APPEAL NO. 93658

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On June 25, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) did not sustain a compensable injury on (date of injury). Claimant asserts, emphasizing medical evidence, that the great weight of the evidence shows injury in the course and scope of employment. Carrier asks that the decision be affirmed.

DECISION

We affirm.

The issues at the hearing were whether carrier had waived its right to contest compensability, whether claimant was injured in the course and scope of employment, and whether claimant has disability.

Section 410.204(a) of the 1989 Act states that the Appeals Panel "shall issue a decision that determines each issue on which review was requested."

The claimant states in the appeal that the carrier's notice of refused claim did not comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(a)(9), that the great weight of the evidence shows the claimant was injured, and asks for temporary income benefits (TIBS).

The Appeals Panel determines:

That the hearing officer did not err in concluding that the carrier gave sufficient notice of its dispute of the compensability of the claim.

That the determination of the hearing officer that the claimant did not sustain a compensable injury was sufficiently supported by the evidence.

That the determination of the hearing officer that the claimant does not have disability is sufficiently supported by the evidence.

Claimant had worked for over a year for (employer) as an inspector and sorter of plastic pellets when she stated that she fell while descending a ladder. She described that she had a bag of pellets in one hand and her other hand slipped on the ladder causing her to fall onto her buttock, with her buttock and right leg hitting a pallet and her back hitting the concrete floor. She testified that the work was in a large warehouse but that the workers in her unit were clustered in one area. Other workers were nearby with adjoining areas every eight feet or so. Claimant testified that she told other workers of her fall and then told her supervisor. She left that afternoon and went to a doctor. She returned once to turn in her time card and has not worked since.

Claimant also stated that she showed coworkers her swollen ankle and a bruise. She said her boss had spoken to her in the past about the speed of her work and about not dancing on a table, but said she never commented that she wanted to be laid off. She also stated that she ripped her pants when she fell. She acknowledged that no one saw her fall.

(DM) testified for the carrier that she also had worked for the employer approximately the same amount of time as claimant. She said her work table is next to claimant's. At about 10:00 a.m. on the day in question claimant told her that she had fallen on the ladder about twenty-five feet away. She later complained of swelling but DM saw no swelling and claimant walked without a noticeable problem. She was at her table and heard no noise at the time claimant said she fell; she indicated that if there had been a fall, she would expect to have heard something, although it could be possible to have a fall and not hear it. She had been an orthopedic assistant for several years in the past and said she saw nothing to indicate injury.

The carrier produced statements of (BH), (PD) and (EV), each of whom said they worked for employer and on the day of the incident claimant showed them her injured leg. Each said that the first time they saw claimant's leg she had no scratches, but later after 1:00 p.m., when claimant went in the bathroom, she then showed them what appeared to be fresh scratches on her calf. BH in her statement said that when claimant first showed her her leg, BH told her that there was nothing wrong with it; she then told claimant, "well it might hurt but I mean there's nothing there to see." She noticed claimant looking at her leg after that and later claimant showed her the leg again with "scratched redness" on it. In addition, statements of both PD and DM indicated that claimant had stated before that she would like to be laid off but could not quit because of pressure exerted at home.

The medical evidence showed that claimant presented to (Dr. M) on (date of injury), with a contusion of the right leg and knee sprain, with a tender thigh, knee, and calf. (Dr. A) on October 1, 1992, said that her EMG was negative and CT scan was negative except for spondylosis and evidence of arthritis. An MRI was also negative. Dr. A considered claimant to have cervical and lumbar radiculopathy and muscle strain to her shoulders. (Dr. M) D.C. first indicates his office saw claimant in December 1992. His impression of claimant was, "1. cervicalgia 2. cervical myofasciitis 3. thoracic radiculitis 4. lumbar myofasciitis 5. lumbar segment dysfunction."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165 of the 1989 Act. She could believe that claimant did not have scratches on her leg immediately after the incident and as a result find claimant not to be credible. She could also consider that a fall, such as that described, would have been heard by someone in the area. The evidence is sufficient to support the hearing officer's finding that

claimant's testimony was not credible. This finding and another that claimant sustained no harm on (date of injury), formed the basis for determining that claimant had no compensable injury. Even when medical documents show some injury, the fact finder does not have to find that the injury occurred on the job. *See* Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Without a compensable injury, there can be no disability because Section 401.011(16) states, "Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Without disability, TIBS are not payable.

The hearing officer correctly found that the carrier's assertion on a TWCC-21 (Notice of Refused/Disputed Claim) that it questioned whether an accident had happened was sufficient to show a dispute of compensability. *See* Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992, which said that the TWCC-21 had to state a basis for the defense of a claim. In the case on appeal, the hearing officer could reasonably conclude that questioning whether an accident ever occurred was a defense to a claim.

The decision and order are sufficiently supported by the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge