APPEAL NO. 93754

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 14, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be determined were:

1.Whether Claimant was injured in the course and scope of his employment; and

2.Whether Claimant's inability to work is due to a compensable injury of (date of injury).

The hearing officer determined that the appellant, claimant herein, was not injured in the course and scope of his employment on (date of injury), and that consequently claimant has not had disability. Claimant contends that witnesses for the carrier were not credible and asks that their testimony be re-evaluated and a favorable decision rendered. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified he was employed as a commercial pest control technician for (employer), employer herein. It is undisputed that it was claimant's job to provide pest control services to various commercial customers in the city. It is claimant's contention that on (date of injury), he began work at 6:00 a.m., provided services for three scheduled customers and then went to the employer's office. Claimant testified he then went to the (Apartments) on an unscheduled visit to a "problem account." Claimant maintains he was at the Apartments from about 9:00 to 9:20 a.m. and submitted a statement from an Apartments tenant stating that claimant was there "[o]n (date of injury) . . . at approximately 9:20 a.m. for an insect problem." Carrier counters by submitting a statement from the office manager for the Apartments project who stated claimant was not there "on (date of injury)," she had not made a call for follow-up service and that claimant was last there "on 2-11-93." Claimant testified that after servicing the Apartments he headed north to service another unscheduled "problem account" (referred to as law firm). According to claimant, while on his way from the Apartments to the law firm he was involved in an automobile accident. The police report indicates the accident occurred at 9:20 a.m. The Apartments are three blocks south of the accident site and the law firm is one block north of the accident site. It is undisputed that claimant had provided pest control services to both the Apartments and the law firm in the past.

Carrier's position is that claimant was on personal business at the time of the accident and consequently was not injured in the course and scope of employment. Carrier offered the recorded statement of (Ms. KW) who was identified as claimant's girlfriend at the time.

Ms. KW, in the statement, says that claimant came to her place of business (she apparently works at a child care center) and had breakfast with her from 8:30 to 9:15 a.m. on the day in question. She further states that claimant said he was going to pawn a necklace and go to his apartment before his next stop. Claimant countered this statement by testifying he and Ms. KW had broken up and that Ms. KW was not being truthful and was trying to prejudice his claim. Claimant does concede that Ms. KW came to the hospital emergency room and picked him up after the accident and that he might have called her from the office earlier on the day in question about getting together for lunch or dinner. The accident site was in fairly close proximity of claimant's apartment. It is unclear where the location of Ms. KW's job was in relation to the accident site.

Carrier further points out the Apartments manager's statement that claimant had not called to say he was going to the Apartments and that claimant had not documented the service call on his log. Claimant testified he did not call the Apartments manager (who was located several blocks away) because he was just checking the outside grounds. Carrier points out that claimant had just serviced the law firm premises the day before (date) and it was unlikely he would come back the following day without a call. Carrier provided testimony of two supervisors who testified that during "free time" between scheduled service calls, technicians, such as claimant, do make unscheduled service calls on problem accounts, but that they should document those service calls and that it was company policy that technicians were not to go back to their homes. Claimant had been counseled on one occasion for going back to his apartment between scheduled service calls.

Claimant testified that he was unable to work "for about a month" after the accident, that when he was released to go back to light duty the employer had no light duty positions available and that he is still "not 100%" and does not know whether the employer has terminated him or not. Ms. KW in her statement said that she had seen claimant "throwing a football" after the accident. Claimant responded he was just loosening up and exercising as the doctor had instructed him to do. No medical reports were submitted and the police report of the accident indicated claimant was "not injured." Claimant testified he injured his back.

The hearing officer determined that claimant was involved in an automobile accident at about 9:30 a.m. on (date of injury), that at the time of the accident claimant ". . . was traveling in furtherance of his personal business and was not traveling in furtherance of his employer's business" and that since claimant was not injured in the course and scope of his employment ". . . he has not had disability."

Claimant appealed, disputing the status of carrier's witnesses as his supervisors, but not disputing their testimony on company policy about going home between scheduled appointments and his one-time violation of that policy. Claimant adamantly disputes Ms. KW's statement saying she ". . . deliberately with malice set out to jeopardize my claim."

Claimant asks we "re-evaluate" the testimony of the supervisors and Ms. KW.

Initially we would point out that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. (Section 410.165(a)). 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. Texas Workers' Compensation Commission Appeal No. 93734, decided September 30, 1993, citing National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied). We will, however, review the evidence to determine whether the hearing officer's decision is sufficiently supported by the evidence.

Obviously this case revolves around what claimant was doing at the time of the accident. Claimant alleges he was driving from one service site to another. Carrier alleges he had just finished having breakfast with his girlfriend and was on his way to or from pawning a necklace. As carrier points out, claimant has not advanced a theory of recovery through any of the exceptions noted in Section 401.011(12) of the 1989 Act. Instead, claimant has chosen to proceed strictly on a factual determination that he was pursuing the furtherance of his employer's business by making unscheduled visits to problem accounts, while the carrier contends claimant's travel was strictly of a purely personal nature of having breakfast with his girlfriend and pawning a necklace between scheduled appointments. Consequently, we do not believe the "implied direction" cases under Section 401-011(a)(iii) or the "dual purpose rule" under Section 401.011(B) are applicable here. Johnson v. Pacific Employers Indemnity Co., 439 S.W.2d 824 (Tex. 1969) held that the dual purpose doctrine may not be invoked when injury occurs during the course of travel which is not in the furtherance of the affairs of the employer. *See also* Texas Workers' Compensation Commission Appeal No. 91078, decided December 19, 1991. Whether an injury is incurred within the course and scope of employment is generally a question of fact. Texas Employers Insurance Association v. Anderson, 125 S.W.2d 674 (Tex. Civ. App.-Dallas 1939, writ refused); Texas Workers' Compensation Commission Appeal No. 92373, decided September 10, 1992. Given the diametrically conflicting evidence of claimant's testimony versus Ms. KW's statement and supporting circumstantial evidence surrounding the unscheduled visits, we conclude that it was within the hearing officer's domain to resolve the conflicts and inconsistencies in the evidence. *See* McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 965 (Tex. Civ. App.-Amarillo 1978, no writ).

The hearing officer, in the discussion portion of the decision, states that "[t]he claimant had the burden of proving by a preponderance of the evidence that he was injured in the course and scope of his employment but did not meet that burden." The hearing officer obviously did not believe claimant's version and instead found that claimant was in furtherance of his own personal business. We conclude that the hearing officer's

determinations are supported by sufficient evidence in the form of Ms. KW's statement, claimant's failure to log in his unscheduled visits, and claimant's service of the law firm the day before. Only if we were to determine that the findings were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we set aside or otherwise disturb his findings and determination. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). We decline to do so in this case.

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge