APPEAL NUMBER 94988
FILED SEPTEMBER 2, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 29, 1994, a contested case hearing was held in (City), Texas, with (hearing officer) presiding as hearing officer. The record closed on June 30, 1994. With respect to the issues before her, the hearing officer determined: (1) that appellant (claimant) did not sustain a compensable injury in the course and scope of his employment on _____; (2) that claimant did not have disability as a result of a compensable injury; and (3) that claimant's average weekly wage (AWW) is $178.50. Claimant appeals, essentially rearguing the evidence he thinks proves that he sustained an injury in the course and scope of his employment which resulted in disability. In his request for review, claimant also asserts error in the hearing officer having denied his requests for a continuance and a subpoena. Respondent (carrier) urges affirmance, arguing the sufficiency of the evidence in support of the hearing officer's decision and order. The claimant did not appeal the hearing officer's determination of his AWW; thus, that determination has become final. *See* Section 410.169 and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(f) (Rule 142.16(f)).

DECISION

We affirm the hearing officer's decision and order.

There is substantial conflict in the evidence in this case. Claimant testified that he began working as a busboy/dishwasher for (employer) on February 2, 1994. He stated that on _____, he started to work at 4:30 p.m. Claimant said that the other busperson that evening was Ms. C. He further testified that he and Ms. C should have taken out the garbage but that Mr. S, a kitchen employee, volunteered to help claimant because the trash was very heavy. Claimant stated that he and Mr. S took one trash can out to the dumpster and emptied it. Thereafter, claimant said he went back into the kitchen and took out a second garbage can by himself, while Mr. S went into the break room to smoke a cigarette. Claimant testified that as he was emptying the second trash can, he slipped in some grease on the ground by the dumpster, fell to his knees, catching his right arm between the trash can and the dumpster. Claimant said that as he was getting up from the fall, Mr. S came back outside and helped him get the trash can out of the dumpster where it had become stuck. Claimant said that after his fall he reported his accident to his supervisor, who assisted him in filling out an incident report.

Ms. C also testified at the hearing. She stated that she worked on the evening of _____, and that she saw claimant after he came in from taking out the trash. She noticed that his uniform was smudged with grease, particularly his right forearm and elbow and his right knee and thigh. She stated that she teased claimant about it, and he told her that he had slipped in grease near the dumpster and fallen. In addition, Ms. C said that claimant had been by himself when he had fallen, because she had seen Mr. S in the break room smoking at that time. Finally, Ms. C testified that she left work for the

employer when she saw how badly the company was treating the claimant about his workers' compensation claim.

Mr. S also testified at the hearing. He denied that claimant ever took any trash cans out by himself on that date, insisting that he helped claimant take out all of the trash cans and also assisted him in emptying the trash into the dumpster. He recalled seeing the grease on the ground near the dumpster; however, he denied that claimant slipped and fell in the grease. In addition, he stated that he did not see any grease stains on claimant's uniform.

Claimant sought medical treatment from Dr. B, on March 21, 1994. Dr. B diagnosed acute traumatic cervicodorsal strain with right outlet syndrome, prescribed anti-inflammatory medication and pain medication and began claimant on physical therapy. In addition, Dr. B took claimant off work. On May 10, 1994, Dr. B returned claimant to work with a 20-pound lifting restriction. There was some oral contact between claimant and the employer's general manager, Mr. G, about getting claimant back to work, which was unsuccessful; however, by certified letter dated May 27, 1994, the employer made a written offer of light duty work consistent with claimant's lifting restrictions. On June 4, 1994, claimant returned to work for the employer in accordance with the offer in the letter. He worked about four hours of his scheduled eight hour shift and then was sent home by the manager on duty because business was slow. Claimant stated that he did not go to work the next day because when he woke up he had severe pain in his left arm. Claimant said the pain was so intense that he thought he had had a stroke so he went to the emergency room. Finally, claimant testified that he had not returned to work since June 4, 1994, because of a pinched nerve in his neck.

Mr. G was the final witness at the hearing. He testified that the employer used a point system, which assigned points for absence and tardiness. Mr. G stated that an employee is assigned 1 point for absence and one-half a point for tardiness and upon the accumulation of six points, an employee is suspended pending a termination hearing. Mr. G stated that as of the date of his alleged accident, claimant had acquired five and one-half points. Claimant asserted that he only had four and one-half points as of the date of his injury. Mr. G also testified as to several unsuccessful attempts he made to get claimant back to work consistent with Dr. B's release of May 10, 1994. Nonetheless, Mr. G stated that it was not until the company sent a certified letter dated May 27, 1994, that he was able to arrange claimant's return to work. Finally, Mr. G stated that he had documented claimant under a work rule for using threatening or abusive language based upon the alleged threat to Mr. G's life that claimant had made.

It is well-settled that the claimant has the burden of proving that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Under the 1989 Act, the hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight

and credibility to be given thereto. Section 410.165(a). When presented with conflicting testimony and evidence, the hearing officer may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). As the fact finder, the hearing officer must resolve such conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and enter findings of fact and conclusions of law. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. An appellate 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. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied.) Where sufficient evidence supports the hearing officer's determinations and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that claimant had not met his burden of proving a compensable injury. In so doing, the hearing officer chose not to believe claimant's testimony relating to the alleged injury and resolved the inconsistencies in the other evidence against finding that claimant sustained a compensable injury. The hearing officer was acting within her province as the fact finder in so doing. *See* Lopez v. Associated Employers Insurance Company, 330 S.W.2d 522 (Tex. Civ. App.-San Antonio 1960, writ ref'd), where the jury rejected the testimony of the allegedly injured employee that she sustained an injury in a slip and fall accident at work. Our review of the record indicates that there is sufficient evidence to support the determination that claimant was not injured in the course and scope of his employment and, contrary to claimant's assertions, nothing in the record indicates that it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, there is no basis for disturbing that decision on appeal. Because the hearing officer found that claimant did not sustain a compensable injury, she correctly determined that claimant did not suffer disability within the meaning of the 1989 Act, as the existence of a compensable injury is a prerequisite to a finding of disability. *See* Section 401.011(16).

Lastly, we will address claimant's allegations of error related to the hearing officer's denial of his motion for continuance and his request for a subpoena, which claimant filed two days before the hearing was scheduled. As the carrier noted, claimant did not raise these issues at the hearing and therefore, he cannot pursue them on appeal. However, the appellate record includes a tape recorded transcript of a telephone conversation of June 28, 1994, between the claimant and the hearing officer, where his motion for continuance and his subpoena for the testimony of Mr. S were discussed. The claimant sought a continuance because of the unavailability of Ms. C. However, we note that Ms. C was present at the hearing and provided testimony; therefore, it is unclear how claimant could assert prejudice resulting from the hearing officer's failure to grant the continuance, in that Ms. C was in fact available and did testify. Similarly, we note that Mr. S was present

at the hearing and was called as a witness by claimant so again claimant cannot credibly assert prejudice resulting from the denial of the subpoena.

However, we are concerned that the hearing officer initiated an *ex parte* communication about the claimant's motion for continuance and request for a subpoena in this case. While our review of the tape recorded conversation does not indicate that there was any improper discussion of the merits, the hearing officer is cautioned against initiating *ex parte* conversations in the future. The better practice would certainly have been to include the carrier's representative in that conversation, if possible; otherwise to communicate the substance of the conversation to the other party on the record. *See generally* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.3 (Rule 142.3).

Finding that there is sufficient evidence to support the hearing officer's decision and order, we affirm.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Tommy W. Lueders
Appeals Judge