APPEAL NO. 94204

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 January 11, 1994, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) was injured in the course and scope of his employment on (date of injury). The appellant (carrier) appeals urging that the great weight and preponderance of the evidence is contrary to the decision of the hearing officer and asks that we reverse. The claimant argues that the evidence is sufficient to support the decision and asks that it be affirmed.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

The single issue in the case was whether the claimant was injured in the course and scope of his employment on (date of injury). In essence, the matter for the fact finding hearing officer (Section 410.165(a) and 410.168(a)) came down to whether to believe the version of events as testified to by the claimant or as stated by a coworker, (Mr. A). The claimant testified that on (date of injury), while he was stepping down from a "cherry picker" he was operating, he stepped on a rock or mound of dirt and twisted his left ankle and rolled over. Although other workers were in the area, he did not know if this incident was observed. He crawled back into his rig "for a little while" when Mr. A came over at which time the claimant told Mr. A, "man, I turned my ankle" and that something was wrong. He told Mr. A to get "ahold" of their supervisor to get another operator as he, the claimant, had to go to first aid. He subsequently saw the employer's nurse and, after having difficulty getting his boot off, had ice applied to the ankle and then went home. Mr. A made a statement the same day indicating he did not know how the claimant hurt his ankle.

The claimant was given light duty for a short period of time, checked in with the nurse on several occasions, continued to have problems with his ankle but was able to return to duty in the "cherry picker" since it only involved sitting in the cab and did not require using his left leg or foot. His ankle not getting better, the claimant subsequently went to a doctor on December 16, 1992, and was taken off work and referred to an orthopedic specialist. Unfortunately, because of complications of the injury, treatment involved surgery of the ankle and ultimately amputation of his leg above the knee.

Although a comprehensive investigation was not undertaken by the employer, Mr. A gave a statement indicating no knowledge of how the claimant injured his ankle. Subsequently, and after December 16, 1992, Mr. A was asked by the employer to give another statement wherein he indicated that the claimant had told him on the morning of (date of injury), that he, the claimant, had injured his ankle the weekend before when he tripped over a bicycle onto some flagstones at his father's house. In an oral deposition on January 4, 1994, Mr. A stated that the claimant told him he had tripped over a bicycle at his house and sprained his ankle the evening before. He said that he thought the claimant's ankle was swollen at that time although he had his boots on. Mr. A stated that the claimant

told him to say he did not know anything about the sprained ankle incident. The claimant vigorously denied that he had injured his ankle the weekend preceding (date of injury) or that he ever told such to Mr. A. He stated he told Mr. A about the injury shortly after it happened and when he determined that Mr. A had not witnessed the incident told him to just state he did not know. He stated that he and Mr. A did not socialize and did not know each other well.

The claimant's treating doctor testified that, in his opinion, if the claimant had sprained his ankle the weekend before (date of injury), he would have been noticeably limping when he went to work on the morning of (date of injury), that his ankle would likely be discolored from bruising (the medical notes of the company nurse who treated the claimant do not make any reference to any discoloration), and that he had known the claimant for about 17 years and that he had always been a "straight shooter" with him even if it was not in his own best interest. He also acknowledged that he did not see the claimant until February 1993 and only knew first hand what his condition was at that time.

The claimant's father testified that he did not believe the claimant was at his home the weekend before (date of injury), that the only bicycles on his premises were in a storage shed and that he did not have any flagstone on his property. (Mr. M), the employer's safety manager, testified and explained the lack of earlier investigation of the incident, the circumstances surrounding the various statements of Mr. A, and the claimant's employment history before and following the incident.

As indicated, the case came down to the credibility of the two key witnesses, the claimant and Mr. A, and the weight to be given their testimony and statements. The hearing officer made clear in his Decision and Order that he found the claimant was more credible. Determining credibility of witnesses is the function of the fact finding hearing officer who is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). It is for the hearing officer to resolve conflicts and inconsistences in the testimony and evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer may believe one witness and disbelieve another, and he can believe all, part or none of the testimony of any given witness. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Claimant's testimony only raises an issue of fact and it may be believed over the testimony of other witnesses. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). And, the testimony of a claimant alone can be sufficient to establish an injury. *See* Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). Even if there was some discrepancy in the claimant's testimony and previous actions or statements, which may or may not be the case here, the fact finder is not required to discard or disbelieve the testimony of the claimant at the hearing. *See* Texas Employer's Insurance Association v. Stephenson, 496 S.W.2d 184 (Tex. Civ. App.-Amarillo 1973, no writ). We have held that we will not substitute our judgment for that of

the fact finder where supported by sufficient evidence. Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. And, although the evidence on review may reasonably give rise to inferences different from those deemed most reasonable by the fact finder, this is not a sound basis to disturb the decision. *See* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); 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 evidently gave greater weight to the testimony of the claimant in considering the circumstances surrounding the incident and the course of the resultant injury. There is sufficient evidence to support his determinations. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge