APPEAL NO. 931056

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on October 22, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the respondent (claimant) injured his back in the course and scope of his employment on (date of injury), and that he has had continuing disability since May 24, 1993. The parties reached agreement on the claimant's average weekly wage (AWW). The appellant (carrier) appeals the decision of the hearing officer arguing that it is against the great weight and preponderance of the evidence and that the hearing officer erred in ordering the payment of temporary income benefits (TIBS) and medical benefits.

DECISION

The decision of the hearing officer is affirmed.

There was conflicting evidence about the circumstances surrounding the claimant's alleged injury. According to his testimony, claimant had been working for the employer (a temporary employment service) for about three or four days in a warehouse. His duties included loading plastic and cardboard into a recycling machine, or "baler" starting the machine and attending it as necessary. Once the recyclable items were loaded a vault-like door was closed and locked. When the baler was turned on, a plunger would compress and bale the contents for reclamation. Claimant testified that between 2:30 and 3:00 p.m. on (date of injury), he had loaded the machine when the door "popped" open. He tried to push it, or force it shut with his hands, when he felt an intense pain in his back. There were no witnesses. He continued trying to slam the door shut for about 10 minutes until his floor supervisor, (MA), came over to see what was going on. MA and several other workers then used a forklift to force the door shut.

Although he felt severe pain, the claimant admitted he told no one of his injury at the time because he did not think it was serious. He continued clean-up work for about another half hour until his shift was over. He went home that evening and had difficulty sleeping because of his pain. He stated that he reported for work the next day about 9:30 a.m.[1] and felt sluggish and unable to do his job. He told the warehouse manager, (GS), that he had to see a doctor. According to the claimant, GS told him to "just leave now." He saw his family doctor, (Dr. M), who diagnosed "intervertebral disc syndrome and myofacial disorder." Dr. M determined that beginning on May 24, 1993, the claimant was "incapacitated" for work as a result of this alleged injury "for an indefinite period." At the request of the Commission, the claimant was examined by (Dr.W), who found cervical and thoracic strain and lumbar radicular syndrome with occasional left leg pain and numbness. As of the August 18, 1993, Dr. W did not consider the claimant to have reached maximum medical improvement (MMI).

Testifying in support of the claimant were his cousin, (WW), and his wife, (CR). Both

[1]The claimant's time card for this date indicates that the claimant reported for work at 7:30 a.m.

stated that the claimant told them about his accident at work and both saw him in severe pain.

Mr. GS, the warehouse manager, testified that the claimant was operating the baling machine on (date of injury). In his experience, the door of the machine does not normally come open unless the individual operating the machine does not latch it properly. When this happens, the usual procedure is to force the door shut with a forklift. He did not witness the alleged incident on (date of injury), and no one told him about it until the next day. He observed the claimant the next day ((date)) working slower than anyone else so he asked MA to tell the claimant to speed up his work. He did not notice any signs of pain or injury. GS heard the claimant then tell his assistant that he felt GS was "buggin' me and I'm going home." GS then told claimant that, if he was quitting, he had to punch out on the time clock and leave the premises. As he was walking toward the door, the claimant said to GS, "Oh, by the way, I hurt my back" and that he was going to the doctor. GS said that the claimant volunteered no other details of his injury. GS further testified that he "could not conceive of any way" the claimant got hurt. He said the door doesn't just "pop open" and that it was so heavy that you could not just use your body to force it closed.

MA testified that the claimant was working the baler on the morning of (date of injury), not the afternoon. He was told that the claimant was having trouble with the machine, and when he got there the door was already open with the claimant holding the handle. He said this happened twice that morning over a five minute period. He got the forklift to close the door. The claimant did not mention that day that he was hurt nor did he show any signs of pain. The next day, after MA told the claimant he was working too slow, he quotes the claimant as saying: "Well, I'm just going to say I hurt my back and I quit." He later recounts this conversation as being to the effect that the claimant told him he hurt his back. To which MA responded: "Well, why didn't you tell [GS]?" The claimant answered: "Well, then I'm going to tell him now because I'm fixing to quit."

Another coworker, (EM), in a written transcription of a telephone conversation, stated that the incident with the door happened about 11:30 in the morning. He only found out about it when MA got him to help shut the door. The claimant never told him that he injured his back. In a similar written transcription of a telephone conversation, another coworker, (JS), stated that the claimant never mentioned to him that he was injured and he looked normal. He recalled the incident with the door as occurring in the morning.

Based on the evidence presented, the hearing officer found as a matter of fact that the claimant injured his back on (date of injury), "while attempting to close a baler door while in the furtherance of the Employer's business" and that he "has been unable to obtain and retain employment at wages equivalent to his preinjury wage because of a compensable injury." He concluded that this injury occurred in the course and scope of employment and that the claimant has continuing disability since May 24, 1993.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and

scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The question of whether an injury occurred in the course and scope of employment is one of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. A finding of compensable injury and of disability arising from that injury may be based on the claimant's testimony alone. Texas Workers' Compensation Commission Appeal No. 93854, decided November 11, 1993. The hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, 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 we will 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 Company, 715 S.W.2d 629 (Tex. 1986).

In the instant case, there was uncontradicted evidence that the claimant was working at the baler on the day he claimed injury. He testified he injured his back at work and he has been diagnosed as having a neck strain and a back strain. He was also taken off work by a doctor. However, only the claimant was present at the time of the injury and only he asserts that the injury occurred in the afternoon about an hour before his workday ended. Coworkers and supervisors all testified that the incident of the open baler door happened in the morning. There was also much speculation that the claimant could not have been injured by the door. The carrier, in its appeal, refers to these and other inconsistencies in the evidence, and asserts that the claimant's failure to appear injured or to report his injury on the day it happened together with the circumstances of his departure from work on (date), and a history of previous workers' compensation claims impeach his credibility. Where there are conflicts and contradictions in the evidence, it is the duty of the hearing officer as fact finder to consider those conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). We are satisfied that the hearing officer's determination that the claimant sustained an injury in the course and scope of his employment and that he has disability is supported by sufficient evidence and is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

We affirm the decision of the hearing officer.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge