APPEAL NO. 93643

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 24, 1993, and continued on June 21, 1993, (hearing officer) presiding. The issues at the CCH were whether the respondent (claimant herein) was injured in the course and scope of employment on (date of injury), and, if so, whether he suffered any disability as a result. The hearing officer concluded that the claimant was injured in the course and scope of his employment and as a result had disability which began on November 2, 1992, and which was still continuing through the date of the hearing. The hearing officer ordered the appellant (carrier herein) to pay temporary income benefits from the beginning of disability until the disability ends or until the claimant reaches maximum medical improvement (MMI).

The carrier appeals arguing that there is no evidence or insufficient evidence to support the determinations of the hearing officer. The claimant responds that there was sufficient evidence to support the decision of the hearing officer.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

It was undisputed that the claimant worked for (employer) (hereinafter employer), a car dealership, for several years and prior to the time of his alleged injury his main duty was to gather trash that accumulated around employer's place of business and put it in a dumpster. It was also undisputed that the claimant's normal duty days were Monday through Friday, but the claimant testified that when requested to do so by his supervisor he worked on Saturday and records from the employer showed that the claimant had worked on a number of Saturdays in the year preceding his alleged accident. Claimant testified that at the request of his supervisor he came to work on Saturday, (date of injury), and punched in on the time clock that morning. The claimant also testified that on that morning he had also brought his private vehicle to the employer to get a safety inspection performed on the vehicle.

The claimant testified that on (date of injury), he collected trash from various work areas and took the trash to the dumpster. The claimant testified that while he was attempting to dump trash in the dumpster he tried to pack it down with his own body weight because the dumpster was full and fell, knocking out a front tooth. The claimant testified that shortly after the fall at the dumpster he told his supervisor, (Mr. K), about the accident and showed him the tooth.

On Monday, November 2, 1992, the claimant stated that he complained of pain in his left side and back pain and was sent to the Prima Care Clinic by his employer. Doctors at this clinic took the claimant off work for two days due to lower back problems and a head injury. On November 4, 1992, the claimant was released to return to work with medium duty work restrictions by the clinic. The claimant testified that on

November 5, 1992, he advised his supervisor that he was in pain and asked for time off and that he was told to take a few days off. The claimant never returned to work and was terminated on November 23, 1992, for abandoning his job. On November 18, 1992, the claimant sought treatment from a (Dr. S). Dr. S placed the claimant off work and prescribed physical therapy. A radiology report dated May 13, 1993, of a lumbar MRI performed on claimant at the request of Dr. S indicated a herniated disc at L5-S1 "contacting the right S1 nerve root and displacing the left S1 nerve root."

Mr. K testified that the claimant was not authorized to work on Saturday, (date of injury), and that he did not tell the claimant to come to work that day. Mr. K also testified that he saw the claimant on the employer's premises on (date of injury), but thought the claimant was there to get his car inspected. There was also evidence that the dumpster was regularly emptied on Friday as well as testimony from the claimant that it was not always emptied on the regular day. The carrier questioned the claimant about prior injuries which the claimant denied until the carrier presented documentary evidence of a previous motor vehicle (bus) accident in 1989. Claimant had also denied any previous injury in a recorded statement given to the carrier as well as interrogatories in this case. There were a number of contradictory statements made by the claimant during his testimony, particularly on cross-examination.

In reviewing a no evidence point, we have held in accordance with Texas authority that a reviewing body should consider only the evidence and reasonable inferences therefrom which support the finder of fact and reject all evidence and inferences to the contrary. *See* Nasser v. Security Insurance Company, 724 S.W. 2d 17 (Tex. 1987); Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. We have held that applying this standard of review, we should uphold the finding of the hearing officer if any evidence of probative force supports it. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. A claimant's testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W. 2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. Further, disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. In the present case, the testimony of the claimant as to both injury and disability provides some probative evidence and precludes us from setting aside the findings of the hearing officer on these issues as being supported by no evidence.

In reviewing a sufficiency of the evidence point contradictory evidence may be considered. However, strict rules of appellate review apply. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true

regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may 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). 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 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).

The carrier contends that the claimant contradicted himself in regard to a number of points. The carrier points out there was evidence that the dumpster had been emptied the day before the accident when the claimant states it was full. The carrier highlights testimony from the claimant's supervisor stating that the claimant was not on duty on the date of the accident. The fact remains that the claimant testified that he was hurt at work, testified that he was on duty at the request of his supervisor and clocked in performing his regular duties at the time of the accident, and testified that the dumpster was not always emptied on Friday and in fact on Saturday, (date of injury), was full. More importantly, the hearing officer found this testimony of the claimant credible and we do not find that it was against the great weight and preponderance of the evidence.

As to the issue of disability, the carrier asserts that the claimant was released to return to work by his treating doctor on January 14, 1993. The medical report which includes the release to return the work clearly refers to another claimant with a different employer and date of injury. Further, as stated *supra*, the testimony of the claimant alone, even if contradicted by medical testimony, can establish disability.

For the foregoing reason, we affirm the decision of the hearing officer.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge