APPEAL NO. 93721

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011 *et seq*. (1989 Act). At a contested case hearing held in (city), Texas, on July 13, 1993, the hearing officer, (hearing officer), concluded that claimant was injured in the course and scope of his employment with (employer), and that he had disability as the result of his injury beginning on (date of injury). The appellant (carrier) asserts on appeal that the evidence is insufficient to support these conclusions as well as certain of the hearing officer's factual findings. No response was filed by the respondent (claimant).

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

The hearing officer's detailed statement of the evidence is adopted for this opinion. In brief, while working as a material handler for employer on, claimant said the material cutting machine he was working on (referred to as the "inline") became jammed, that he walked around the side of the machine to clear it, and that in returning to his position with material in his hand he walked between his machine and another nearby and bumped into a protruding handle which struck him on the left hip causing him to twist, lose his balance, and fall backwards onto his buttocks. Coworker (Mr. M) said he saw claimant twist, jerk, and fall. He went over to help claimant up and the latter said he hurt himself and was holding his side. There was no issue concerning the provision of timely notice of the injury to employer. Claimant said he told his supervisor, (Mr. R), of the incident. He said there had been several "near misses" and that the problem with the protruding handle was shortly thereafter remedied. He said he continued to work but had pain in his hip and back and was sent to see (Dr. G), the company doctor, in November 1991. He said he continued to work and to have problems, that he remained under Dr. G's care, and that as of May 15, 1992, Dr. G restricted him to light duty. He said he commenced treatment with (Dr. H) in July 1992, and that in November 1992 his supervisor told him he could not return to work until he was released to regular work. Claimant stated that in March 1993, Dr. H took him off work and that he remains off work by virtue of Dr. H's order.

Dr. G's record of November 20, 1991, entitled "Workers Compensation Report," stated that claimant had a contusion on his hip and that he was returned to full work activity. Claimant's radiology report of that date was normal and a bone scan was scheduled. Another medical report from the same medical group dated "5-18-92," stated that claimant had back and leg pain and a probable herniated disc, and was restricted to light duty with avoidance of sitting and lifting. On September 21, 1992, claimant signed a Notice of Change of Treating Doctor form to change his treating doctor from Dr. G to Dr. H stating as the reason that employer stopped his therapy and treatment. An October 12, 1992, report by Dr. H stated that he saw claimant on "10/8/92" for an "independent medical evaluation" and in his opinion claimant retained chronic symptoms of a lumbar discogenic syndrome and partially resolved lumbar disc injury. He scheduled claimant for MRI and EMG studies.

An MRI report dated February 10, 1993, stated an impression of a herniated disc as well as mild degenerative disc disease at the L5-S1 level.

It was the carrier's position that claimant did not have the work-related injury to which he testified but rather that he hurt himself when he fell off the roof of the house where he resided, perhaps when putting up Christmas decorations. Claimant denied falling off a roof and Mr. M said he had never been told that claimant fell off a roof nor had he ever seen claimant come to work appearing to be in pain before (date of injury). Claimant also testified that in September 1992 employer sponsored a bowling event for a charity, that Mr. M, a team captain, asked him to bowl, and that he did so for two games using a lighter weight ball but that he had problems and scored below his average. Mr. M corroborated this testimony. He said he noticed that he was being videotaped as he bowled. The carrier introduced a videotape depicting several people bowling. However, no effort was made to identify the claimant on the videotape which was not shown during the hearing.

(Ms. B) testified that she is employed as a cutter in the room where claimant worked, a room where she could see everything going on, that she never saw claimant get hurt on the job, that one day he came to work, said his back was hurting and that he had been fixing a roof and fell, and that he later reported having been hurt on the job. In a summary of a March 18, 1993, interview, Ms. B stated that claimant told her he had hurt his hip falling off the roof, was going to lie and say it happened at work, and asked her to be a witness for him. Claimant denied telling Ms. B he fell off a roof, insisting he had never fallen from a roof. JV an adjuster, testified that he investigated the claim and that one of claimant's neighbors, who would not testify, said that while she was aware claimant said he was hurt on the job, she knew he fell off a roof.

Carrier introduced the transcripts of two interviews of coworker (Mr. N), the first occurring on an unstated date and the second on "August 5" and transcribed on November 17, 1992. In the first interview Mr. N stated that while he did not see claimant get hurt on the job, claimant had told him about bumping into the machine. He confirmed that a lever protruded and was turned around the next day so that claimant would not hit himself again. In the second interview, Mr. N said that claimant told him he fell off a roof and that he was trying to find an excuse to get his hip injury paid for. Both he and claimant mentioned having been former friends who had a falling out. An employer investigative report of November 20, 1991, stated that claimant reported an injury on that date, that he was experiencing left side hip pain, that he was not sure when it started or how he had hurt his side but that he had bumped against the "Big Joe" machine twice and had also "hit against a lever at the inline." In a March 29, 1993, interview of claimant's supervisor, Mr. R, he stated he had no knowledge of claimant's injury and would need to see a report to refresh his memory.

The hearing officer found, among other things, that on (date of injury), while attempting to fix a jam on the inline machine, claimant ran into a protruding handle which caused him to twist and fall, that he began treatment on November 20, 1991, for the (date of injury) injury with Dr. G, and that he continued to work until (date of injury), when the

employer told claimant not to return until he had a full duty release. The hearing officer went on to conclude that claimant was injured in the course and scope of his employment and that he had disability beginning on (date of injury).

It is apparent that the hearing officer accepted claimant's version of how his left hip and back were injured and resolved the conflicting statements in his favor. We have often observed that the fact issues of the existence of a compensable injury and of disability under the 1989 Act can be established by the testimony of a claimant alone. And, it is recognized that although the evidence could reasonably support a different result, as here, an appellate level body is not a fact finder and does not normally substitute its own judgment for that of the trier of fact. National Union Fire Insurance Co. of Pittsburgh, Penn. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses, the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports the findings and they are not so against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp

Appeals Judge