APPEAL NO. 931161

This appeal arises under 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.*). On November 16, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The sole issue to be resolved at the CCH was: "Did CLAIMANT suffer a compensable injury in the course and scope of his employment on (date of injury)?" The hearing officer determined that the appellant, claimant herein, did not sustain a compensable injury in the course and scope of his employment on (date of injury).

Claimant contends that the great weight of the evidence is contrary to the decision of the hearing officer and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified he was employed as a morning or breakfast cook at (employer) (part of (employer)), employer herein. Claimant testified that on the morning of (date of injury) (all dates are 1993 unless otherwise noted) some time between 11:00 a.m. and 12:00 noon, after another morning cook had left, claimant went to a large mixer which was being used by the baker, (PS). Claimant stated that because another employee was trying to get them to "move out," claimant stopped the mixer containing pancake mix, and tried to lift the pot out of the mixer, when he felt a pull in his back. Claimant testified that PS came to help him and said the pot was too heavy for claimant to lift by himself. Claimant testified the pot full of pancake mix weighed about 50 to 65 pounds. Claimant testified that he reported the incident to (HL), the manager, who was standing nearby but that HL "just laughed." Claimant testified that this incident happened about 12:00 noon and that he worked another 35 minutes before going home. A statement by PS generally supports claimant's version of the incident. Claimant stated he worked his regular shift (5:00 a.m. to 1:00 p.m.) the next day (date) and the following day June 14th. Claimant testified he wanted to tell (Mr. T), employer's co-owner, about his injury, but did not have an opportunity to do so. Mr. T testified that during the June 14th shift, claimant was apparently perceived to have put some raw meat in a sandwich served to the wife of another owner and that claimant was fired at the end of his June 14th shift for insolence.

Claimant testified he saw the TV ad of (Dr. S), a chiropractor and made an appointment to see Dr. S on June 21st. Claimant variously testified he called Dr. S on June 15th and June 19th for the June 21st appointment. Dr. S took x-rays and is still treating claimant. An "initial medical report" from Dr. S dated July 5th, gives a history of a date of injury of (date of injury), extensive computer generated range of motion and muscle testing, a prognosis of "marked degenerative changes especially in the lumbar spine, the congenital hypertrophy of the transverse processes at L5, and the fact that he was symptomatic for nine days before he entered my clinic all combine to darken his long term prognosis." Dr. S's treatment plan was to see claimant "daily for the first week and a half." In another report

dated June 22nd, Dr. S diagnosed some lumbar disc degeneration cervical and lumbar "[r]adiculitis/Neuritis" and "[d]eep and Superficial Muscle Spasms." Dr. S stated in the report that due to the severity of claimant's condition he was taken off work.

Carrier's position is that this is a "spite claim" filed by claimant because he had been fired. Carrier emphasized inconsistencies and contradictions that claimant had made in work applications and the number of times he had been reprimanded. Carrier presented evidence that claimant had been reprimanded for threatening other employees, making racial slurs about another employee and disregarding instructions on when to report for work. Carrier attacked claimant's credibility and the fact he had waited nine days before seeing a doctor and had done so only after he had been fired.

Mr. T, employer's co-owner, testified that he first knew claimant was claiming a work-related injury when he received a call from the doctor's office on June 22nd. Mr. T testified he immediately spoke with the entire kitchen crew and that no one, including HL, saw the accident or had heard claimant complain of an injury. (Although Mr. T named PS in the kitchen crew, PS's statement would tend to contradict Mr. T's blanket statement). Mr. T stated HL had said that claimant had not reported an injury to him.

The hearing officer determined that while claimant may have had some degenerative and congenital problems, the medical evidence did not support a work-related injury and concluded that claimant did not suffer a compensable injury in the course and scope of employment on (date of injury). Claimant appealed pointing to claimant's testimony supported by PS's statement and the fact that claimant sought medical attention within one week of the alleged accident.

As carrier noted at the CCH, this case revolved around the credibility of claimant's testimony. In a worker's compensation case, the hearing officer, as the finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. Section 410.165(a). Regarding the inconsistencies and contradictions in claimant's testimony, it was for the hearing officer to resolve those inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer could choose to 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). The hearing officer obviously disbelieved claimant's testimony and found that the medical evidence only showed degenerative or congenital defects. The hearing officer had the benefit of seeing the witnesses, observing their demeanor and hearing their testimony. An appeals level body is not normally a fact finder and 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). We do not so find.

Finding there is sufficient evidence to support the determinations of the hearing officer and applying the cited standard of appellate review, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge