APPEAL NO. 950071
FILED FEBRUARY 13, 1991

This appeal is considered under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 10, 1994, a contested case hearing was held. With respect to the two issues before her, the hearing officer determined that claimant did not sustain a compensable back injury on _____, and, accordingly, did not have disability within the meaning of the 1989 Act. Appellant's (claimant) timely appeal points to the evidence he believes supports his position that the hearing officer's decision is against the great weight of the evidence. Respondent (carrier) urges affirmance, arguing the sufficiency of the evidence to support the hearing officer's decision and order.

DECISION

We affirm.

Claimant testified that he was an employee of (employer) and was assigned to _____. In that position, he ran parts through a machine, stacked them in bundles and put the bundles on pallets. Claimant testified that on Saturday, _____, he was turning to place a bundle on a pallet, his left leg gave out, he dropped the bundle and as he was attempting to catch it, he felt pain in his low back. Claimant testified that although he felt pain immediately after the incident, he finished his shift. Claimant was not scheduled to work on Sunday, (day after date of injury) and he travelled to visit his family. On (two days after date of injury) he was scheduled to work but did not report. When he called in about not going to work on (two days after date of injury), claimant did not report any work-related injury, instead he stated that he was having difficulty getting back into town. Nevertheless, claimant testified that his back pain was also a factor in his inability to work his scheduled shift on (two days after date of injury). Claimant was again unable to work on Tuesday, (three days after date of injury) and when he called his employer on that day, he reported his injury of the previous Saturday.

The employer sent claimant to (Provider) for treatment. Specifically, claimant had an appointment with (Dr. J), who diagnosed back strain, took claimant off work and scheduled a follow-up appointment for June 28th. On June 28th, claimant was seen by (Dr. E), who referred claimant to (Dr. L), an orthopedic surgeon. Dr. L diagnosed a lumbar sprain, initiated physical therapy and on July 5, 1994, released claimant to light duty. On July 22, 1994, claimant began treating with (Dr. M), a chiropractor. Claimant stated that he continued to treat with Dr. M up to the date of the hearing. In addition, claimant testified that Dr. M took claimant off work at his initial appointment and had not yet released him to return to work.

Claimant acknowledged in his testimony at the hearing that he has had prior compensable back injuries in 1983 and 1990. In addition, it is undisputed that claimant has had three prior lumbar surgeries: in 1977 for a herniated disc, in 1983 for a herniated disc and in 1984 to remove scar tissue. In addition, claimant testified that the doctors who treated him for his 1990 injury concurred in their conclusion that he had a surgical condition after that injury; however, no surgery was ever performed.

(Ms. R), employer's staff coordinator, also testified at the hearing. Ms. R stated that on May 24, 1994, May 25, 1994, and June 6, 1994, claimant called in and stated that he would not be in to work, stating on each occasion that he had strained his back at home and was unable to work. Ms. R said that on each occasion she asked claimant if he had hurt his back at work and he had stated that he had not and also stated that he did not think he could hurt his back doing the work he was doing at _____. Claimant specifically denied that he had strained his back at home or that he had reported back strain to Ms. R as the reason for his absences on those dates. Instead, claimant stated that he missed work because of a stomach virus. In support of that assertion, claimant submitted an unsigned off-work statement dated June 6, 1994, from the (Clinic), which purports to attribute his absence of that date to a gastrointestinal virus.

Ms. R also testified that when the employer asked employees at _____ about claimant's alleged injury no one had any knowledge thereof. Specifically, claimant's supervisor at _____ stated that claimant had finished his shift and had not shown any signs of being injured. In addition, one of claimant's coworkers at _____ stated that she had seen claimant run out to his car after he finished his shift and another coworker, whom claimant initially identified as a witness, stated that he had not seen any injury. Ms. R also testified that on July 11, 1994, she called claimant and offered him a light duty position after receiving Dr. L's release. She stated that claimant refused the position. At the hearing, claimant testified that he did not return to light duty with employer, because he did not believe he could work, although he also testified that he did not find out anything about the position before he decided that he could not do it.

(Ms. L), employer's president, testified that she went to _____ to investigate claimant's alleged accident and talked to claimant's supervisor and coworkers. Ms. L stated that no one had any knowledge of an injury and that one of claimant's coworkers stated that she had seen claimant run out to the car after completing his shift on _____. Finally, Ms. L testified that as of the date of the hearing, claimant was still considered to be an employee of employer.

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 to the evidence. 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 Insurance Company of Pittsburgh, Pennsylvania 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. With respect to credibility, the hearing officer specifically noted in her decision that "[t]he credibility of witnesses was pivotal in sorting the facts in this case, and the credible evidence demonstrated that claimant did not sustain a work-related back injury on or about _____." Thus, the hearing officer resolved the inconsistencies in the evidence against finding that claimant sustained a compensable injury. She 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 1959, 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 the hearing officer's decision on appeal. Cain, *supra*. 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).

We address one other item in this decision. At the hearing, carrier's attorney offered the claim files associated with claimant's two previous workers' compensation injuries. Carrier's attorney stated at the hearing that he was submitting only the relevant portion of the files. He represented that he had removed duplicates and other extraneous documents. Claimant's attorney objected, noting that he wanted to insure that all of the relevant evidence from those files was admitted. In response to that objection, the entire files were offered and admitted; thus, necessitating that the hearing officer and the Appeals Panel to wade through considerable evidence of no relevance to this proceeding. By far, the better procedure is for parties to review files before the hearing and add that evidence which is determined to be needed and included rather than merely cluttering up the record

with voluminous evidence. We have previously noted that such unacceptable procedures should not be followed as they are "unnecessarily expensive and time consuming, and hamper and encumber an orderly proceeding." Texas Workers' Compensation Commission Appeal No. 94230, decided April 8, 1994. *See also* Texas Workers' Compensation Commission Appeal No. 94426, decided May 16, 1994. We caution that, although the hearing officer and the Appeals Panel are required to review all of the evidence admitted at the hearing, it is not the responsibility of either the hearing officer or the Appeals Panel to scour a voluminous record in an attempt to find support for a party's position. Rather, it is the responsibility of the parties to identify the relevant evidence in support of their arguments.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge