

APPEAL NO. 93738

On June 3, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Sec. 401.001 *et seq.* (1989 Act). The appellant (claimant) contends that the hearing officer's findings that he injured only his left foot and did not injure his back, neck, and shoulder in the course and scope of his employment on (date of injury), are against the great weight and preponderance of the evidence. The claimant requests that the decision of the hearing officer be reversed in part and that a decision be rendered that he injured his back, neck, shoulder, and both feet while working for his employer on (date of injury). There is no appeal of the hearing officer's determination that the claimant has had disability as a result of the injury to his left foot.

DECISION

The decision of the hearing officer is affirmed.

On (date of injury), the claimant was working for the employer, (employer), in the warehouse stacking pallets that weighed about 30 pounds. When 12 pallets were stacked, the claimant would use a forklift to move them to another area. The claimant said he had been stacking pallets for about a month. The claimant testified that on Friday, (date of injury), as he lifted a pallet to about eye-level he "felt something" in his back and that he "didn't have any strength and everything came tumbling down." The claimant said that one pallet fell on his feet. He said the pallet hit one foot first and then the other. The claimant kept working and did not report the accident to his supervisor on the day it occurred. The claimant said that he stayed in bed over the weekend and that his whole body hurt, especially his back and shoulder. He went to work on Monday and said he reported to his supervisor "mainly about my feet." He testified that he did not tell his supervisor about an injury to his back, neck, or shoulder. He said his employer told him he could go to a doctor. The claimant said that two or three days later he went to (Dr. G), who was associated with the (the Clinic). The claimant said he had no medical problems with his feet, neck, shoulder, or back prior to his accident on (date of injury). The claimant also testified that he told his attorney that he had hurt his feet, neck, shoulder, and back.

Claimant's supervisor, (Mr. D), stated in a recorded statement that on a Tuesday the claimant told him, through MD, who interprets for the claimant at work, that "a pallet (sic) on his foot." Later that day, Mr. D said that the claimant called worked from a chiropractor's office reporting a back injury.

A coworker, (Mr. B), stated in a sworn written statement that on a Monday or a Tuesday the claimant told him that he, the claimant, had dropped a pallet on his foot on Friday. Mr. B said that the claimant didn't mention a back injury.

Ms. MD said that on Tuesday, (date), the claimant told her he had hurt his foot, wanted to see a doctor, and needed her to interpret for him when he reported the injury to Mr. D. Ms. MD testified that the claimant reported that "a pallet fell on both his feet," but did

not report anything about his back. Ms. MD said that the claimant was told to go see a doctor. Ms. MD said that later on she talked to a nurse that had called work and she told the nurse that the claimant had hurt his foot.

On or about September 4, 1992, the claimant filed a claim for compensation with the Texas Workers' Compensation Commission (Commission), claiming that on or about (date of injury) he injured his legs, feet, back and body in general while working.

The claimant said that the nurses at the Clinic interpreted for him. In a report dated August 19, 1992, Dr. G stated that the claimant stated that he was injured on (date of injury) when he got off a forklift to rearrange some wooden pallets on the forklift and, as he was doing this, the top pallet which was about shoulder high fell on his left foot and his right foot. Dr. G also reported that the claimant said that on Saturday the claimant noticed "increasing cervical and left shoulder and mid to lower back pain with bilateral foot pain more in the left foot." Dr. G stated that the claimant stated that when the pallet hit his left foot, "there was a shock sensation and tingling sensation that ran from his left foot, all the way to his left neck." Dr. G noted muscle spasms in the neck, low back, and left trapezius and left suprascapularis, and a mild contusion of the "left third phalange." Dr. G's assessment was 1) fibromyalgia; 2) possible cervical syndrome; 3) lumbar syndrome; 4) left third phalange contusion (contusion on the third toe of the left foot); and 5) possible fracture. Dr. G noted that the right foot and toes appeared normal. In a Notice of Refused or Disputed Claim dated September 16, 1992, the carrier said that it was accepting the report of injury "to the foot," but was disputing the extent of injury to the back and/or neck.

In a physical therapy evaluation report dated October 26, 1992, the physical therapist reported that the claimant stated that a wooden pallet fell on his feet and that the "pain went up from feet towards back." The physical therapist noted that an interpreter was present during the evaluation. The physical therapist reported that the claimant was seen for complaints of pain in the cervical area, left shoulder area, thoracic and lumbar areas, the left leg from the knee down to the heel, toes, both feet and soles of the feet. The claimant also reported that he developed a rash on his buttocks about three days after his accident.

In a report dated January 20, 1993, (Dr. F), who was also associated with the Clinic, reported that he saw the claimant for complaints of pain in the neck, left shoulder, thoracic area, low back, and both feet. Dr. F noted that the claimant did not have muscle spasms and his range of motion appeared to be within normal limits. Dr. F assessed a left ankle sprain. In a report dated February 17, 1993, Dr. F reported that he saw the claimant for complaints of pain in the left foot, and low back which radiates into both lower extremities. Dr. F assessed a contusion of the left foot. In a report dated March 17, 1993, (Dr. L), who is also associated with the Clinic, reported that the claimant's cervical and lumbar physical findings appeared to be within normal limits, but that the claimant had left foot tenderness. Dr. L assessed a contusion of the left foot.

The claimant disputes the following findings of fact as being against the great weight

and preponderance of the evidence.

FINDINGS OF FACT

No. 8. Claimant injured his left foot while working for his employer on (date of injury).
(Claimant contends that the evidence shows he injured both feet).

No. 9. Claimant did not injure his back, neck or shoulder while performing work for his employer.

No. 10. Claimant's back, neck and shoulder problems are not work-related.

The claimant also disputes Conclusion of Law No. 3 that the claimant did not injure his shoulder, neck, and back in the course and scope of his employment on (date of injury).

Pursuant to Section 410.165, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred within the course and scope of his employment. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The trier of fact is not required to accept a claimant's testimony at face value, even if it is not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Co., 609 S.W.2d 621 (Tex. Civ. App. - Amarillo 1980, no writ). To the extent that the medical testimony is based upon the credibility of the information imparted by the claimant, the trier of fact is not bound to accept it. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App. - Houston [14th Dist.] 1972, writ ref'd n.r.e.).

Having reviewed the record, we cannot conclude that the complained of findings and conclusion are against the great weight and preponderance of the evidence. While the medical records disclose an injury to the left foot, no injury to the right foot is demonstrated. In this case the extent of the injury rested largely on the credibility of the claimant. While the claimant testified at the hearing that he experienced back pain lifting a pallet and then the pallet fell or dropped on his feet, it appears from the medical records that he reported to his health care providers that the opposite occurred, that is, the pallet fell on his feet and then he felt a shock that went to his neck and felt low back pain. In addition, although Dr. G found that the claimant had muscle spasms and diagnosed various syndromes, Drs. F and L, who saw the claimant for complaints of back and neck pain, diagnosed only an injury to the left foot after physical examination. Such conflicts in the evidence are for the hearing officer to resolve. Generally, an injured employee may establish an injury in the course and scope of employment through his or her own testimony. See Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App. - Eastland 1980, no writ). However, the testimony of an interested witness, such as the claimant, does no more than raise a fact issue for the trier of fact to determine. Baugh, *supra*. The trier of fact is privileged to

believe all, part, or none of the testimony of any witness. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App. - Amarillo 1978, no writ).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge