APPEAL NO. 031784
FILED AUGUST 28, 2003

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 2, 2003. The hearing officer decided that the respondent (claimant herein) was injured in the course and scope of her employment on _____; that the horseplay by the claimant was not a producing cause of the claimant's _____, injury; and that the claimant had disability from October 24, 2002, continuing through the date of the CCH. The appellant (self-insured herein) files a request for review in which it argues that the hearing officer's resolution of the injury, horseplay, and disability issues was contrary to the evidence. The self-insured further argues that the hearing officer erred in not permitting the employer's representative to testify. The claimant responds that the evidence supports the decision of the hearing officer as to injury, disability, and horseplay. The claimant also contends that the hearing officer did not err in excluding the testimony of a witness whose identity was not timely disclosed.

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.

We first address the self-insured's evidentiary point. The self-insured called Mr. S, who stated that he was a risk manager who investigated the incident in which the claimant asserted she was injured. The claimant objected to Mr. S testifying because the self-insured had failed to disclose that he was going to be a witness, and in fact had not identified him as a witness prior to the CCH. The self-insured responded that Mr. S was the employer representative and therefore could testify whether or not he was timely disclosed as a witness. The claimant argued that this would permit unfair surprise. The hearing officer ruled that, in this case, where the employer and the self-insured were essentially the same entity, that it would be unfair to permit the self-insured to call the employer representative whose identity had not been disclosed prior to the hearing and excluded the testimony of Mr. S.

On appeal the self-insured argues that pursuant to Section 412.041(g) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 109.1 (Rule 109.1) the State Office of Risk Management (SORM) is the carrier and the Texas state agency is the employer. Thus the self-insured asserts that it was error for the hearing officer to refuse to permit the employer representative from testifying. We note that in Texas Workers' Compensation Commission Appeal No. 000078, decided February 28, 2000, we rejected an argument made by the employer that it was not bound by agreement entered into by SORM because it was the employer and SORM was the carrier, pointing out that essentially the State of Texas is a single self-insured governmental entity. In any case, we perceive no reversible error in the hearing officer's evidentiary ruling in the present case. The self-insured made no bill of exceptions and provides us with no explanation

of what Mr. S's testimony would be. Mr. S apparently conducted an investigation of the incident made the basis of the claim, but witness statements and investigative reports concerning the incident are in evidence and there is no indication that Mr. S's testimony would have been anything but hearsay, which would have been cumulative of the documents already in evidence. Any error in the exclusion of Mr. S's testimony is harmless error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

As far as the issues of injury and disability are concerned, both of these issues turned on factual considerations. Section 410.165(a) provides that the 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 to 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). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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, we find no error in the hearing officer's findings of injury and disability.

The thrust of the carrier's defense is that it is relieved of liability pursuant to Section 406.032 because the claimant's horseplay was a producing cause of her injury. The claimant testified that she was injured while working as a corrections officer when she was involved in a physical struggle with a fellow officer over a dispute as to which of them had the right to use a desk. The claimant testified that she was essentially harassed and attacked by the fellow officer, while the other officer's statement painted the claimant as the aggressor. The self-insured argues that at the minimum the claimant was a voluntary participant in the physical confrontation. The hearing officer chose to believe the claimant's version of events. It was the province of the hearing officer to resolve the conflicts in the evidence. We do not consider it an error as a matter of law that the hearing officer believed that the claimant, a 65 year old female officer, who was wearing a cast on her foot at the time, did not voluntary engage in a wrestling match with a 32 year old male officer.

The decision and order of the hearing officer are affirmed.

The self-insured represents that the true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

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Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

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Edward Vilano
Appeals Judge