APPEAL NO. 93799

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held on July 19, 1993, with the record closing on August 18, 1993, in (city), Texas, and with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. whether the appellant (claimant) sustained an injury in the course and scope of his employment on (date of injury); 2. if so, did he have disability; 3. the period of any disability, and 4. what, if any, temporary income benefit s (TIBS) to which the claimant was entitled. The hearing officer determined that the claimant did not sustain a compensable injury, that he did not have disability and that he was not entitled to TIBS. In his appeal, the claimant restates his position at the CCH and challenges the sufficiency of the evidence to support the hearing officer's decision. The respondent (carrier) contends that the claimant failed to meet his burden of proof that he sustained an injury in the course and scope of his employment and that the hearing officer's decision is supported by the great weight and preponderance of the evidence.

DECISION

The decision of the hearing officer is affirmed.

The claimant applied for work at a temporary employment service on (date). His first job began the next day at a soft drink bottling plant. His duties involved watching a conveyor belt that moved bottles (most often plastic, but sometimes glass) through the plant to ensure that the bottles did not jam up the conveyer belt and to replace any bottles that fell to the conveyor belt. The work involved standing throughout an entire shift and stooping, bending over and stretching to retrieve bottles. Over a 30 minute period around noon on (date), the claimant's second day on this assignment, he noticed severe pain in the area of his neck, back, right shoulder and right arm. He recalls no specific event that may have triggered this pain. He finished work that day at 5:00 p.m. and the next morning, a Sunday, went to a Veteran's Administration Hospital complaining of the pain. He was diagnosed with "musculoskeletal (right) shoulder pain," prescribed a muscle relaxant and painkillers, and told to apply heat to the area and rest. He returned to work at the bottling plant the next day, but was demoted from the bottle line to the can line because he could not keep up with the work. When it became apparent that he could not lift the cans, he was assigned outside maintenance work until he was terminated from this job assignment at noon on (date). He then returned to his employer and stated he was injured.

On his first visit to the hospital, x-rays were taken of the claimant's cervical spine and right shoulder. The back x-rays disclosed "minimal degenerative changes . . . [and] . . . mild osteophytic changes present in the lower cervical vertebrae." The shoulder x-ray showed "irregularity of the proximal end of the right humerus . . . probably due to old healed fracture . . . [and] . . . mild degenerative changes of right AC joint." At a subsequent visit, it was recommended to the claimant that he see an orthopedist. On March 31, 1993, the claimant was evaluated by (Dr. D), an orthopedic surgeon, who found good range of motion in the neck and excellent range of motion of the right arm. Dr. D diagnosed

degenerative disc disease and determined that the claimant achieved maximum medical improvement (MMI) and could return to work full time on March 31, 1993. Dissatisfied with Dr. D, the claimant on his own initiative next consulted with (Dr. K) who, based on MRI and EMG studies, diagnosed a herniated disc at C6-7 impinging upon the nerve root and effacing the spinal cord; herniation at C5-6, with protruded disc at C7-T1; and radiculopathy at right C-7 and probably at C6.

Whether the claimant sustained this herniation in the course and scope of his employment on (date of injury), was hotly contested at the CCH. The carrier stresses that the claimant did not report his alleged injury until his temporary job at the bottling plant ended and that he never described his pain to hospital doctors as work related. Furthermore, the carrier contends that degenerative disc disease was by its nature long evolving and that the claimant's very mild on-the-job exertions on (date of injury), could not have produced these injuries. Claimant, on the other hand, is adamant that his work activities caused his herniated disc condition. He testified that he did not tell anyone at work of his problem because he thought at first it was only a muscle strain and he did not want to jeopardize whatever chances he had to make his job at the bottling plant permanent. He also stated that he did not want to file a frivolous workers' compensation claim. He testified that on his first visit to the hospital he did not plan on filing a workers' compensation claim, so he did not indicate his injury was work related. However, on his second visit he stated he knew that he had to file the claim so he put on the form that his injury was work related. He also said that he never knew what a herniated disc was before this incident in March, 1993.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether an injury occurred in the course and scope is generally a question of fact. *See* Texas Workers' Compensation Commission Appeal No. 92251, decided July 29, 1992; Texas Workers' Compensation Commission Appeal No. 92361, decided September 9, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility and the inferences to be drawn therefrom. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, 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 we will 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 Company, 715 S.W.2d 629, 635 (Tex. 1986).

In this case, the hearing officer carefully reviewed the evidence. We believe that there was sufficient credible evidence to support the findings and conclusions of the hearing officer. Under these circumstances, we will not substitute our judgment for that of the hearing officer.

Finding no error, the decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge