APPEAL NO. 94108

Pursuant to the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on December 23, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) was not injured in the course and scope of his employment and did not sustain any disability. He also determined that the carrier timely filed a notice of dispute with the Texas Workers' Compensation Commission (Commission). Claimant appeals urging our review of the evidence and that the facts show that a compensable injury did occur. He also faults the hearing officer for considering an item of evidence that was objected to, for not allowing him to fully respond to the carrier, and for allowing the carrier time to obtain an item of evidence. He further complains of conflicting evidence and what he deems a conflict in the hearing officer's own findings. No response was filed.

DECISION

Finding the evidence sufficient to support the hearing officer's decision and that his findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The claimant is certainly accurate when he states in his request for review that there was conflicting evidence presented during the hearing. However, this is for the hearing officer to sort out as the fact finder. Sections 410.165(a) and 410.168(a). He resolves conflicts and inconsistencies in the evidence and determines the facts in the case. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). He may believe one witness and disbelieve others and may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). The testimony of a claimant only raises an issue of fact for the fact finder (Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ) and does not need to be accepted at face value. Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ).

Regarding the primary issue on appeal, whether the claimant sustained a compensable injury on or about (date of injury), the claimant testified that he sustained an injury to his shoulder and back when he tried to move a wedged box on his truck while unloading at the employer's freight dock. According to him, he had earlier picked up some freight at a company called (SK) and that he felt his shoulder pop as he tried to move the box. He stated that he reported the matter to a supervisor, (JF), that day and to another supervisor, (GS), the following morning. He stated that his shoulder was swollen and stiff and that after he reported the matter to GS he was sent to the medical clinic the company used and saw a doctor who diagnosed "left shoulder and back musculoskeletal strain, severe." He was subsequently seen by another doctor at the clinic on August 11, 1993, and he was released to light duty. He disagreed with this opinion. According to the claimant's testimony and the clinic's records dated "8/14/93," there was an argument or

discussion between the claimant and the doctor who indicated that the claimant did not want physical therapy, did not want to go back to work; rather, just wanted to "lay around and collect checks." In any event, the claimant saw another doctor (apparently with the authorization of the Commission) who diagnosed "sprain/strain" cervical, lumbar, dorsal and unspecified, and gave an anticipated date of "return to limited type work: 9/30/93."

The claimant indicated that he went back to duty for three days after the alleged incident but was not satisfied with the light duty the employer gave him. Subsequently, after three days of not showing up for work, the employer considered that the claimant had resigned. The claimant indicated that he had made some efforts to seek employment in November and that he could have been ready to go back to work earlier but for the carrier refusing to authorize further medical treatment. He denied that he told anyone that he was injured at SK rather than at employer's dock or that his girlfriend had hit him with a bat or large stick about the time of the alleged incident at work.

JF was called by the carrier and testified that he was at the dock when the claimant returned from SK and that the claimant said he injured himself at SK. JF also stated he was at the dock during the unloading which was by forklift and that he did not observe any occurrence of any injury. He also testified that the claimant stated that his girlfriend had hit him on the shoulder before the alleged incident on (date of injury).

GS testified that he saw the claimant on the morning of (date) after he made one delivery and that the claimant told him he injured his shoulder the day before at SK. GS sent him to the company clinic.

(TD), representing the employer, testifed that when he started checking the claimant's claim of injury, it did not make sense because SK always does all their own loading and that their freight was lightweight. It was sometime later that the claimant changed his story to indicate he injured himself at the employer's dock while unloading freight.

As indicated, it was for the hearing officer to sort out the conflicts and inconsistencies in the evidence. This he did, and determined that the claimant, who has the burden to prove by a preponderance of the evidence that he sustained a compensable injury, Martinez v. Travelers Insurance Company 543 S.W.2d 911 (Tex. Civ. App.-Waco 1976, no writ), did not meet that burden. He is supported by sufficient evidence.

The item of evidence that the claimant urges was improperly considered by the hearing officer and which he cites in his request for review, was a statement from his ex-wife who indicated that the claimant had previously set up or claimed injuries when none occurred. The claimant denied the truth of the statement and said it resulted from a bitter divorce and child custody battle. The hearing officer quite apparently accepted the claimant's version as he specifically stated during an attempt by the carrier in closing argument to refer to the statement, "I'm not going to consider his ex-wife's statement against him." There is no indication that the hearing officer did give it any consideration.

We have reviewed the entire record and do not find any support for the claimant's assertion that he was hampered in presenting his testimony, cross examining witnesses or responding to or rebutting the carrier's case. To the contrary, the record abundantly shows even-handedness by the hearing officer in conducting the hearing. Too, the hearing officer has a responsibility to develop the "facts required for the determinations to be made." Section 410.163(b). This certainly encompasses obtaining a document contained in the Commission's official claims file, the subject of another complaint on appeal. Regarding the assertion that the hearing officer contradicted himself in finding that the claimant was injured yet finding he was not injured in another finding, we do not find it meritorious. The hearing officer was merely indicating that the claimant may well have sustained an injury to his back and shoulder on or about (date of injury), but that he was not injured in the course and scope of his employment, a requirement before any benefits would accrue.

Finding the evidence sufficient to support the determinations of the hearing officer and no legal or procedural errors requiring corrective action, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge