason that the Downs case is not being given applicability by the Commission at the present time. We cannot agree with the hearing officer's statement that the carrier "was not obligated" to respond to a notice of injury in this case because a carrier is always obligated to respond to a written notice of injury. We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995. We find the determination that the carrier did not waive the right to contest compensability to be supported by the record.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We accordingly affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge