

APPEAL NO. 92353

On June 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. Appellant, the employer's workers' compensation insurance carrier, contends that the hearing officer's finding that the claimant, (claimant), respondent herein, sustained an on-the-job right shoulder injury on (date of injury), and conclusion that respondent sustained a compensable injury, are so against the great weight and preponderance of the evidence as to be manifestly unjust. Appellant requests that we reverse the hearing officer's decision awarding benefits to respondent under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), and render a decision for appellant. Respondent responds that the decision of the hearing officer is correct and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

There were two issues at the hearing: (1) whether respondent sustained a compensable injury; and (2) whether appellant complied with Article 8308-5.21 in contesting the compensability of the injury. The hearing officer found in the affirmative on both issues. We do not address the determination on the second issue because it was not appealed.

The parties stipulated that respondent worked for the employer, (employer), on (date of injury), and that appellant was the employer's workers' compensation insurance carrier on that date.

Respondent was employed as a loader on a cup printing machine. He had to turn away from the machine, pick up the cups that were behind him, and then turn toward the machine while reaching up to put the cups on a turntable. Respondent said that on (date of injury), he was working very fast and that as he turned and reached up with the cups, he had to suddenly stop his movement to avoid hitting a coworker who was sweeping the area between him and the machine. The coworker was not called as a witness by either party. Respondent said he felt immediate pain in his right shoulder and reported the injury to his supervisor the same day. He said he continued to work his loading job for about three weeks, but could only use his left hand due to the injury to his right shoulder. After three weeks, he said he told the plant manager about his injury when the manager told him his work was too slow. Respondent said that he was then assigned to light duty work sorting cups which he could do using only his left hand. On (date) respondent said that he again informed the plant manager about his shoulder injury and that he was sent to (Dr. S) that day. No medical report from (Dr. S) was in evidence. However, respondent testified that (Dr. S) sent him back to work with lifting restrictions. On September 30th respondent went to (Dr. L), who found that respondent's entire right shoulder region was tender and that the range of motion was decreased. His medical report also reflected that orthopedic tests indicated shoulder pathology, and that cervical x-rays revealed "aberrant biomechanics in upper cervical spine." (Dr. L) diagnosed "Cervicobrachial syndrome, subluxation of cervical

spine, adhesive capsulitis, and shoulder injury." The history of the injury given to (Dr. L) by respondent was consistent with respondent's testimony.

Respondent's supervisor testified that respondent was always a slow worker and that respondent never reported an injury to him. He acknowledged that part of the duties of the coworker that respondent testified about were to sweep and clean up when the coworker was not working on her machine, but added that he would not have had the coworker sweep between respondent and the machine respondent worked on while that machine was running.

The plant manager also testified that respondent was always a slow worker. He further stated that the first he heard about the injury was on (date) when respondent told him about the injury after he had told respondent that he had recommended in a written evaluation that respondent be terminated because of poor work performance. He said that respondent was sent to a doctor on (date).

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). The claimant has the burden of proving that he was injured in the course and scope of his employment. Reed v. Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness, and resolves conflicts and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203, 208 (Tex. Civ. App. - Austin 1967, no writ); Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App. - Amarillo 1974, no writ). While the hearing officer is not bound to accept the testimony of the claimant, an interested witness, at face value, Garza, supra, the testimony of the claimant, if believed by the trier of fact, can support a finding of a compensable injury in a case such as this. See Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App. - Eastland 1980, no writ); Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App. - Waco 1966, writ ref'd n.r.e.). In Johnson, the court affirmed a judgment for the claimant where the claimant testified that he strained his back when he turned while in a stooping or squatting position to find out what another worker had said to him.

In the instant case, it is evident that the hearing officer believed respondent's testimony. Weighing all the evidence in support of as well as against the hearing officer's finding that respondent sustained an on-the-job injury to his right shoulder, and the hearing officer's conclusion that respondent sustained a compensable injury, we conclude that the finding and conclusion are supported by sufficient evidence, and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. See Baugh, supra; Johnson, supra. The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge