APPEAL NO. 93925

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 21, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) was injured in the course and scope of his employment on (date of injury), and, if so, whether he had any disability. The hearing officer concluded that the claimant failed to establish by a preponderance of the evidence that he was injured in the course and scope of his employment and that he had disability as a result of a compensable injury. The claimant appeals this decision on the grounds that "it is contrary to all of the evidence submitted regarding this claim." The respondent (carrier) urges affirmance because the decision of the hearing officer was not against the great weight and preponderance of the evidence.

DECISION

We affirm the decision and order of the hearing officer.

Claimant testified that on (date of injury), he was assisting his employer in a sandblasting project at a storage tank.[1] The tank was about 60 feet high. A crane was used to raise the hoses about 40 feet up the side of the tank where the claimant was positioned on a stairway. His job was to hold the hoses in place as they were released from the crane until another employee lifted them to the top of the tank. The hoses were estimated to weigh from 50 to 60 pounds each. When a load of three hoses was released, they appeared as if they were going to fall so the claimant grabbed the stair railing with his hand and held the hoses in place against the tank wall with his left shoulder until a co-worker, (RP), could lift the hoses to the top one at a time. When the hoses were secured, the claimant said he climbed back down the stairs and complained to his supervisor, (MC), that he hurt his shoulder. According to the claimant's testimony, MC did not believe that he hurt his shoulder and asked the claimant to continue hauling equipment. The claimant said he worked the rest of the day and again at quitting time told MC that his shoulder was bothering him "real bad." He said that the next day, January 13, 1993, he went to a clinic emergency room where (Dr. V), the emergency room physician, diagnosed shoulder strain. An x-ray taken at the hospital showed "some mild degenerative change of the AP joint" in the left shoulder, but no signs of fractures or other abnormalities. The claimant testified that Dr. V gave him a note which indicated that he was unable to work.[2] Dr. V referred the claimant to (Dr. G) who wanted to have MRI testing done, but the carrier refused to pay and no MRI was ever done.

The claimant admitted that about three years previously he had injured this same

[1]There was some confusion as to the exact date the injury was alleged to have occurred. At the close of the hearing the parties stipulated that the alleged date of injury was (date of injury).

[2]The claimant was unable to produce the writing.

shoulder when he fell out of his bunk, but he considered himself fully recovered from that injury and able to do his very physically demanding current job up to the time of his injury. His shoulder continues to hurt and he believes he is unable to find a job because of this injury. He has not received medical care since his visit with Dr. G on January 14, 1993. When the claimant went back to his employer four days after the alleged injury to pick up his paycheck, he stated that he showed MC the work release from Dr. V. Even though he had his arm in a sling when he picked up his last paycheck from the owner, (WS), he did not report his accident to WS until February 9, 1993. He admitted he was offered light duty by MC, and that he declined to return to work until he was released by his doctor. He does not know if he can work until he sees a doctor. He stated he has not applied for work anywhere.

RP testified that he was working on the top of the tank preparing for the sandblasting job. The claimant's job was to make sure the hoses stayed in place on a platform on the stairway until RP could bring them to the top. He did not witness the incident of slippage described by the claimant. RP said he gave the claimant a ride home after work on (date of injury), and claimant told him that he was going to go to the hospital because his shoulder was bothering him. RP did not recall when the claimant told him he hurt his shoulder carrying hoses, but he mentioned to the claimant that WS had said there was light duty available for him. RP also testified that the claimant never came back to work. In a previously transcribed interview admitted into evidence at the hearing, RP stated that, after the alleged injury, the claimant, who rode to work with him, told RP that he was not coming to work because his shoulder was hurting, but that "he (claimant) wasn't going to raise no charges because it was an old injury he had."

MC testified that he was the claimant's supervisor on (date of injury). He did not witness, nor did anyone report to him that the claimant was involved in an accident that day. Some five days later, after the claimant had missed work and returned, he explained to MC that he thought he was suffering from an old injury that had been "agitated." According to MC, claimant never mentioned any hoses falling on him to cause his present condition, nor did he mention any previous injuries when he was hired. MC said he offered the claimant light duty, but the claimant refused it. In a previously transcribed interview admitted into evidence at the hearing, MC stated that after the alleged injury, the claimant told him that he did not know if he hurt his shoulder on this job or working previously for some other company.

WS testified that he first learned that the claimant was alleging an injury when he got a letter from the claimant's attorney. He said he was never given any off-work slip from a doctor or a hospital. He also stated he was for the first time specifically told by the claimant on February 9, 1993, that he was injured while working with the hoses when the claimant, accompanied by an investigator from his attorney's office, came to WS' office to fill out the Employer's First Report of Injury or Illness (TWCC-1). The claimant told him he injured his shoulder while working with the air hoses on (date of injury). When asked why he did not report the accident earlier, claimant said because WS was "too busy to talk to and he couldn't talk to me." Mr. WS also stated that claimant did not report an accident when he picked up his last paycheck.

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). We have previously said that the testimony of the claimant may be sufficient to prove both a compensable injury and disability. *See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992, and Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. However, the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. It is for the hearing officer as trier of fact to resolve conflicts and inconsistencies in the evidence. Gee v. Liberty Mutual Insurance Company, 765 S.W. 2d 394 (Tex. 1989); 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 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, (Tex. 1986).

In this case, claimant on appeal argues that the evidence was sufficient to establish that he was injured in the course and scope of his employment. In support of this proposition he points to claimant's own testimony describing how he was injured and to medical reports which described the nature of his injury. The hearing officer considered this evidence as well as other conflicting evidence from the claimant in which he denied that he injured his shoulder on the job and related his present condition to a previous injury. Similarly, there were other discrepancies in the evidence as to when he reported this injury. Under these circumstances, we believe the challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly erroneous and manifestly unjust.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge