

APPEAL NO. 001983

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 August 7, 2000. The issue at the CCH was whether the respondent (claimant) sustained a compensable injury to his hand on _____. The compensability of the claimant's injury was opposed by the appellant (employer), under the Employer's Bill of Rights, on the basis that the claimant had willfully caused injury to himself and there was no liability for the injury under Section 406.032(1)(B). The carrier had accepted the claim.

The hearing officer rejected this defense and found that the claimant sustained a compensable injury to his hand on the date in question.

The employer has appealed, and argues the evidence showing that the claimant's injury could not have happened as he stated, pointing out that the material the claimant contended he was cutting at the time of his injury was not in fact in the machine after the accident. The employer also highlights other evidence in favor of its position of intentional injury. There is no response from the claimant or the carrier.

DECISION

Although other inferences could be drawn, the decision of the hearing officer is not against the great weight and preponderance of the evidence and is affirmed.

The claimant was employed for one or two months by an aluminum door manufacturer, (employer), when he injured his hand on _____. The claimant sustained a severe crush and puncture wound to the back of his right hand at the end of his shift, at around 2:00-2:30 a.m., while operating a machine that punched holes into certain areas of long aluminum shafts.

A review of a videotape of the machine shows it to operate in this fashion: two angled aluminum shafts, about five to six feet long, are laid horizontally, at right angles to each other, in the machine, one up on edge along the back of the machine, and the other flat. There are three dye presses, one at either end, one in the middle, that are activated by two buttons which must be simultaneously pressed and are located at either side of the operator. It is noted that the aluminum shafts appear to "lock" into position, at which time the operator presses the buttons and the hole punching dyes come down. The hole punching devices are slightly behind a larger "cam" that comes down and does not appear to actually punch a hole. It was this "cam" device in the middle press that the claimant said came down into the back of his hand. After the holes are punched, the operator removes the pieces by grasping them underneath and pulling them away from their placement in the machine, palms up. They are then put horizontally into a bin which is to the side of the operator.

There was conflicting testimony about the extent of time the claimant had operated this machine or the training he had been given. He said that this was his first night on the machine after five minutes training. Other witnesses said it was his second night. His supervisor, Mr. C, said that he and another supervisor, Mr. M, had shown the claimant for three or four minutes how to operate the device, and then had observed him operate it for another ten minutes. Based upon the videotape, it is not apparent that extensive training would be required as to the operation of the machine. Mr. M said that as part of his training of the claimant, he cautioned the claimant that his hands were never to go "inside" the device while in operation. Mr. M indicated that the shafts could not be moved once they were in place.

The claimant contended that the machine began to malfunction, and it was necessary for him to "jiggle" the aluminum shafts in order to hold them in place, and then press the two buttons with both elbows. He did not want to inform his supervisors of this purported malfunction because the shift was about over and he was ready to leave. He contended he had done about 450 pairs of shafts at the time the accident happened. The claimant also said that he was looking away from the middle press when the accident actually happened, although he did not say where he was looking. The claimant contended he did not remove the aluminum shafts from the machine, and if he appeared calm it was because he felt somewhat panicky and was trying consciously not to give in to that sentiment. Medical records characterize the injury as a "crush" injury, with multiple fractures and a skin graft to close the dorsal wound of his hand.

The employer offered a "re-enactment" video, using a plastic arm, showing how the cam would come down on a hand flexed up over aluminum pieces, and how it would come down on a hand just lying in place without aluminum in the machine. On the former, the point of impact was above the wrist; on the latter (without the pieces), the point of impact is the back of the hand.

Mr. C said that he became aware of the accident when he heard a whistle and saw the claimant coming toward him with an injured hand. He said that the claimant appeared calm, and was looking at his hand although Mr. C urged him not to, for fear he might faint. Mr. C and Mr. M took the claimant to the hospital. Mr. C said that he instructed a foreman not to touch anything with the machine in question. Mr. M said that there were no shifts after this one, and that everyone was gone when he locked the plant at about 2:30 a.m. as he was taking the claimant for medical treatment.

Mr. C said that he returned to the plant to await the safety manager at 7:00 a.m. the next morning. He said that he inspected the area around the machine in question at 4:00 a.m. There were bits of blood and bone on the cam, but no aluminum shafts in the machine. He said he looked around for the piece that had been in the machine. The only pieces of aluminum were in the bin, and he did agree that there was blood on the ends (but not the middle) of some aluminum pieces that were in this bin. Mr. M also stated that there was no aluminum in the machine.

Mr. P, the safety manager, conducted his own inspection with the same results. He said that after the machine was cleaned and put back into operation, there were no malfunctions. Mr. P said that he was aware of another accident that had happened where a worker lost the edge of his thumb when he was holding the aluminum shaft and the dye punch (not the cam) came down on his finger. In that case, the injured worker had pushed one button with his elbow, the other with his hand. Mr. P said that the claimant had given a different account of how the accident happened at every proceeding he had attended.

Mr. C said he came to the conclusion that the claimant intentionally had inflicted his wound due to his calm demeanor and the fact that there was no aluminum in the machine. However, he said he heard later some rumors around the plant that the claimant needed money for one of two unrelated reasons: that he owed money from a car accident he had in Mexico, and that he wished to return to Mexico to start a custom belt business with his brother.

The employer has made a plausible mechanical case for its defense. While the hearing officer noted that the claimant's operation of the machine was "in retrospect" unsafe, there was evidence that it was unsafe not merely in retrospect. The hearing officer in this case has emphasized the scant training that the claimant was given in the machine; it is difficult to tell from his decision how much consideration was given to the mechanics of how the accident happened and where the likely wound placement would be. However, the hearing officer's decision plainly indicates that the hurdle he could not overcome was his belief that a self-inflicted wound would more likely have been minor in nature, and as he noted there was nothing more than rumor and innuendo to supply a motive for intentional self-mutilation.

As we have often emphasized, 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). 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.). Consequently, the Appeals Panel will not act as a "second tier" fact finder and will affirm the hearing officer's decision unless the evidence in favor of it amounts to no more than a mere scintilla. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). As the inferences drawn by the hearing officer are legitimate ones that may be drawn from this evidence, and are not against the great weight and preponderance of the evidence, we affirm the hearing officer's decision and order.

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.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge