APPEAL NO. 93931

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*.). On September 21, 1993, at a contested case hearing held in (city), Texas, the hearing officer, (hearing officer), concluded that the appellant (claimant) was not an employee of (employer), that he was not injured in the course and scope of his employment on (date of injury), that he did not have disability (defined in Section 401.011 (16)), and that had claimant been an employee, his average weekly wage (AWW) would be $170.00. Claimant has requested our review of several of the salient factual findings, as well as the stated conclusions (excepting AWW), asserting the insufficiency of the evidence to support them. Claimant also asserts error in the hearing officer's refusal to admit into evidence the affidavit of a witness who testified at the hearing. The response filed by the respondent (carrier) urges the sufficiency of the evidence and requests our affirmance.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified that on the evening of (date of injury), he accompanied his friend (Mr. S), Mr. S's brother, and (Mr. P) to the (plant) where employer had its crews cleaning sludge from inside tanks. Mr. S and his brother worked for employer at that site and claimant said he and Mr. P went to the plant to see if work was available. At the plant entrance, Mr. S introduced claimant to (Mr. G), employer's night shift foreman. Claimant said he provided a driver's license and social security card for identification, was provided with a blue coverall suit which the evidence showed all plant visitors had to put on, and was transported in a truck to the tank work site along with Mr. P, Mr. S and the other evening shift employees.

According to the undisputed evidence, upon arrival at the tank site, the employees donned their "slicker suits", rubber boots, masks, and gloves, and several, including Mr. S, then entered the tank to begin their task of removing sludge using both vacuum truck hoses and shovels and wheelbarrows. A log was kept of the times each employee entered and departed the tank and several groups of employees alternated working in the tank for approximate 50 minutes periods. Claimant testified that he put on the "slicker suit," rubber boots, and also a hat with a miner's light on it. (Mr. G testified that no hats with lights were used.) Claimant said that Mr. G explained the proper fitting of the mask, how it functioned, and its importance given the fumes in the tank. Claimant testified variously that he entered the tank and that he was "in and out" of the tank. This testimony, however, was contradicted by Mr. G and Mr. S, a well as by the log of the employees who entered the tank on that shift which showed claimant never entered the tank. Claimant said he sustained an injury to his right elbow when he slipped and fell while waiting to enter the tank to work.

Claimant offered the affidavit of Mr. S which was refused admission over the carrier's

objection to its not having been exchanged by claimant as required by the 1989 Act and the Commission Rules. *See* Sections 410.160 and 410.161 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13). Notwithstanding that the affiant's signature was notarized on the day of the hearing and that claimant testified that he had only recently discovered the whereabouts of Mr. S, the hearing officer did not make a good cause determination but summarily refused to admit the exhibit. While it was error to fail to determine whether claimant had good cause for not timely exchanging the document, as we have so frequently held (*see* Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993), the error was not reversible since the content was cumulative of Mr. S's testimony. Mr. S testified that he had advised claimant there might be a job at the plant, that he did not hear the conversation between claimant and Mr. G after telling Mr. G at the plant entrance that claimant wanted a job, that at the tank site, Mr. G showed claimant around the area and that when he, Mr. S, went into the tank to work, claimant and Mr. P stayed outside for an orientation by Mr. G. Mr. S also stated it was not possible to just step inside the tank to have a look, that he does not think claimant went inside the tank, that he never saw claimant work although Mr. P did work for a while, and that he did not see claimant fall but that when he came out of the tank he did see Mr. P picking claimant up. He also testified he saw claimant being escorted out of the area.

Claimant introduced the affidavit of Mr. P which stated that he worked at the tank site until about 10:00 p.m. on (date of injury), that during the shift he saw claimant slip on some oil and fall, and that he noticed afterwards that claimant's elbow area was swollen. He also stated that he himself later quit over poor working conditions. Mr. G, however, testified that Mr. P also left the plant after the orientation and that no new employees started working that night.

Claimant also introduced medical records showing that he was seen for complaints of right elbow pain and treated on April 12th, 16th, 28th, and 30th for traumatic olecranon bursitis.

(Ms. W), employer's office manager, testified that employer had no employment application, W-4 form, I-9 form, drug test consent form or other paperwork related to claimant. She also said she understood that employer's new employees at the plant job site usually go to work after their orientation but she did not know when the employment paperwork was accomplished relative to the orientation and commencement of work.

