APPEAL NO. 93876

This appeal arises under 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*.). Following a contested case hearing held in (city), Texas, on August 25, 1993, hearing officer (hearing officer) held that the appellant, hereinafter claimant, was not injured in the course and scope of his employment on either August 19 or 20, 1992, and has no disability as the result of a compensable injury on those dates. The claimant asks this panel to reverse the hearing officer's decision and order because the evidence in the case clearly establishes that claimant suffered an injury in the course and scope of his employment and incurred disability as a result. The respondent, hereinafter carrier, urges that the hearing officer's decision be upheld.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that he was hired by (employer) on August 19, 1992, to dig a ditch and that he worked for employer that day and the following day. On August 20th he said that he injured his right knee and back when he slipped and fell when he stepped down to get a wheelbarrow out of a trailer. However, (Mr. E), an electrical contractor with employer, stated that claimant had been hired to work on August 18th and 19th, that he was laid off on the 19th, and that this was established by employer's daily time sheets (which were filled out by (DB), who was not present at the hearing) and by payroll records, which were put into evidence. He denied that check stubs for two checks claimant had received from employer, which gave a payroll date of "(date)" meant that claimant worked that day; he pointed out that the first check covered the payroll period of August 12th to 18th, and that the second covered the period August 19th and 20th. He also said the payroll date of August 20th meant that the checks were printed up on that date. The claimant contended that the latter check stub showed that he worked for employer on August 19th and 20th.

Mr. E said he was first aware that claimant was claiming to have been injured when he came to pick up his paycheck. He said employer initially "took [the claim] at face value" and was not going to contest compensability of the claim, but that one of claimant's coworkers, (Mr. T), said claimant had told him he was going to file a claim and "make some money from the company." In a signed and notarized statement Mr. T said that on an unspecified date he had unloaded a 25-pound wheelbarrow with claimant, who then sat down and said he hurt his knee; that the two of them then continued digging the ditch for about four hours after which claimant fell down a couple of times "like he wanted everyone to see him;" and that claimant showed him a scar on his knee and said "I'm going to sue these people and get me a bunch of money." Mr. T further said he saw claimant a week later, that the claimant was walking normally, and that he asked Mr. T to be a witness for him. Claimant denied making these statements to Mr. T, whom he said was untrustworthy and had had problems with the law. Employer's daily time sheets showed that Mr. T worked on the same crew with claimant on August 18th and 19th, and that he also worked August 20th. Another employee, (Mr. J), who employer's records do not show as having worked

with claimant, said in a signed statement that he met claimant when he came to pick up his check, and that later when he saw him at the labor hall claimant said he was going to sue the company. Claimant said he had recently talked with Mr. J, who told him the statement did not contain all the questions he answered.

Medical reports in evidence show claimant was treated by (Dr. P) beginning on August 27, 1992. X-rays and an MRI of the lumbar spine were read as normal. Dr. P referred claimant to (Dr. S) for treatment of his right knee. On November 13th Dr. S wrote that claimant's knee was significant for previous injury which had required major open reconstruction. Dr. S recommended conservative care at that point. On December 7th, Dr. S wrote that claimant had an unstable knee which would require an anterior cruciate ligament in addition to a posterior lateral corner reconstruction. However, on that date he also dismissed claimant as a patient due to claimant's lack of interest in rehabilitation or education preceding surgery. On December 21st Dr. P prescribed three weeks of physical therapy for claimant's knee. On March 30, 1993, Dr. P stated that claimant was still having knee pain and that Dr. P planned to refer him to another orthopedic surgeon.

The claimant cites discrepancies in the evidence and the testimony of Mr. E, notes that Mr. E was not at the job site on the days in question and that other persons with knowledge did not appear and testify; thus, he argues, his own testimony constituted the only direct evidence and the hearing officer abused his discretion in weighing the evidence in favor of the carrier.

The claimant in a workers' compensation case has the burden of proof to establish that a compensable injury arose in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer in this case found that burden had not been met. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). In a case such as this one, where there was conflicting evidence from both parties, the hearing officer as trier of fact must weight the evidence, determine what credence should be given to the whole, or any part, of the testimony of each witness, and resolve conflicts and inconsistencies. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ). The testimony of a claimant, as an interested party, only raises questions of fact for the determination of the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). With regard to the statements of Mr. T and Mr. J, we note that such statements were signed and that Section 410.163(b) allows the use of witness statements as evidence. Further, the record shows that these statements were not objected to by the claimant.

As an appellate body, we will not disturb the decision of the hearing officer unless it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Upon our review of the record, we decline to do so here.

The decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge