APPEAL NO. 94158

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 20, 1993, a contested case hearing (CCH) was held in (city), Texas with (hearing officer) presiding. The issues agreed upon and presented for resolution were:

1.Did the CLAIMANT sustain a compensable injury on (date of injury)?

2Did CLAIMANT report an injury to the employer on or before the 30th day of the injury and if not, does good cause exist for failing to report the injury timely?

3.Did the CLAIMANT sustain disability as a result of the injury of (date of injury), and if so, for what periods?

The hearing officer determined that the claimant sustained a compensable injury in the course and scope of his employment, that claimant reported his injury within 30 days of the date of the accident and that the claimant did not have disability to the date of the hearing as the result of the compensable injury.

Appellant, carrier herein, contends that the evidence is factually insufficient to support the hearing officer's determinations and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Initially, we feel compelled to make some comment on the quality of the record submitted for review. Claimant submitted, as exhibits, photocopies of two photographs, purportedly showing the machine and operator in question, which are almost totally unintelligible. To make matters worse, the parties then heavily relied on the photographs, apparently pointing to various parts of the machine. In describing how the injury happened, the claimant demonstrated his position and testified the trash can was "there" and he was standing "here." Without more of a verbal description of movements, verbal description where items are located (other than "here" or "there") and given sizes or heights, an electronic tape record, or even a transcript, is very hard to review. Furthermore, on electronic tape recordings, especially where a translator is translating the conversation, effort should be made to have only one person speak at a time. On this tape, there were occasions where several individuals were speaking in two languages, at the same time. Finally, we would note that claimant obviously had a communication problem and in that claimant's answers were frequently garbled and not responsive to the questions asked.

As to the merits of the case, claimant testified through a translator, that he was employed by Wells Lamont, employer herein, for over 10 years. Claimant stated the

employer was in the business of making leather gloves. Claimant testified part of his job was to go around the plant and empty trash cans where machine operators had accumulated trash. At approximately noon, on a date subsequently determined, and apparently agreed to, as being (date of injury) (all dates are 1993 unless otherwise noted), claimant testified he was collecting trash by picking up one trash can and emptying it into another container when he was hit, or bumped into, by what was variously described as a movable "iron arm," or cutting beam, or iron of a machine apparently used to cut leather. It is not entirely clear to us whether this iron arm was entirely on the counter or whether it protruded over the edge of the counter. After the accident, claimant testified he approached (SV), who was identified as the "assistant supervisor" or a supervisor, and reported the accident and injury. Claimant testified SV told him "to take a pill." Claimant also testified that he went to the plant secretary, (Ms. R) and informed her of the accident. Claimant testified he went to JM, to see a doctor because he had no money to see an American doctor and was unaware that carrier would pay medical bills on a compensable injury. It is undisputed that claimant was a member of employer's "safety committee" and the safety committee met monthly. It is not clear that the committee discussed workers' compensation. Claimant continued to work his regular duties, without losing any time from work due to his injury, until he was laid off on August 6th. Claimant testified he applied for and began receiving unemployment benefits on August 22nd.

The medical evidence regarding claimant's injury is very sparse and includes a prescription for pain medication dated October 29th. A clinic note, dated October 15th, indicated claimant was seen that day "for a back problem from an apparent work related trauma back in April of this year." The note indicated "muscle spasm bilaterally . . . questionable radiation to lower extremities" and stated they would try "to tx conservatively . . . ." Another clinic note dated 10-29-93 stated claimant was seen "for a back problem" and he was being referred to a university clinic for a more comprehensive work-up. The record contains three notes dated "15 De Abril 1993," "4 De Junio 1993" and "08/12/93" in Spanish regarding treatment of claimant by an acupuncturist, presumably the "doctor" claimant stated he saw in Mexico. The notes generally describe acupuncture and massage therapy were performed to the waist and back for an injury received in April 1993 with claimant needing rest for two months, which he has not been getting.

Employer's operation manager testified that he was claimant's supervisor, that claimant never reported an injury to him and he did not know about claimant's alleged injury until after claimant was terminated. The worker who was operating the machine which injured claimant testified she does not recall striking claimant with the "arm" but she did recall striking someone else "a long time ago" (in the way claimant described) but that he wasn't injured. The machine operator testified claimant had told her to be careful with the machine as he went by, but she took it as a joke. Ms. R, the plant secretary testified that she typed up reports of injury but she had no knowledge of claimant's injury and she denied claimant reported the injury to her. SV testified that the first he knew of the injury was when his statement (for this case) was taken on August 31st. Statements of other employees are in the record, however, none have contemporaneous knowledge of the specific incident in question.

The hearing officer determined that claimant "was hit by an iron" in the course and scope of his employment, that the claimant reported his injury to SV, his supervisor, on the day of the accident and that claimant did not have disability (inability to obtain and retain employment at his pre-injury wage) due to his compensable injury. Carrier's appeal emphasizes that the machine operator of the machine where claimant was allegedly injured, and all the other individuals claimant named as being involved or possibly having knowledge of the accident, "indicated that they knew nothing about this injury until after the claimant was terminated on or about August 12, 1993."

Carrier states that it ". . . is well aware of the standards of review followed by the Appeals Panel when faced with questions concerning the factual sufficiency of the evidence to support the findings of fact and decision of the hearing officer." In support of that statement, carrier cites Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.); Presley v. Royal Indemnity Insurance Co,., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ); "TEX REV. CIV. STAT. ANN., Article 8308, Section 6.34(e)" (since codified as Section 410.165(a)), and other cases. We agree with the propositions all those cases represent, having cited them many times. However, we have also held in many Appeals Panel decisions that a claimant's testimony alone is sufficient to establish that an injury occurred. Texas Workers' Compensation Commission Appeal No. 94129, decided March 18, 1994,; Texas Workers' Compensation Commission Appeal No. 93921, decided November 30, 1993; Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93698, decided September 22, 1993. *See also* Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). The hearing officer obviously believed claimant's version of the accident and that he reported the injury to SV and Ms. R, their testimony notwithstanding. Although the claimant's testimony is that of an interested party and only raises an issue of fact, Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ), the hearing officer is the sole judge of the testimony's credibility and weight. Carrier, in its appeal brief, clearly recognizes the deference the Appeals Panel gives to the hearing officer on factual determinations. This is particularly true in this case where the hearing officer was able to observe the demonstration of how the injury happened and was able to determine what a witness was referring to when the witness was referring to items being "here" or "there."

As the carrier clearly understands, as evidenced in its appeal, 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). The hearing officer could well have found that claimant did not sustain an injury and that the injury was not reported, based on the testimony of the machine operator, SV, the operations manager and Ms. R. However, the hearing officer chose not to do so, and even though we might have reached a different conclusion, such does not justify substituting our judgment for that of the hearing officer. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Carrier contends that the report of the acupuncturist of April 15, 1993, suggests "that the condition from which the claimant suffered was incurred long before the alleged date of injury." We believe that to be a generous reading of that report which we read to state that claimant is to have two months rest and is not getting the rest he needs. Even so, if a pre-existing condition is aggravated, or if claimant's already sore back was reinjured by being struck by the machine arm, that could be the basis for entitlement to benefits. *See* Texas Workers' Compensation Commission Appeal No. 92317, decided August 25, 1992; Texas Workers' Compensation Commission Appeal No. 91094, decided January 17, 1992.

Contrary to the carrier's urging we find sufficient evidence in the form of the claimant's testimony to support the hearing officer's determinations. When reviewing the hearing officer's decision for factual sufficiency we will reverse such a decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or 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). We do not so find.

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge