APPEAL NO. 94169

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 21, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the appellant (claimant herein) sustained an injury in the course and scope of his employment on (date of injury), and whether the respondent's (carrier herein) contest of compensability was sufficiently specific. The parties stipulated during the hearing that the carrier did not waive its right to contest the compensability of the claim, leaving injury as the only issue to be determined by the hearing officer. The hearing officer found that the claimant did not sustain an injury at work on (date of injury). The claimant appeals contending that the evidence is insufficient to support the finding of fact and conclusion of law of the hearing officer on this issue and that the finding and conclusion are legally insufficient to support his decision. The carrier responds that the challenged finding and conclusion are supported by the evidence and are sufficient to support the decision of the hearing officer.

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 injured his right shoulder at work on (date of injury). Claimant worked for the employer, a fairgrounds, as a laborer. The claimant testified that on the date of his alleged injury he had cleaned out and rented stalls and that part of the process of renting out stalls involved him carrying bags of wood shavings that weighed from 60-80 pounds. The claimant testified that he felt pain and numbness in his right shoulder and arm while sitting at a desk in the office. The claimant also testified that while in the office he told his supervisor, (Mr. H), that "something is wrong with my arm."

Claimant testified that he finished his shift on (date of injury), and sought medical treatment the next day. Medical records indicate that the claimant was examined for a complaint of right shoulder pain, given pain medication and released. The claimant returned to work July 20, 1993, with a return to work note from the emergency room and was terminated for absenteeism. The claimant sought further treatment for his right shoulder and was ultimately referred to (Dr. H) who performed an arthrogram which indicated that the claimant did not have a rotator cuff tear. Dr. H has diagnosed the claimant with tendinitis in the right shoulder and has prescribed medication.

Carrier contended that the claimant was not injured at work on (date of injury). Mr. H testified and denied that the claimant had told him on (date of injury), that his arm was sore. Carrier's witnesses testified that the employer was unaware that claimant was alleging an injury until after he was terminated. They further testified that the claimant's problem with absenteeism predated the alleged date of injury. The carrier pointed out that the claimant had a history of left shoulder problems and his medical records indicated that he had a prescription drug problem.

The claimant specifically complains about the following Finding of Fact and Conclusion of Law by the hearing officer:

FINDING OF FACT

8.Claimant did not injure his right shoulder at work on (date of injury).

CONCLUSION OF LAW

2.Claimant did not sustain an injury during the course and scope of his employment on (date of injury).

The question of whether an injury occurred is one fact. Texas Workers' 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).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st District] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found no injury contrary to the testimony of the claimant, and we cannot say that his decision was contrary to the overwhelming weight of the evidence, particularly in light of the testimony of the carrier's witnesses and some of the medical evidence.

As to claimant's contention that the challenged finding and conclusion are insufficient to support the hearing officer's decision, the claimant's real complaint here seems to be that the hearing officer's finding of no injury was not specific enough. The claimant argues that this lack of specificity (1) did not allow the claimant to ascertain whether the hearing officer considered and rejected whether or not the claimant suffered a repetitive trauma or occupational disease; (2) violated the provisions of the requirements of § 410.168 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(a)(1) and 142.16(a)(2) (Rules 142.16(a)(1) and 142.16(a)(2)); (3) failed to comply with the requirements of the Administrative Procedure and Texas Register Act, Tex. Rev. Civ. Stat. Ann. art. 6252-13a §§ 13(f)(5), 13(h) and 16(b) (West 1993) (APTRA) (now Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.001 to 2001.092) (APA)); and (4) failed to comply with pre-APA case law, specifically Miller v. Railroad Commission of Texas, 363 S.W.2d 244 (Tex. 1963) (Miller hereinafter).

As to points (3) and (4) we have earlier dealt with this same contention and explained in great detail how both APA and Miller do not, in this sort of situation, apply to the specificity of hearing officer findings under the 1989 Act in Texas Workers' Compensation Commission Appeal No. 93147, decided April 12, 1993. As to point (1), we first point out that under the 1989 Act the term "injury" includes "occupational disease" which itself encompasses "repetitive trauma injury." Section 401.011(26), (34), and (36); Texas Workers' Compensation Commission Appeal No. 92092, decided April 27, 1992. Nor are we surprised that the hearing officer failed to specifically mention either occupational disease or repetitive trauma injury considering the dearth of evidence at the hearing concerning either. We find somewhat disingenuous claimant's argument on appeal that he does not understand the hearing officer's rationale when in argument his counsel stated that the case boiled down to a "spitting match," turning entirely on the credibility of the witnesses. Nor do we find that § 410.168 or Rules 142.16(a)(1) and (a)(2), which essentially require the hearing officer to make written findings, were violated.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge