APPEAL NO. 94347

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 15, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) sustained a compensable injury to his right wrist on (date of injury); if so, are his cervical problems related to that injury; and whether he has disability as a result of the injury. The hearing officer found against the claimant on all issues and the claimant appeals, contending in general that the decision was not supported by sufficient evidence. The respondent (carrier) replies that the decision is support by sufficient evidence and urges affirmance.

DECISION

We affirm.

The issues in this case, including the credibility of the claimant, were intensely disputed. The claimant testified that he was hired in (city), Texas, by the employer for a job in Illinois involving the installation of steel racks in a warehouse. The work required the lifting and positioning of steel rails or "uprights", about 35 feet long and weighing about 368 pounds. He said that between 9:00 a.m. and 10:00 a.m. on (date of injury), he was working with (Mr. L), the project manager. He said that as he was reaching down to help pick up an upright, Mr. L pulled it up from the end thereby jamming it against the claimant's open right palm. He felt pain in his right wrist. He continued working another seven or eight hours that day and the next. He said that he immediately told Mr. L that he had injured himself, but Mr. L made light of it. When he asked, that day or the next, to see a doctor, he said Mr. L told him that if he took time off to visit a doctor he would be fired. He worked the next day shift and was then transferred to the night shift. He said he bought and wore a brace on his right hand before beginning the night shift. He said he had problems at work because he had to favor his right hand, but continued working because he needed the job. He stated that because he could not hold the uprights with his right hand he had to carry them on his shoulder. He as told he was released from work on October 1, 1993, because he could not get along with his co-workers. His employer drove him to the bus station and he returned to Abilene. He admitted to getting into an argument with Mr. L about the firing, but denied threatening him or the employer in any way.

On October 6, 1993, according to his testimony, he went to a hospital emergency room (ER) because of pain in his neck, right arm and right side. He testified that he did not notice the neck pain until he had been off the job for a while. The report of the his visit to the ER diagnosed a right wrist sprain caused when he "fell on right hand." He returned the next day to the hospital with complaints of "throbbing pain" in the right wrist. He said he mentioned to both the doctor and the nurse that his neck also hurt, which, according to the claimant, they said was the result of tension and they did not examine his neck. He denied, or at least did not recall, ever telling anyone at the ER that he hurt himself in a fall. He admitted that he broke the same wrist in a fall in 1982 and was in a cast for a year, but considered the fracture completely healed.

He was referred for further treatment to (Dr. J) who first saw the claimant on October 15, 1993. In a letter of November 29, 1993, recounting his treatment to that date, Dr. J noted a "small chip in the radial styloid region which was felt to be an old injury." He noted synovitis and pain and felt there was "a possible capsular strain or injury to the wrist." Because the claimant also complained of numbness in the hand and fingers, Dr. J was concerned about "possible" carpal tunnel syndrome. Without benefit of an MRI scan of the wrist, Dr. J said:

> I feel his symptoms are compatible with an injury 2-3 weeks prior to the time that we saw him and that this is a highly subjective situation in which the patient's complaints such as pain with movement, do depend upon pain tolerance, etc.

On November 30, 1993, and again on December 7, 1993, Dr. J noted that the claimant was unable to work using his right wrist and hand. This is the first work excuse the claimant received. An MRI of the right wrist on November 30, 1993, disclosed fluid "which could be secondary to inflammatory process anywhere within the wrist." Although no fractures were seen, there was arthropathy with hypertrophic bone formation. An MRI of the cervical spine on December 28, 1993, showed disc protrusion at C5-6 and mild intervertebral foramen stenosis on the right at C4-5. On January 19, 1994, (Dr. L) on referral from Dr. J diagnosed herniation at C5-6, but considered the source of his neck pain to be a right trapezius strain related to a muscle sprain. He also found what he believed to be mechanical pain in the right wrist mainly related to "intrinsic problems in the wrist" and a very mild ulnar irritation sign in the right elbow.

Mr. L testified that when he bent over to pick up the end of the upright, he did not actually see the claimant who was about sixteen feet away. He said the claimant did not complain until Mr. L had the upright positioned on a cart. He said he asked the claimant if he was hurt or wanted to go to a doctor. The claimant answered no to both questions. He said he did not see or feel the upright strike the claimant. The claimant continued working the rest of the day, including climbing on the racks, the next day and the night shift. Mr. L said the claimant did not appear to favor his right hand. He did not notice him wearing a wrist brace or carrying uprights on his shoulder which he did not have to do and, if he did, he would have stopped him. He denied ever telling the claimant he would be fired if he went to a doctor. He said he fired the claimant on or about October 1, 1993, because of the disruption he caused with other employees (threatening them, accusing them of stealing, and trying to borrow money from them). He recounted that when he took the claimant to the bus station to return him to Texas after firing him, the claimant became belligerent and threatened him and the company with a lawsuit. He said this was the first time the claimant ever said he was injured on the job and did not even then mention a neck injury. He said the only one present at the time of the alleged injury was a (Mr. A). (No evidence from Mr. A was offered by either party.) The others who the claimant said were witnesses were, according to Mr. L, out of view in a staging area.

A transcription of a telephone conversation between an adjuster and (Mr. J), a co-worker, was also admitted in to evidence. Mr. J, who is no longer employed by the employer, stated that he and about four or five others heard the claimant yell when the upright hit his hand. In a similar statement, (Mr. M), the night shift supervisor, stated that the claimant never wore a wrist brace and his performance did not appear to be affected by a wrist injury. He said the claimant did not tell him he had a wrist injury until the day he was fired.

Based on this evidence, the hearing officer determined that the claimant was not injured in the course and scope of his employment on (date of injury), and that his cervical condition was not related to his alleged injury. Finding no injury, the hearing officer determined that the claimant did not have disability. The claimant appeals these findings stating that the "decision made was not based on truth."

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment, including the extent of the injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. It is the duty of the hearing officer, as the finder of fact under the 1989 Act, to resolve conflicts and contradictions in the evidence and to determine what facts have been established. St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). In doing this, the hearing officer may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In this case, the hearing officer declined to credit the testimony of the claimant about the facts and circumstances of his claimed wrist and neck injury. He could have given Mr. L's testimony about what did or did not happen to the claimant on (date of injury), greater weight. An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgement 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). Having reviewed the record, we conclude that the evidence sufficiently supports the hearing officer's findings of fact, conclusions of law and his decision and order. We will not reverse the decision and order of the hearing officer where, as here, there is sufficient evidence to support it and it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, a standard not met in this case. 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 also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011 (16)

Finding no error, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge