APPEAL NO. 94191

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On September 8, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The restated issues presented for resolution were:

1.Did Claimant injure his back, left hip and right side on (date of injury).

2.If Claimant injured his back, left hip and/or his right side on (date of injury), did the injury occur in the course and scope of his employment.

3.For what period or periods, if any, has Claimant had disability after (date of injury).

The hearing officer determined that the claimant injured his back and left hip in the course and scope of his employment on (date of injury), and that claimant has had disability from July 30, 1992, through the date of the CCH.

Appellant, carrier herein, contends that the hearing officer erred in finding a compensable injury on (date of injury), and that claimant had disability resulting from a compensable injury. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that carrier's appeal was not timely filed or in the alternative that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant, in his response, alleges that carrier, by its own admission, stated it received a copy of the decision on February 4, 1994, and an appeal must be filed not later than the 15th day after the date on which the decision of the hearing officer is received (citing Section 410.202(a) and two Appeals Panel decision). Claimant points out carrier's appeal was not filed until February 22, 1994, 18 days after it received written notice of the hearing officer's decision. However, we note that the provisions of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 102.3 and 102.7 (Rules 102.3 and 102.7) are applicable. Those rules provide that if the last day of a filing period is a Saturday, Sunday or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday or legal holiday. In that carrier received the hearing officer's decision on February 4, 1994, the 15th day thereafter would be Saturday, February 19th, and we note that Monday, February 21st was a legal state and federal holiday, Washington's Birthday. Therefore, carrier's appeal filed on Tuesday, February 22nd, was timely pursuant to Rules 102.3 and 102.7.

A comment on the exhibits is that the record reflects that Claimant's Exhibit No. 1, a drawing of a scaffold, was not admitted because it had not been timely exchanged; however, later, the carrier appeared to withdraw its objection. The decision lists that particular item

as a hearing officer's exhibit but the exhibit was never so marked or admitted. Nonetheless, we will consider it as a hearing officer's exhibit in that is what the parties and the hearing officer apparently intended. Further, the decision lists Carrier's Exhibit F, statement by R, as "Not Admitted" and Carrier's Exhibit H, "typed statement P," admitted. The record reflects that Carrier's Exhibit F (the R statement) admitted and Carrier's Exhibit H (the P statement) not admitteThe record reflects that Carrier's Exhibit F (the R statement) admitted and Carrier's Exhibit H (the P statement) not admitted. We will consider the record, as opposed to the hearing officer's recitation, accurate.

As to the merits, the claimant testified he was employed by (employer), employer herein, as a pipe fitter on (date of injury) (all dates are 1992 unless otherwise noted). Claimant was assigned (T) (TP) as a helper. Claimant and TP were working on a scaffold some 20 feet high. Claimant testified, and was supported by TP, that the job required bowing out some overhead pipes and this was normally accomplished by using either a "cherry picker" or a "come along" but that neither was available. Claimant and TP testified that they began prying the pipes out of their "clips" or "shoes" using wooden 2"x4" boards (2x4) to leverage the pipes. Claimant testified they (claimant and TP) had pried one pipe loose and were holding it in place with 2x4s when a four inch steel pipe rolled back, striking claimant in the waist, left hip and back. TP testified he did not see this accident but that he may have been out of position to see it and such an accident was certainly possible. Claimant testified that about 20 minutes later, as they were prying on the pipe, the 2x4 claimant was using broke, claimant lost his balance, fell backward against some other pipes and lost his hard hat and safety glasses. Claimant and TP agree that TP was possibly facing away from claimant and did not see the accident. TP testified he did not see a broken 2x4 but that he saw claimant attempting to "compose himself" and that claimant asked TP to retrieve his hard hat from the ground below, which TP did. Some time later on the same day, (date of injury), claimant testified that he was struck in the lower chest, below the rib cage, with a nail, presumably shot out of a nail gun by a nearby carpenter. TP testified he did not see the nail hit claimant, did not see the nail or blood but that claimant showed him the hole in his shirt that the nail allegedly made. Claimant testified he finished his work, climbed off the scaffold, and went home; the next day, July 30th, claimant returned to employer's premises, complained of working conditions and gave employer and several of the foremen and other managers a five page handwritten letter generally complaining of the working conditions.

In a signed statement, dated August 4th, (C) (CF), one of the foremen and claimant's immediate supervisor, told of the events of July 30th, when claimant gave out his letter and quit. CF also stated (in his statement) that claimant ". . . told me that he had straing [sic] him self by puching [sic] the pipe on the scafold [sic]." Claimant's five page letter expounded at length about poor working conditions, lack of tools/equipment, pay and concluded ". . . me & my helper strained our ass off trying to make room for my fits in the rack using 2x4." Claimant's large tool box was checked, loaded, sealed and taken to the front gate by means of a cherry picker where, according to carrier's witness, claimant attempted to pay someone to take his tool box to his home in a truck. (The tool box was apparently much too large and heavy to carry by hand.)

Claimant first sought medical attention at the local hospital emergency room (ER) on August 7th. A medical report from (Dr. H) dated "8/7/92" recorded a history consistent with claimant's version of the accident(s), essentially normal tests, x-rays showed no fractures of the L-5 spine or left elbow. Dr. H's impression was "[f]all at work resulting in lumbosacral strain and contusion to right [sic] elbow." Dr. H prescribed "[b]ed rest," pain medication and "[r]echeck in a week." A radiology report, dated August 10th, requested by the hospital, stated:

IMPRESSION:Fracture of left transverse process of L-2, age indeterminant, but possibly acute.
Degenerative disc disease, L-4/5 and L-5, S-1.

Claimant was subsequently seen by (Dr. W), who is characterized by the hearing officer as a designated doctor and carrier as "the Commission's MEO doctor." Claimant, in his appeal, states "a Commission selected designated doctor's report shall have presumptive weight. . . ." In that neither maximum medical improvement (MMI) nor impairment is at issue in this case, even if Dr. W were a designated doctor, which by reading the report is not at all apparent, his opinion on other matters would not be entitled to presumptive weight. Nonetheless, Dr. W recounted claimant's medical history, recited some problems he had with claimant, and concluded:

It became apparent that the patient was unprepared or unwilling to permit a proper orthopedic examination of his injury, and the office visit was terminated.

X-rays: I reviewed a lumbosacral spine series obtained at M Hospital in August of 1992. This does show a minimally displaced transverse process fracture of L_2 on the left side. There is a narrowed lamina of L_5 and the strong probability that he has a spondylolysis bilaterally of the 5th lumbar vertebra.

I am unable to make anymore of a diagnosis than a transverse process fracture at L_2 which should have been healed in three to four months at the most. Because of lack of an examination, I am unable to comment further about any continuing injury; and as such without a diagnosis cannot make any recommendations for treatment.

Because claimant had "failed to cooperate" with Dr. W, the hearing officer, on his own motion, reopened the record for further evaluation of claimant by Dr. W. In a report dated November 1, 1993, Dr. W stated that, as of October 11, 1993, x-rays show ". . . no evidence of any fracture or dislocation . . ." however, a "lumbar spine MRI revealed a small right herniated disk, L1, L2, without significant canal stenosis." Dr. W concluded:

DIAGNOSIS:1.Probable herniated nucleus pulposus, L1, L2, right.
2.Degenerative disk disease, L5-S1, severe, pre-existing.
3.Possible S1 nerve root compression secondary to right neuroforamen narrowing with osteophyte.

4.Cervical spondylosis, pre-existing.

COMMENT: Accuracy in determining [claimant's] diagnosis within reasonable medical probability is difficult because the event occurred well over a year before I saw him and because he is a poor historian. I think it is highly probable that the complaints for which he now presents arose from the accident of (date of injury).

The patient at the present time is not able to return to work as a heavy laborer and such occupations as a pipe fitter. It is medically reasonable that he has been unable to work in this occupation since the injury of (date of injury) [sic].

Claimant sought employment, and worked 81 hours, for a grocery store as a stocker in June 1993. Claimant agreed that he was terminated. A portion of carrier's exhibit indicates claimant was laid off with the reason "last person hired first one laid off for payroll cut on stocker Dept."

It is carrier's contention that claimant did not prove there was an accident; claimant did not prove an injury; and claimant did not have disability. The hearing officer determined in pertinent part:

FINDINGS OF FACT

4.On (date of injury), Claimant injured his left hip when he was struck by a 4" pipe while he was preparing to do pipe fitting work on an adjunct.

5.On (date of injury), Claimant injured his back (a fracture at L2) when he fell on his back while he was preparing to do pipe fitting work.

6.On (date of injury), Claimant was struck in the stomach with a nail while he was preparing to do pipe fitting work.

9.Due to the injury he sustained on (date of injury), the Claimant has been unable [to] obtain and retain employment at wages equivalent to his pre-injury wages beginning July 30, 1992 and continuing through the date of this hearing.

10.On August 6, 1992, Claimant was placed on bed rest for one week due to his alleged injuries.

CONCLUSIONS OF LAW

2.Claimant injured his back and left hip on (date of injury) in the course and scope of his employment.

3.Claimant has had disability from July 30, 1992 through the date of this hearing.

Carrier contends that claimant did not prove that there was an accident emphasizing that TP "does not corroborate the claimant's allegations" (because he did not actually see any of the accidents) and that "the mechanism of this alleged injury does not make sense." We note at this point that the hearing officer, as the trier of fact, is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). Although carrier states that TP does not corroborate claimant's allegations, we note, as discussed by the hearing officer, that TP testified he heard claimant's hard hat fall to the "floor some 20' below" and saw claimant attempting to regain his composure. Further, TP, in a sworn statement, Carrier's Exhibit E, stated that claimant complained of pain the following day (July 30th). Consequently, the hearing officer could have found that TP's testimony did corroborate claimant's description of the events of (date of injury) and 30th. Even if it did not, we have 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. 93689, 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 accidents. 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 has the responsibility to judge the credibility of the claimant and the weight to be given his testimony in light of the other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ).

The carrier also contends claimant did not prove an injury because he did not seek treatment until August 7th and did not get treatment between August 1992 and August 1993. Carrier also reaches the conclusion that if claimant had been "crushed by a 4-inch steel pipe, it would have been difficult for him to walk." Carrier argues that claimant did not report an injury, but we note that notice is not an issue. Whether claimant could walk after receiving a "crushing" injury and the circumstances why claimant did not seek treatment between August 1992 and August 1993 are inconsistencies and conflicts which are within the province of the hearing officer to resolve. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Carrier recognized this in its closing argument by stating that it is the hearing officer who must determine "whether [claimant's] description of the injuries makes sense, persuade you that they actually occurred." Apparently, the hearing officer was persuaded and the Appeals Panel, as an appellate level body, is not a fact finder and does not normally pass on the credibility of witnesses or substitute its own judgment for that of the trier of fact, where there is evidence to support the hearing officer's determinations. Texas Workers' Compensation Commission Appeal No. 931148, decided February 7, 1994; Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994; Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993.

Carrier contends that the hearing officer ". . . inexplicably found disability from the day of injury forward. There is no evidence to support this finding." We note that the radiology report of August 10th, reports a "fracture of left transverse process of L-2," that claimant was given bed rest, and that Dr. W, either a designated doctor or a Texas Workers' Compensation Commission (Commission) Medical Examination Order (MEO) doctor, in his November 1, 1993, report opined: "It is medically reasonable that he [claimant] has been unable to work in this occupation since the injury of (date of injury) [sic]." Although claimant applied for work at the grocery store, and did work for 81 hours, his testimony was to the effect that he had to quit because of the pain. Whether that was the true reason or whether claimant was laid off as carrier's exhibit would indicate is a factual determination for the hearing officer who obviously believed claimant's version. Further, in a workers' compensation case, the issue of disability may be based on the sole testimony of the injured employee. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394, 397 (Tex. 1989).

Contrary to the carrier's urging we find sufficient evidence in the form of the claimant's testimony, TP's testimony and the medical reports 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

Alan C. Ernst
Appeals Judge