APPEAL NO. 040955
FILED JUNE 10, 2004

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 April 2, 2004. The hearing officer resolved the disputed issues by deciding that: (1) the appellant (carrier) is not relieved of liability for compensation because the respondent's (claimant) claimed injury on _____, was not caused by the claimant's attempt to unlawfully injure another person; (2) that the claimant's claimed injury arose out of an act of a third person intended to injure the claimant because of the claimant's employment with the employer; (3) that the claimant was not participating in horseplay at the time of the claimant's claimed injury; (4) that the claimant sustained a compensable left hip, left knee, right elbow, head, left eye, face, and left arm injury on _____; and (5) that the claimant had disability beginning on September 17 and continuing through September 20, 2003, and for no other period. The carrier appealed the determinations and disputed an evidentiary ruling made by the hearing officer. The claimant responded, urging affirmance of the challenged determinations and evidentiary ruling.

DECISION

Affirmed.

The carrier asserts that the hearing officer erred in excluding its exhibit "H," the claimant's personnel records, from admission into evidence at the CCH because it was not exchanged with the claimant as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(E) (Rule 142.13(c)(1)(E)). Rule 142.13(c)(1)(E) requires in part that no later than 15 days after the benefit review conference, parties shall exchange with one another all photographs or other documents which a party intends to offer into evidence at the hearing. The carrier asserted that although the exhibit was not exchanged timely, it was exchanged as soon as it was obtained. The claimant objected to the exhibit on the grounds that it was not timely exchanged. The hearing officer determined that the exhibit was not timely exchanged and sustained the claimant's objection.

Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted

without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). Given the determination that the exhibit was not timely exchanged, we do not find the hearing officer's evidentiary ruling to be an abuse of discretion, as he acted with reference to guiding rules and principles. Nor did the carrier establish that the exclusion of this evidence probably caused the rendition of an improper judgment. We perceive no error.

The issues of injury and disability both 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.

Section 406.032(1)(B) and (1)(C) provide that an insurance carrier is not liable for compensation if the injury was caused by the employee's willful attempt to injure himself or to unlawfully injure another person or 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. Section 406.032(2) provides that an insurance carrier is not liable for compensation if the employee's horseplay was a producing cause of the injury.

We have observed that whether there was a personal motivation to an assault that causes injury is a question of fact to be decided by the hearing officer. Texas Workers' Compensation Commission Appeal No. 971051, decided July 21, 1997. There was conflicting evidence on this issue. The hearing officer's determinations that the claimant's claimed injury was not caused by the claimant's attempt to unlawfully injure another person; that the claimant was not participating in horseplay at the time of the claimed injury; and that the claimant's claimed injury arose out of an act of a third person intended to injure the claimant because of the claimant's employment with the

employer are not against the great weight and preponderance of the evidence, and we will not disturb them on appeal.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **FIDELITY AND GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
701 BRAZOS STREET, SUITE 1050
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Chris Cowan
Appeals Judge