Mr. G testified that after advising claimant and Mr. P that the work was hard and hot, they indicated a willingness to work. He said he took their names and told them they would need to go through an orientation. He also said the employment paperwork is accomplished after the orientation. Mr. G indicated that most new workers would begin to work after the orientation and would stay on the job for varying lengths of time but that claimant and Mr. P did not do so and were the first applicants he could recall who did not immediately commence work. Mr. G said that at the tank area, he had claimant and Mr. P put on the slicker suits, boots and gloves over the coveralls issued at the plant entrance to keep them clean as the site was very dirty, and he instructed them on the use of the

breathing apparatus. He also stated that during their orientation, a question arose as to how long the job would last and when he advised it would last only two more days claimant stated he did not want to work for only two days. Mr. G said he then responded, "that's fine," told claimant to stand off to the side while he arranged for someone to escort claimant to the plant entrance, and that about thirty minutes later, a plant employee came to the job site and escorted claimant to the plant entrance. This particular testimony of Mr. G was not refuted. Mr. G further testified that claimant did not enter the tank, performed no work, and that he did not see claimant fall and was unaware he had been injured.

Claimant's theory was and continues to be that at the point he donned the work gear at the tank site, he became an employee. As claimant put it, why else would he put on such gear. Mr. G however stated that claimant was at the work site for an orientation about the job, that he put on the protective clothing to keep the blue coveralls clean, and that when apprised the job would last only another two days he decided not commence work and was shortly later escorted out of the plant not having done any work.

The hearing officer found, among other things, that the preponderance of the evidence did not establish that Mr. G either expressly or impliedly offered claimant a position of employment, did not establish that claimant and Mr. G agreed that claimant would receive wages for the time claimant was on the work site including the time involved in his being instructed on the breathing apparatus and protective clothing, and did not establish that Mr. G implied that claimant would receive wages for his time involved in those activities. The hearing officer further found that claimant performed no work for employer while he was at the plant, that he was not paid for his presence there, that he did not fall at the work site and sustain an injury, and that the cause of his right upper extremity difficulties cannot be determined from the evidence. Based on such factual findings, the hearing officer concluded that claimant was not an employee of employer and was not injured in the course and scope of his employment.

Section 401.012(a) defines "employee" to mean a "person in the service of another under a contract of hire, whether express or implied, oral or written." Similarly, Section 401.011(18) defines "employer" to mean a "person who makes a contract of hire, . . ." As we noted in Texas Workers' Compensation Commission Appeal No. 93443, decided July 19, 1993, Professor L has noted that "the compensation concept of `employee' is narrower than that of the common law concept of `servant' in the respect that most statutes insist upon the existence of an express or implied contract of hire as an essential feature of the employment relation. 1C Larson, Workmen's Compensation Law, §§ 47.00, 47.10."

Claimant's burden to prove that he sustained an injury compensable under the 1989 Act included the burden of proving he was an employee of employer at the time of his injury. Whether a contract of hire existed between employer and the claimant was a mixed question of fact and law for the hearing officer. There was no evidence of an express contract of hire, oral or written. It was clear that claimant went to the plant looking for employment by employer. It was also evident from Mr. G's testimony that others had gone to the employer's work site under similar circumstances, had commenced working after receiving

the orientation, and had become employees. In that regard, Mr. G testified that the pay of such new employees did not start until after their orientations. While the evidence could support the drawing of different inferences by the fact finder, we do not view the evidence in this case as compelling findings that the employer made an implied offer of employment through Mr. G's conduct in taking claimant to the tank site and giving him an orientation on the use of the breathing apparatus, protective clothing, and the nature of the duties to be performed. Nor do we find claimant's activities at the job site including his donning of the mask and protective garb as compelling the finding of an implied acceptance of an offer of employment such as to create an implied contract of hire. We view this case as somewhat akin to but distinguishable from the so-called volunteer cases such as those discussed in Texas Workers' Compensation Commission Appeal No. 93443, *supra*, where services are performed gratuitously without implied promises of remuneration by the employer.

It is also apparent, particularly from the finding that claimant did not fall and sustain an injury at the job site, that the hearing officer viewed claimant's testimony wanting in credibility. Even if the evidence compelled a finding that an implied contract of hire was created by the conduct of Mr. G and claimant at the job site, the hearing officer could disbelieve claimant's testimony, as well as the corroborating affidavit of Mr. P, regarding the occurrence of the slip and fall incident. Section 410.165(a) provides that the hearing officer is the sole judge of the credibility and weight to be given the evidence. We are satisfied from a careful review of the record that there is sufficient evidence to support the disputed findings. Claimant's burden was to prove by preponderance of the evidence that he was an employee, that he sustained a compensable injury (Section 401.011(10)), and that he had disability as a result thereof. It is apparent that the hearing officer was not persuaded by claimant's testimony that he sustained an injury in the manner he described. Section 410.165(a) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility.

As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

Finding no reversible error and the evidence sufficient to support the findings and conclusions, the decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge