APPEAL NO. 94098

At a contested case hearing held in (city), Texas, on December 20, 1993, the hearing officer, (hearing officer), considered the following three disputed issues: 1. whether the respondent (claimant) suffered a compensable injury on (date of injury); 2. whether claimant has disability resulting from a (date of injury), injury entitling him to temporary income benefits (TIBS), and if so, for what periods; and 3. whether claimant reported an injury to his employer not later than 30 days after the date the injury occurred, and if not, whether good cause exists for failing to timely report the injury. The hearing officer determined the compensable injury and timely notice issues in claimant's favor and also concluded that claimant had disability resulting from his (date of injury), back injury from (date of injury), until June 14, 1993. The appellant (carrier) challenges the sufficiency of the evidence to support these favorable determinations pointing up a number of conflicts in the evidence and inconsistencies in claimant's testimony. The claimant's response seeks affirmance asserting that "[t]he standard for reversal of a Hearing Officer's decision should be 'abuse of discretion' and none was cited in Carrier's appeal."

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified that he had worked for (employer) for about five years before his accident. Apparently, his work involved the assembly of floor and roof trusses. Claimant said that on (date of injury), he was working in the "floor area" as a "set up man" and crew leader. Apparently, a "set up man" places wooden forms on an assembly line table to be used a guide in making trusses. On that date, according to claimant, he and three co-workers, (Mr. B), (Mr. F), and (Mr. H), had occasion to push a cart loaded with finished floor trusses. The floor was uneven and the cart, which claimant estimated to be bearing a load of over 1000 pounds, rolled to one side and claimant became jammed between the cart and an assembly line table and injured his back. He said he continued to work in pain for a while and then went to the office of his supervisor, (Mr. D), who was not on the scene, and advised him of the injury. The next day, according to claimant, Mr. D re-assigned him to the "roof area" as a "set up man," which claimant said required less strenuous work in that the pieces he lifted for the assembly of roof trusses weighed approximately 15 pounds whereas the pieces he lifted in the floor truss assembly area weighed over 100 pounds. Although claimant said he was performing light duty in the roof area and did not function there as a crew leader, his hours and pay remained the same. Claimant acknowledged that he was terminated by Mr. D for tardiness and absenteeism on February 15, 1993.

Claimant also testified to having a second job delivering 200 to 300 newspapers which he accomplished by throwing them from his car window. He said that in December 1992 he switched from the day shift to employer's night shift in order to accommodate the hours of his second job. He also said that after his termination he continued to deliver

newspapers until September 1993 when he was terminated, and that at the time of the hearing he was a self-employed contractor working for a residential contractor. The carrier presented evidence of claimant's second job including evidence of his earnings. However, the carrier argued the second job evidence only for the point that the newspaper delivery job was a strenuous activity which tended to contradict claimant's having sustained the claimed injury, and made no assertions concerning the relationship, if any, between claimant's earnings from his second job and the issue of disability. There was no disputed issue regarding claimant's average weekly wage (AWW) or amount of his temporary income benefits (TIBS) during his period of disability. The Appeals Panel has discussed the relationship of a claimant's collateral employment as it relates to issues of AWW and TIBS. *See* Texas Workers' Compensation Appeal No. 93506, decided August 2, 1993.

The affidavits of Messrs. B, F, and R, signed during the first week in June 1993, stated that on (date of injury) they, with claimant, were pushing a cart loaded with trusses when it veered to one side, striking claimant in the area of his left hip and rib cage and pinning him against the solid assembly table. They also said claimant worked for about 30 minutes, then went to the office of the supervisor, Mr. D, and a few days later was assigned light duty in another area.

Mr. D, who said he was aware of a similar accident having happened years earlier, denied that claimant reported the injury to him on (date of injury). He testified that he had no awareness of the occurrence of the cart accident and claimant's having an injury until after he fired claimant on February 16, 1993. Mr. D further denied he assigned claimant to light duty the day after the alleged accident. He said claimant and his entire crew were reassigned to the roof area and that it had nothing to do with any alleged accident or injury. He also asserted that claimant's duties in the roof area after (date of injury) were not "light duty." Mr. D also indicated he terminated Messrs. B, F, and R in January 1993, upon discovering that they were illegal aliens.

In his December 13, 1993, deposition, a night shift supervisor, (Mr. U), testified that he reported to Mr. D, that he supervised claimant when claimant was on the night shift in December 1992, that the alleged accident was not reported to him, that he was unaware of claimant's having had an injury, and that claimant was not assigned to light duty. In their December 13th depositions, co-worker (Mr. G) testified he did not see the claimant's accident but at some time did hear claimant talking about it with co-workers who were no longer employed there; co-worker (Mr. M) testified he was unaware of the alleged accident or any similar accident but understood claimant to have hurt himself lifting a truss; and co-worker (Mr. G) testified that claimant told him he was hurt lifting a truss and said he had no knowledge of the accident described by the claimant.

Claimant testified that he did not seek medical treatment until (date of injury), at which time (Dr. SW) took him off work. Dr. SW's report of April 14th contained no history of claimant's injury; however, the April 14th report of Dr. SW's associate, (Dr. RW), stated that

claimant gave a history of losing his balance and striking his lower back against a steel table at work in December 1992. A physical therapist's report of April 14th related that claimant struck his waistline on the left side on a table at work and injured his lower back. An April 14th Functional Capacity Evaluation report stated a history of claimant's having had his hips and pelvis "pinned between a table and buggy filled with trusses, . . . " and having reported the incident to a supervisor who told him to go back to work without obtaining a medical consultation. Dr. SW's May 5, 1993, report stated that an MRI revealed disc herniations and desiccation at the L4-5 and L5-S1 levels. According to Dr. SW's letter of July 3, 1993, to the carrier, he released claimant for "medium level work" on June 14, 1993, and said he was unaware that claimant was working two jobs at the time of his injury and that he has sent claimant back to work "at an appropriate level." A July 7, 1993, letter from Dr. RW stated that on that date claimant had "a certain amount of very mild back pain," was "basically asymptomatic," showed "no abnormal findings on physical examination," had "responded well to conservative measures," and "will be returned to full duty this date."

The hearing officer's Decision and Order refers to a witness, (Mr. Y), as "Dr. Y." However, Mr. Y was called by the carrier to authenticate certain exhibits and no medical witnesses were called.

The hearing officer found that claimant injured his lower back on (date of injury), while moving a heavy cart with co-workers, that he reported the injury a short time later on that date to Mr. D, that he was terminated for cause on February 16, 1993, that he continued to work at his second job delivering newspapers but was unable to obtain and retain employment at his pre-injury wages from (date of injury), when his treating doctor ordered him off work until June 14, 1993, when he was released to return to medium work. Based on these findings, the hearing officer concluded that claimant sustained a compensable back injury on (date of injury), that he timely notified employer of that injury, and that he had disability resulting from that injury from April 14 to June 14, 1993.

The carrier emphasizes on appeal its view of claimant's testimony as not credible owing to its inconsistencies and its conflicts with the evidence carrier introduced. However, it is apparent that the hearing officer accepted the claimant's version of the events regarding the occurrence of the accident, his ensuing back injury, his timely reporting of the injury, and his period of disability. We have often observed that the occurrence of an injury in the course and scope of employment, the timely reporting of such an injury, and the existence of disability resulting therefrom under the 1989 Act are fact questions which can be established by the testimony of a claimant alone. Here, claimant's testimony not only sufficiently established the issues upon which he had the burden of proof but also found corroboration in various particulars, both in the affidavits of other witnesses as well as in the documentary evidence. We also observe that the Appeals Panel has previously addressed the matter of disability arising after a termination for cause. *See e.g.* Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993.

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses and the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided (date of injury). As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. An appellate 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.) Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951).

Finding the evidence sufficient to support the challenged factual findings and legal conclusions and further finding the absence of reversible error, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge