APPEAL NO. 93638

This case returns for review, pursuant to the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*., following this panel's decision in Texas Workers' Compensation Commission Appeal No. 92195, decided July 1, 1992. In that case we reversed the decision of hearing officer (hearing officer) that the claimant did not sustain an injury in the course and scope of his employment on (date of injury), because this issue was added during an off the record discussion to which, it was determined, the unrepresented claimant who spoke little English gave his consent. (The hearing officer also held that the claimant did not have disability.) Therefore, we remanded either for the claimant to demonstrate his consent to addition of this issue, as requested by the carrier, or to allow the carrier to make a showing of good cause.

This case was heard on remand in (city), Texas, on September 14, 1992; it was recessed and reconvened on October 2 and June 28, 1993, with the record closing on the latter date. The claimant appeals the hearing officer's decision on remand that he did not sustain an injury to his back on (date of injury), in the course and scope of his employment and that he did not have disability from (date of injury), through the date the hearing was closed; in short, the claimant contends that the hearing officer has ignored, misstated, or overlooked a vast amount of evidence in claimant's favor.

DECISION

Finding no error, we affirm the decision and order of the hearing officer.

Because of the massive volume of testimony and exhibits in this case, the evidence will be summarized only briefly. A fuller statement of the evidence can be found in Appeal No. 92195, *supra*.

Briefly, the claimant, who was employed by the (employer) as a custodian at a public school, claimed he injured his back and lower abdomen while loading trash into a dumpster. Two co-employees at the school, who did not see the incident, observed claimant slumped over; they testified that he told them he was in pain. That day, claimant reported the incident to his supervisor, MR, who filled out an accident form and took claimant to a doctor.

It was not disputed that claimant worked a second, evening job for a janitorial service, (CBM), at a bank building. His supervisor and the company's owner, (Mr. F), testified that claimant had worked for him since 1988 and that he was promoted to supervisor around September 1, 1991. The claimant contended that as supervisor he did no physical work and only gave orders to the crew; he denied that he performed such tasks as vacuuming, shampooing the rug, or carrying buckets. Two members of the crew, (Ms. BR) and (Ms. L) also testified that claimant only gave orders. However, Mr. F testified that claimant was a "working supervisor" and was required to do physical tasks.

Both Ms. BR and Ms. L said they had heard claimant had been hurt, so they "took over the keys" to the building. After that time, they said claimant would come in to check

the doors and see that they were locked, but they did not believe he was working for CBM any longer. After a few days, Ms. BR said she did not see claimant around the bank building any more; she also said there was no time card for claimant.

The claimant's testimony was that after he was injured, he no longer did any work for CBM. However, he went back to the bank building several times to look for Mr. F to ask him to hold claimant's job for him. He said Mr. F agreed to pay him two weeks' vacation time, but denied that he signed any time cards after (date) or received any money other than accumulated back pay and the vacation pay. Mr. F stated that when claimant told him he had been injured in October, he discussed continuing employment with claimant, telling him that he needed someone just to check to make sure things were done. However, "around the 10th" he determined that claimant was not able to work, and at that point Mr. F authorized the two weeks' paid vacation time.

In letters dated November 20, 1991, and February 28, 1992, Mr. F stated that claimant had done no physical work for CBM since October 20, 1991. At the hearing Mr. F said that subsequent to those letters and to his deposition testimony of April 8, 1992, he had looked in his personnel files and found time cards with claimant's name on them indicating claimant worked for a period of time between October 21 and November 30, 1991, the date CBM lost the contract with the bank. (Mr. F said time cards were turned in to his secretary and that he signed the checks and did not review time cards unless they contained overtime.) CBM's Texas Employment Commission Employer's Quarterly Report for the fourth quarter of 1991 reflected that the claimant had been paid $1,961.18. The claimant denied that he had earned this amount and that he had filled out the time cards in question. Cancelled checks made out to claimant on October 25th and November 25th were admitted into evidence. Claimant said the endorsement on one check (whose front was not copied visibly) was not his signature.

Medical records show claimant was seen at Health Plus Medical Group on (date), where he was diagnosed with lumbar and inguinal strain, given medication, and released to light duty work. The claimant said he also underwent physical therapy until the carrier refused to pay for further treatments. He continued to be seen there until November 8th, when he was taken off work and referred to (Dr. R), who stated his impression of "post-traumatic lumbar syndrome with chronic mechanical low back pain and positive root tension signs on the right although mild." Dr. R also administered a lumbar epidural sterior injection. During this time employer reassigned claimant, although he contended the work he was given was not light duty. His supervisor at that time, (Mr. L), testified that claimant worked for a few days but asked to leave after about one hour because he said he was in pain.

Two investigative reports and one videotape were made part of the record. One report stated that the claimant was observed entering the bank building at 6:00 p.m. on

October 29th, and changing into his uniform shirt upon entering the building. The second report stated claimant's car was observed in the bank parking lot on November 13th, but claimant was not observed in the building. The video showed the claimant entering the building on October 29th and closing the bank doors. The claimant contended he was not locking the doors, only aligning them, as he no longer had his keys at that time. Claimant on another occasion helped a coworker, (Mr. D), unload a buffer weighing 50-60 pounds from a vehicle; however, Mr. D testified that claimant was not in uniform and said he was there waiting to talk to Mr. F.

In answer to carrier's interrogatories, claimant stated he had never before sustained an injury of any nature to the parts of his body he was now claiming to have been injured. However, medical records from University Health Sciences Center, where claimant was seen for his back pain in the summer of 1992, show he was seen in August of 1991 for back pain and inguinal tenderness of seven months' duration. The claimant said he went to that facility prior to (date) for a checkup, and that they performed tests such as x-rays because of the nature of the work he performed. He also said he had had a prior injury during the summer of 1991, while shampooing rugs, and that he had reported it to Mr. L. Mr. L testified that he was unaware of such an injury.

Records from the medical center show claimant continuing to complain of back pain in the summer of 1992. An MRI report showed no herniation or impingement of the nerve roots or thecal sac, and concluded that "hypointense signal in the disc between L5 and S1 is consistent with degenerative disc disease." Claimant's latest medicals at the time of the hearing on remand included a January 18, 1993, report from a doctor at Injury Centers of Texas, whose examination found pain upon palpation and range of motion. The stated impression was chronic lumbosacral strain, chronic cervical and thoracic strain secondary to chronic lumbosacral strain, and degenerative disc disease. A January 21st report from the West Texas Testing and Evaluation Center concluded the claimant could return to work in a job classified as "less than sedentary."

In his appeal, claimant takes issue with the hearing officer's findings and conclusions on the issues of injury and disability and with his summary of the various witness's testimony, and he cites from the record testimony and other evidence which he says is favorable to his case. He also contends the hearing officer assigned undue weight to certain testimony and evidence which is unfavorable to claimant. In support of his argument, claimant cites copiously from the very lengthy record in this case.

We note at the outset that the claimant in a workers' compensation case has the burden to establish that he suffered an injury in the course and scope of his employment; the insurance carrier has no burden to establish that the injury did not occur as the claimant contended. Johnson v.Employers Reinsurance Corporation, 531 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Moreover, this case is one which clearly turned upon the

credibility of the various witnesses. The 1989 Act provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. Section 410.165(a). As the finder of fact, it is the hearing officer's privilege to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex.x Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Further, the hearing officer may accept some parts of a witness's testimony and reject other parts when the testimony given is inconsistent or contradictory. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Dallas 1947, no writ). While, as claimant alleges, there were inconsistencies and conflicts in the testimony of Mr. F, the hearing officer was entitled to sort through the evidence and resolve such conflicts and inconsistencies in carrier's favor. We will reverse the decision of the hearing officer only where it is so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Our review of the record does not convince us to take such action.

Finally, we address the claimant's contention that the hearing officer exhibited bias against him at various points in the hearing, again citing numerous examples from the record below. The claimant argues that while any individual incident may have revealed no problem, taken as a whole they show the hearing officer's bias and prejudgment "seriously affected" claimant's right to a fair hearing.

Our review of the record from both hearings, and in particular those exchanges noted by the claimant, does not disclose bias or abuse of discretion by the hearing officer which would require our reversal. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 93337, decided June 10, 1993. While he allowed testimony over objection to its relevancy, the hearing officer pointed out that such objections were noted and that the weight of such testimony would be considered. To the extent the hearing officer admonished claimant and other witnesses that they were under oath, and instructed claimant to directly answer each question, does not demonstrate bias but the appropriate actions of a presiding officer. The hearing officer's propounding questions to the claimant and other witnesses is contemplated by the 1989 Act, which makes the hearing officer responsible for the full development of facts for the determinations to be made. Section 410.163(b). We note also that rules of the Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.2 (Rule 142.2) invest the hearing officer with broad authority, including the authority to take any action "as may facilitate the orderly conduct and disposition of the hearing." In short, we have found nothing in the record, either individually or cumulatively, that would merit our reversal on the grounds alleged by the claimant.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge