APPEAL NO. 002022

Following a contested case hearing (CCH) held on July 31, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (carrier herein) was not relieved of liability because the respondent's (claimant herein) injury was not caused by the claimant's attempt to unlawfully injure another person and that the claimant had disability from April 1, 1999, through June 14, 1999; from February 15, 2000, through April 30, 2000; and from May 16, 2000, continuing through the date of the CCH. The carrier appeals, arguing that the hearing officer's decision was contrary to the evidence and that the hearing officer applied an incorrect legal standard. The claimant responds that the hearing officer's findings were sufficiently supported by the evidence and, applying the law to the findings, the hearing officer correctly determined that the claimant's injury was not caused by the claimant's attempt to unlawfully injure another. The claimant also argues that, since the carrier's attack on the hearing officer's disability finding was solely based upon its contention that the claimant's injury was caused by his attempt to unlawfully injure another, the disability finding should be affirmed.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

It was undisputed that the claimant was injured when he was struck with a two by four by Mr. M, a coworker. The evidence is somewhat conflicting concerning the details of the altercation between the claimant and Mr. M. It was undisputed that conflict began when the claimant, who was working as stone mason, was cutting stone with a saw. Mr. M complained to the claimant about dust getting on him from the cutting of the stone. The claimant testified that as a result Mr. M pushed and punched him. There is some evidence that they pushed one another. There is also conflicting evidence about what happened next. There is some evidence that the claimant indicated to others he was going to get even with Mr. M. There is also testimony that the claimant was holding a crowbar as well as evidence that a crowbar is a tool used by a stone mason in the performance of a stone mason's work. In any case, it is undisputed that approximately 30 minutes after their original altercation, Mr. M struck the claimant with a two by four.

The hearing officer's findings of fact and conclusions of law include the following:

FINDINGS OF FACT

2. On _____, Claimant was performing duties as a stone mason cutting stone with a saw.

3. Dust from the saw got on a co-worker who became upset and pushed and punched the Claimant. Claimant was not injured in this incident.

4. Claimant and the co-worker, [Mr. M] went their separate ways and resumed their duties.

5. Approximately 30 minutes later [Mr. M] approached the Claimant and struck him on the left elbow with a two by four.

6. [Mr. M] was the aggressor in both altercations.

7. The Claimant's injury arose out of an altercation that was related to or was a consequence of his duties.

8. The injury sustained by the Claimant was not the result of the Claimant's attempt to unlawfully injure another person.

9. Due to the compensable injury the Claimant was unable to obtain and retain employment at his pre-injury wage from April 1, 1999 to June 14, 1999; from February 15, 2000, to April 30, 2000; and from May 16, 2000, continuing through the date of this hearing.

CONCLUSIONS OF LAW

3. The claimed injury was not caused by the Claimant's attempt to unlawfully injure another person. The Carrier is not relieved of liability for compensation.

4. The Claimant had resulting disability from the compensable injury of _____ from April 1, 1999, through June 14, 1999; from February 15, 2000, through April 30, 2000; and from May 16, 2000, continuing through the date of the hearing.

Section 406.032 provides, in relevant part, as follows:

An insurance carrier is not liable for compensation if:

(1) the injury:

* * * *

(B) was caused by the employee's wilful attempt to injure himself or to unlawfully injure another person;

(C) arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of the employment; . . .

The carrier first argues that the hearing officer applied the wrong standard in the present case because in his discussion and Finding of Fact No. 7 quoted above he related the altercation between the claimant and Mr. M to the claimant's work duties. The carrier argues that the hearing officer applied Section 406.032(1)(C) when this case involves Section 406.032(1)(B). We agree that Finding of Fact No. 7 is not necessary to determine whether or not the claimant sustained an injury as a result of an attempt to unlawfully injure another. However, Findings of Fact Nos. 6 and 8 are legally sufficient to support the hearing officer's conclusion that the injury did not result from a wilful attempt to unlawfully injure another person. The only question then is whether or not these two findings were sufficiently supported by the evidence. Clearly, there was some conflicting evidence regarding these matters.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard of review we find sufficient evidence to support the hearing officer's Findings of Fact Nos. 6 and 8. The carrier points to evidence that the claimant was the aggressor or at least threatened Mr. M prior to their second altercation. However, the evidence was conflicting and there was sufficient evidence for the hearing officer to determine that Mr. M was the aggressor.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Thomas A. Knapp
Appeals Judge