APPEAL NO. 93865

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on September 8, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) sustained an injury in the course and scope of his employment; whether he timely reported the injury; whether the respondent (carrier) timely contested compensability of the injury; whether the claimant has disability as a result of the injury; and what is the claimant's correct average weekly wage (AWW). The hearing officer found timely notice by the claimant and timely contest of compensability by the carrier. The parties stipulated AWW. The hearing officer also found, and the only issues appealed by the claimant were, that the claimant was not injured in the course and scope of his employment and that, as a result, the claimant has not suffered disability. In his appeal, claimant states his general disagreement with the decision of the hearing officer and, in particular, disputes a portion of the statement of evidence[1] and a finding of fact of the hearing officer, and asks why only two of the crew members present at the time he alleges his injury occurred gave evidence and not the two others present. In its response to this appeal, the carrier argues that the claimant failed to meet his burden of proving injury in the course and scope of his employment and that the findings of the hearing officer are not so against the weight of the evidence as to be manifestly wrong.

DECISION

The decision of the hearing officer is affirmed.

The claimant worked off and on for seven years for the employer first as a floor man and then as a derrick man in the oil fields. He alleges that on (date of injury), he was standing on an oil well head which rose about four feet off the ground when he was knocked to the ground by pipe (a "lubricator") described as being about three inches in diameter and twenty feet long. According to the claimant, the pipe struck him and threw him about six or seven feet from the well head. He landed on his feet and felt pain in his low back. This occurred about 4:00 p.m. About 10:00 a.m. the same day he had been told by his supervisor that he was no longer permitted to work with this crew because of poor work habits. He reported his injury the same day to his immediate supervisor and the next day at 5:00 to another supervisor. He asserts that the four other crewmen present at the site witnessed the accident.

The claimant went to (Dr. D) on (date) complaining of a low back injury. Dr. D prescribed exercise, heat and medication. The claimant has not worked since the alleged

[1]The claimant in his appeal objects to part of the hearing officer's Statement of Evidence that reads: "He (claimant) contends that the (pipe) knocked him off of the head . . . ." Claimant asserts that he never said the pipe "knocked me in the head . . . ." A review of the entire Statement of Evidence makes it clear that the hearing officer in this sentence was referring to the "head" of the oil well and said not that the claimant was hit in the head, but was knocked off the head of the well. This was a simple misunderstanding without legal consequence.

injury. On February 17, 1993, the claimant submitted Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) which lists injury to the back, legs "and body in general." On May 20, 1993, he saw (Dr. K), a chiropractor, who found moderate to severe muscle spasms in the lumbar spine and referred the claimant to (Dr. S), an orthopedic surgeon. Dr. S diagnosed degenerative disc disease at L2, L3 and L4 and herniated nucleus pulposus at L4-5. He concluded that the claimant "with or without surgery . . . would probably not return to the strenuous work as an oilfield worker." Computer tomography of the lumbosacral spine by (Dr. G) confirmed the herniated nucleus pulposus and also found bulging of the annulus at L5-S1. Dr. K also testified at the hearing that in his opinion, the claimant was unable to return to work.

The supervisor at the site, (LC), testified that he was working with the claimant on (date of injury), but did not see any accident. In a written statement, (FA), another supervisor, whom the claimant said was a witness to the accident, described the claimant at the job site on (date of injury), as having "an attitude of non-cooperation." He further described the incident as follows:

> . . . we were lifting the (pipe) and he grabbed it as if to steady it. When it wobbled, he looked at the ground for a moment and then jumped from the floor landing on his feet. He then got back on the floor. It was a strange incident until he sometime later said he thought he hurt his back when he fell . . . . He certainly didn't fall, but calculated where he was going to jump.

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). He raises for the first time on appeal the question of why evidence from only two of the four witnesses to the alleged injury was presented by the carrier. Since this issue was not first presented to the hearing officer, we will not treat it on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. Even more significantly, it was the claimant's responsibility, not the carrier's, to introduce whatever evidence he considered necessary to meet his burden of establishing a compensable injury and there is no evidence that he was intentionally or otherwise deprived of this opportunity.

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. 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 judgement 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, 630 (Tex. 1986). In this case, there were conflicts and inherent improbabilities in the testimony and other evidence about what occurred on the day the claimant alleges he was injured. It was the duty of the hearing officer to consider these conflicts and determine what facts had been established by the claimant. We have examined this evidence and find it sufficient to support the hearing officer's findings and conclusions that the claimant was not injured in the course and scope of his employment and that the claimant did not suffer a compensable injury on (date of injury).

The decision of the hearing officer is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge