APPEAL NO. 93944

This appeal arises 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 (CCH) was held on September 22, 1993, in (city), Texas, with the record closing September 29, 1993. (hearing officer) presided as hearing officer. The issues at the CCH were whether the appellant (claimant herein) was injured in the course and scope of his employment on (date of injury), and whether the claimant had disability as a result of the alleged injury. The hearing officer found that the claimant was not injured in the course and scope of employment and consequently did not have disability. The claimant appeals arguing that the findings of the hearing officer as to injury and disability were against the overwhelming weight and preponderance of the medical evidence. The respondent (carrier herein) files a response to the claimant's request for review arguing that the decision of the hearing officer should be upheld.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

Claimant testified that on (date of injury), while working as security guard, he slipped and fell down stairs, injuring his neck and back. The claimant testified that he finished his shift and did not report his accident to anyone because he did not realize he was injured. Claimant testified that he worked on (date of injury) and (date), but that his work on those days involved sitting down and he felt fine physically, so he still did not report his injury. The claimant testified that he was in pain on the evening of (date) and thought about going to the hospital but did not. The claimant stated that he was scheduled to work the afternoon of April 5th, but that morning received a telephone call from his employer telling him not to go in until he had met with (Mr. C), one of his supervisors.

The claimant testified that he intended to tell Mr. C about his injury during their meeting, but when he went to the meeting Mr. C told him that he was suspending him for inadequate job performance. The claimant testified that he became so upset he forgot to report his injury. The claimant testified that Mr. C agreed to further investigate the allegations of claimant's inadequate job performance and promised to call him back later that afternoon to tell him whether or not he would be terminated. The claimant stated that when he did not hear from Mr. C, he kept trying to call him. The claimant testified that the next day he left a message for Mr. C with the employer's secretary telling Mr. C he was injured and asking Mr. C to call him. The claimant testified that when he finally reached Mr. C he was told that he had been terminated and reported his injury.

Mr. C, the employer's secretary and another of the claimant's supervisors testified that the claimant did not report an injury until after his suspension and ultimate termination. (Mr. B) testified that he heard claimant fall on (date of injury), and observed the claimant picking himself up.

The hearing officer found that the claimant did fall down on (date of injury), but found that he was not injured in this fall. The question of whether an injury occurred is one of fact. Texas Worker's Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, 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 for factual sufficiency of the evidence, we should 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Testimony that the claimant did not report the injury until after he was terminated, the claimant's delay in reporting and the claimant's own testimony that it took him several days to realize he was injured in the fall support the findings of the hearing officer that the claimant was not injured in the fall. Applying the above standard of review, we cannot say that the finding of hearing officer is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Because the threshold requirement of compensable injury wasn't established, the disability issue is moot. Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge