APPEAL NO. 94088

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 9, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, disability and timely reporting of the injury to the employer. The parties agreed to withdraw the issue, which was unresolved at the benefit review conference, as to whether the appellant (carrier herein) had timely filed its amended controversion of the claim. The hearing officer ruled that on (date of injury), the respondent (claimant herein) suffered a left inguinal hernia injury in the course and scope of his employment, that he timely reported such injury to his employer, and that he had disability due to his injury beginning April 20, 1993. The carrier files a request for review arguing that the hearing officer's finding that the claimant was injured in the course and scope of employment was against the great weight and preponderance of the evidence. The carrier further argues that since the evidence established that the claimant did not suffer a compensable injury, there could be no disability resulting from such injury and thus the hearing officer's finding on disability should be set aside. The carrier did not appeal the issue of timely notice. The claimant responds contending that there was sufficient evidence to support the decision and that it should be affirmed.

DECISION

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

The claimant testified that he was injured on (date of injury), while using a hoe to move gravestones weighing 65 to 200 pounds from one truck to another. He also testified that he was 70 years old, had a fourth grade education, had worked for (employer), a cemetery, for 46 years at the time of his injury, making $5.50 per hour as grounds superintendent. The claimant described the injury as a burning sensation in his left groin as he was standing on the ground with one leg on the truck while pulling on the hoe, which was hooked on one side of a gravestone. He stated that at the time of his injury he was working with (Mr. R) who he said he told about the burning sensation.

The claimant testified that he continued to work for the next several days but he worsened so he went to the emergency room on April 19, 1993, where he was diagnosed as having a large hernia. The claimant underwent surgery the night of April 20-21 to repair this hernia. The claimant stated that he has not been able to work since the surgery.[1]

Mr. R testified at the CCH through a translator. He testified that he had worked for the employer for 12 years as a laborer and that the claimant was his supervisor. He further testified that the claimant did not load or unload gravestones on (date of injury), and that the claimant did not tell him he was hurt.

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[1]Apparently one reason for this is that the claimant is contending that he has complications from the surgery that affected his leg. The relationship between his hernia injury and leg problems was not in issue at the CCH.

(Ms. M), the secretary of the employer's president, testified that the claimant first called her about the (date of injury) injury on May 10, 1993, and she told the owner, (Mrs. F), who was surprised and stated that this was the first she had heard the claimant was alleging an on-the-job injury.

(Mr. B), the vice-president of operations and a 30 year employee of the employer, testified that he first learned of the claimant's alleged injury on May 10, 1993, from Mrs. F. He testified that he conducted an investigation which included discussing the accident with Mr. R, who told him it did not happen, and checking into what gravestones were received by the employer on the morning of (date of injury), which he stated were mostly larger types that would have to be lifted by tow motor. Mr. B also stated that the employer did not have a hoe.

Mrs. F testified that she was the owner of the employer and had known the claimant since 1947. She denied that the claimant had called her on April 20, 1993,[2] but stated that she did receive a telephone call on that date from the claimant's daughter telling her about the surgery, but not the injury. Mrs. F testified that the claimant had suffered a massive coronary on the employer's premises approximately a year before his alleged (date of injury), injury. Mrs. F testified that after his heart attack, which almost proved fatal, the claimant was on very light duty. She stated she continued to employ him after the heart attack because he had been with the employer for so long. She doubted that due to his physical condition he could lift gravestones as he described.

The carrier's sole ground of appeal is that the finding of the hearing officer that the claimant suffered an injury in the course and scope of his employment is against the great weight and preponderance of the evidence.[3] 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). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153,

[2]The claimant had testified that he called Mrs. F on April 20, 1993, to tell her he was about to have surgery and reported the injury to her.

[3]The basis of the carrier's appeal of the hearing officer's finding that the claimant has disability is based upon the carrier's contention that the claimant did not suffer a compensable injury. Thus, the carrier's argument is that there was no evidence that claimant's disability resulted from a compensable injury. One might read carrier's request for review as obliquely raising the issue of whether the hernia injury, if it did take place, was the cause of any disability especially without medical evidence to this effect. If this was raised, the same analysis described infra concerning our review of injury would apply to this issue. This is because disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992.

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 great weight and preponderance 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).

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Further, injury may be found by the trier of fact based on the claimant's testimony alone. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). The carrier recognizes the correct standard of review, but argues that the evidence it presented constituted the great weight and preponderance of the evidence against the testimony of the claimant. The carrier points to the contradictions between the testimony of its witnesses and that of the claimant.

Without going into each and every discrepancy in the testimony pointed out by the carrier, we simply do not think that the evidence presented by the carrier constituted the great weight and preponderance of the evidence. Many of these contradictions dealt with matters unrelated to the injury itself and were apparently discussed as impugning the claimant's credibility. The hearing officer is in a better position than we are to judge a witness' credibility as he had the witness before him. Also much of the carrier's evidence was circumstantial. The closest thing that the carrier had to direct evidence was the testimony of Mr. R. While his testimony is contrary to the claimant's, it does not rise to the level of the great weight and preponderance of the evidence.

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge