APPEAL NO. 950119
FILED MARCH 3, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 9, 1994. The issues at the CCH were injury and disability. The hearing officer found that the appellant (claimant herein) failed to establish that he injured his back at work and that he did not miss any work as a result of his alleged compensable injury. The claimant appeals contending that the evidence established he suffered a compensable injury resulting in disability. The respondent (carrier herein) replies that the evidence supported the findings of the hearing officer.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that he injured his back on _____ (all dates are 1994 unless otherwise indicated), when a barrel of cow hooves that he was pulling tipped over. The claimant testified that a coworker, (Mr. G), helped him pick up the barrel after it fell. The claimant testified that he felt a pop in his back while handling the barrel but he did not feel pain until the next morning when he got out of bed. The claimant testified that he reported the injury the next day to (Ms. O), the employer's safety coordinator, who sent him to the company doctor, (Dr. L). The claimant testified that at the time he reported his injury to Ms. O she called in his supervisor, (Mr. T), to a meeting at which time the claimant explained how he was injured. The claimant testified that at this time Ms. O and Mr. T also spoke to Mr. G.

Mr. T testified that the claimant did report an injury to him on (day after date of injury), but it was an injury to his arm or shoulder caused when a meat conveyor hook had fallen off a rail and struck the claimant on the arm. Mr. T testified that on August 3rd the claimant complained to him about numbness in his foot and that he took the claimant to first aid and to see Ms. O. Mr. T testified that several days later the claimant came in and told Mr. T that he had injured his back. Mr. T denied he met on (day after date of injury) with Ms. O or Mr. G.

Ms. O testified that she first heard that the claimant was alleging a back injury when she received a call from a doctor on August 4th seeking authorization for treatment. She testified that she had examined the claimant's foot when he came in on August 3rd with Mr. T. Ms. O testified that she first heard about the barrel tipping over from Mr. G on August 4th.

Mr. G testified that he helped the claimant pick up the barrel on _____ as he was passing by the claimant's work station. Mr. G testified that the barrel had fallen over and was very heavy. Dr. L diagnosed the claimant as having "lumbar sacral strain" with radiculopathy.

The hearing officer stated that the claimant had the burden of proof to establish his injury and although "it is apparent that Claimant injured his back at some point" that the evidence is so confused that a "logical course of events supporting Claimant's claim cannot be construed from the facts provided." The hearing officer found that the claimant did not have a compensable injury.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (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, 290 (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, 161 (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 as 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).

A finding of injury may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found no injury, contrary to the testimony of the claimant. Claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though, were we fact finders, we might have drawn other

inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Finally, with no compensable injury found, there is no basis upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011 (16).

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge