APPEAL NO. 93553

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on June 4, 1993, in (city) Texas, before hearing officer (hearing officer). The appellant, hereinafter claimant, appeals the hearing officer's decision that he was not injured in the course and scope of his employment and did not suffer disability. In particular, the claimant alleges error in certain of the hearing officer's findings of fact and conclusions of law, and refers this panel to evidence in the record which he contends supports his position. The claimant also alleges error in the hearing officer's admission of a sworn statement which he alleges contains untruths.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that he was employed as a general laborer for (employer). (An additional issue before the hearing officer was whether the claimant was an employee of employer as of the alleged date of injury. However, because neither party appealed the hearing officer's determination of this issue in claimant's favor, the underlying evidence supporting this determination will not be discussed here.) The claimant said that on the morning of (date of injury), as he lifted a pallet weighing between 40 and 60 pounds, he felt a burning, numbness, aching-type feeling in his right shoulder. He continued to work even though his shoulder was still hurting, and said he came back to work the next day because the pain had somewhat subsided. However, he said the pain continued on the 26th and 27th. By the latter date he had stopped using his right arm and was relying on his left arm and lower back when he felt a burning ache in his back while lifting a pallet. That afternoon he was told by (Mr. S), employer's director of nutrition and plant superintendent, that he was being terminated because his work was too slow. Both claimant and Mr. S testified that claimant did not tell Mr. S on that day that he had been injured on the job. Claimant said that he was afraid he would lose his job if he filed a workers' compensation claim, although he also said he told Mr. S he needed medical treatment for an eye injury he had suffered in a fight. He said he did not tell Mr. S about the injury after he was terminated because Mr. S had said future work might be available for him. Mr. S could not recall making the latter statement.

The claimant said when he came in to pick up his check on January 28th he told Mr. S he had been hurt, but was told by Mr. S that he was not an employee. He said he also called Clinic but was told he could not be treated for a work-related injury without an accident report. However, he said the carrier ultimately agreed to pay for one medical appointment, and he saw (Dr. K) on February 12th. Patient notes from that visit show claimant complaining of low back and right shoulder pain from picking up pallets while at work; Dr. K's physical exam disclosed tenderness in both areas, with straight leg raising equivocal bilaterally and x-rays of the lumbosacral spine and right shoulder negative. Dr. K assessed right shoulder strain, lumbar strain, both acute and chronic problems, and prescribed

medication. The notes state that claimant "claims that there is no light duty for him, so he is going to remain off work."

On January 22nd, prior to the onset of shoulder pain on the 25th, claimant had been in a fight outside of a cafe in which he said someone charged him and knocked him to the floor, where he hit his head and became unconscious. The claimant denied that he hurt his back or shoulder in the fight. A signed and notarized transcription of a telephone conversation with (Mr. C) states that Mr. C was at the cafe and observed claimant wrestling with his attacker and that claimant's face was "all bruised up." Mr. C also stated that claimant rode home from work with him on the evening of (date) and that claimant did not say he was sore.

The claimant said at the hearing that he had had prior injuries, including a June 1988 work-related incident in which he pulled muscles in his left shoulder and lower back; a 1989 car wreck in which he hurt his neck and right arm; a late 1991 injury in which he jammed his right arm; and surgery on his right arm as the result of a nerve having been severed when his arm was cut in a fight in June or July of 1991. He said when he went to work for employer, however, that he was suffering no physical problems.

The claimant said he had not looked for work since being terminated by employer, as his physical problems prevent him from doing the kind of work for which he was qualified. He said Dr. K recommended he try to find a job that would involve sitting, and said he had had one such job in the past, as a telephone solicitor.

In his appeal, the claimant challenges the following findings of fact and conclusions of law made by the hearing officer:

FINDINGS OF FACT

No. 15. Claimant's alleged injuries on (date of injury), and (date), did not aggravate claimant's pre-existing condition of right shoulder injuries or back injuries.

No. 16. Claimant's medical records did not establish a causal connection between claimant's employment with employer and the injuries claimant contended he sustained while working for employer.

No. 17. Claimant did not sustain an on the job injury on either (date of injury), or (date).

No. 18. Claimant's health care provider and treating doctor did not take claimant off work or restrict claimant to light duty for the

injuries claimant contended he sustained on (date) and (date).

No. 19.Claimant's inability to obtain and retain employment at wages equivalent to the wages claimant was receiving prior to (date of injury), was not due to an on the job injury.

CONCLUSIONS OF LAW

No. 3.Claimant did not sustain on either (date of injury) or (date), an injury which arose out of and in the course and scope of employment with employer.

No. 4.Claimant did not suffer disability because claimant did not have compensable injuries on either (date) or (date).

In support of his arguments, the claimant refers to two exhibits made part of the record at the hearing: Dr. K's patient notes of February 12, and a May 19, 1993 letter from Dr. K which states in pertinent part that claimant "reports injuring himself on (date), when in the duties of his work he was picking up pallets. I feel that the injury sustained caused exacerbation and recurrence of his previous medical conditions and feel that the mechanism of injury described could indeed cause the injury sustained."

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury; the burden is not on the insurance carrier to prove that an injury did not occur as the claimant contended. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer in a workers' compensation case is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness, and the testimony of a claimant as an interested party raises issues of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The testimony of medical experts also raises questions of fact and is not binding upon the fact finder. Hood v. Texas Indemnity Insurance Co., 209 S.W.2d 345 (Tex. 1948). In addition, the recitation of the history of an injury as reported by a claimant to a doctor, while admissible to show the basis of the doctor's opinion as to the cause of the problem, is not competent evidence that an injury in fact occurred on the date alleged. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

In addition to the opinion of Dr. K, the fact finder had before him claimant's own testimony and that of Mr. S; he may have found more credible the latter, which stated that

Mr. S did not observe or otherwise know claimant was in physical pain or distress while he worked for employer. In addition, the written statement of Mr. C indicated the fight claimant had been involved in was more serious than claimant had indicated.

Claimant also alleges error in the admission of Mr. C's statement, claiming it contains untruths and that Mr. C was not present to be cross-examined. (Claimant says that Mr. C's statement refers to him as "Brotherline," a name claimant says he has never used; however, the statement as admitted by the hearing officer shows the appellation "brotherlin" (sic) to be stricken and the name "Bubba" written above next to the initials "W.C." Claimant testified on direct examination that he is also known by the name "Bubba.")

The 1989 Act, Article 8308-6.34(e) provides that a hearing officer may accept into evidence written statements signed by a witness. As the parties agreed at the hearing, the document had been exchanged pursuant to rules of the Commission. As such, it was admissible evidence and it was the hearing officer's responsibility to assign it the appropriate weight.

The claimant also alleges error in the hearing officer's determination of disability, and he attaches to his appeal an off-work slip and an initial medical report signed by Dr. K. The 1989 Act requires that this panel's review of the evidence is limited to the record developed at the contested case hearing. Article 8308-6.42(a). In addition, the claimant has not shown that these documents came to his knowledge since the hearing, that it was not owing to a lack of diligence that they did not come to his knowledge sooner, that the documents are not cumulative, or that the information contained in the documents would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 92156, decided June 1, 1992, *citing* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983). Our review of the record shows that the hearing officer's determination on the issue of disability was supported by sufficient evidence; in addition, disability, which is defined in the Act as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury," Article 8308-1.03(16), is itself dependent upon a finding that a compensable injury has occurred, which the hearing officer declined to make in this case.

We find that the decision of the hearing officer is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge