

APPEAL NO. 950079
FILED FEBRUARY 22, 1995

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE Ann. § 401.001 *et seq.* (1989 Act). On December 8, 1994, a contested case hearing was held. The issues were:

1. Did the Claimant sustain a compensable injury on or about _____?
2. Did the Claimant report an injury to the Employer on or before the 30th day after the injury, and if not, does good cause exist for failing to report the injury timely?
3. Did the Claimant have disability resulting from the injury sustained on _____, and if so, for what period?

The hearing officer determined that the claimant had not sustained a compensable injury on _____ (all dates are 1994, unless otherwise noted), but had reported his alleged injury within 30 days of the alleged date of injury, and that claimant has not had any disability because he had not sustained a compensable injury.

Appellant, claimant, requests that the Appeals Panel review the hearing officer's decision to determine if there is sufficient evidence to support the determinations and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified, through a translator, that he hit his head at work while employed by (employer) on _____. Exactly how this injury occurred is not clear from claimant's testimony. Claimant testified that he had trouble sleeping that night and the next day he went to (city), (state), where his brother lived. While in (city), claimant sought treatment at the (R Clinic) on August 12th where apparently he had been seen in June for an injury when he was "hit in the head by a swing bar. . . ." Claimant complained of neck pain and not sleeping due to the alleged _____ injury. Claimant was given a prescription for pain and anti-inflammatory medications. Subsequently claimant sought treatment from (Dr. T) in (city 2) on September 1st. Dr. T diagnosed claimant with pinched nerves and an acute whiplash injury and took claimant off work. While in Dr. T's office claimant called the employer and advised them of his injury and the fact Dr. T had taken him off work. Claimant was advised to bring in the doctor's slip and he did so. The

employer and carrier were also advised by claimant's attorney that claimant was alleging a work-related injury some time between September 1st and September 8th. Claimant testified that he has not returned to work and continues in Dr. T's care.

The medical records include progress notes from the R Clinic showing an office visit on June 28th, for the "swing bar" incident which had occurred "1½ months ago." The following entry, dated "8-12-94" states "Still [with] neck pain" and relates back to the June visit. No mention is made of an _____ injury. A brain scan was performed on August 15th, and was found normal. A progress note of August 29th (still apparently from the R Clinic) indicates claimant came in to discuss his test results.

Dr. T, in a report dated September 6th, diagnosed "pinched nerves in the cervical region" and "whiplash type injury." Dr. T testified at the CCH, explained his diagnosis and maintained that the injury he found was anywhere from two days to two weeks old and was not the result of an incident which occurred in April or May (of 1994).

The hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment. The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The testimony of the claimant as an interested party only raises an issue of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 91089, decided January 15, 1992. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level 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, 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence to be clearly wrong and 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). The hearing officer was able to judge the demeanor of the witnesses and clearly was not persuaded that claimant had sustained a work-related injury on _____. That determination is supported by the progress notes of the R Clinic which appear to relate claimant's condition to an incident which

occurred one and a half months before June 28th. The hearing officer was free to draw reasonable inferences from the R Clinic notes, Dr. T's testimony and report notwithstanding.

We also affirm the hearing officer's determination on disability in that claimant cannot by definition (Section 401.011(16)) have disability in the absence of a compensable injury.

We find the evidence sufficient to support the determination of the hearing officer that the claimant did not sustain a compensable injury on _____, and that the challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge