APPEAL NO. 951091
FILED AUGUST 10, 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 commenced on May 23, 1995, and reconvened on June 15, 1995, after which the record was closed. The issues at the CCH were whether the appellant (claimant herein) was in the course and scope of employment at the time the injury took place, whether the claimant had disability as a result of his injury, and the claimant's average weekly wage (AWW). During the hearing the parties stipulated as to AWW. In regard to the remaining issues, the hearing officer found that the claimant was not in the course and scope of his employment at the time of his injury and consequently had no disability. The claimant appeals arguing that he was injured in the course and scope of his employment under the recreational activities exception when he was injured in a motor vehicle accident on his way to the company fishing trip. The claimant also argues that he was prejudiced in proving his case by the refusal of the hearing officer to allow his case to be consolidated with those of co-workers injured in the same accident. The claimant contends that his participation in the fishing trip was expressly or impliedly required and that he experienced disability as a result of the accident. The respondent (carrier herein) replies that the claimant was not prejudiced by the failure to consolidate his case with others, that the claimant's participation in the fishing trip was not expressly or impliedly required, and that the claimant did not have disability as disability is predicated on compensability.

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.

On (date of injury), the claimant and four other co-employees were traveling from (city 1) to (city 2) for an employer-sponsored fishing trip, in a pick-up truck owned by one of the co-employees, when they were involved in a terrible automobile accident. The pick-up truck was struck from behind by a vehicle operated by an intoxicated driver, forcing the pick-up across the median where it was struck by an on-coming vehicle. The claimant was injured in the accident and three of the co-workers were killed. Beneficiaries of two of the deceased co-workers have filed claims for death benefits under the 1989 Act.

The attorney for the claimant, who also represents some of the beneficiaries of the two deceased workers, in April 1995 filed a Motion for Continuance and a Motion to Consolidate Proceedings. In the Motion to Consolidate Proceedings the attorney requested that all the claims arising out of this accident be consolidated into one CCH.

The hearing officer denied the Motion to Consolidate Proceedings, but granted the Motion for Continuance. In her order on the motions the hearing officer found that the testimony in each of the claims arising out the accident could be used in the others. In the present case, a copy of the audiotape of the testimony of the witnesses in the co-workers' death claims were included in the record and provided to both parties. Each party was instructed to provide a summary of the testimony from each witness and to give the other party an opportunity to respond to its summary. These summaries and any comments were included in the record as hearing officer exhibits.

This fishing trip was for the company employees who worked as store managers or installers (for purposes of invitation to this trip the claimant was considered like an installer, although he was a driver and warehouseman). All the employees in these classifications were male. The employer had sponsored the trip since 1990. Attending the fishing trip was not required. The claimant although invited in past years, had not attended. He testified that this was because he did not like to fish. The employer provided a picnic meal in a public park for those attending the event and the following day provided a chartered deep sea fishing boat. Other than two upper management employees, who planned and made arrangements for the picnic and for the boat charter, all other employees attending (including the claimant and his co-workers in the accident) arranged for their own transportation, lodging and meals (other than the picnic), and paid for the same. There was evidence that there was no set time for arrival for the event, no business agenda, no training, and no work awards given.

The claimant testified that one reason he attended this event was that he had been told by his supervisor, (Mr. R), that his attendance would reflect on his upcoming performance evaluation, and that this would affect the decision on his annual raise. The claimant testified that he did receive a thirty cents per hour raise after the accident. There was also evidence that the claimant had received raises in past years when he did not attend the fishing trip.

The hearing officer's Findings of Fact and Conclusions of Law included the following:

FINDINGS OF FACT

6. There was no agenda at the picnic, no speakers, no training, no awards, or any other business of the Employer conducted at the picnic or on the fishing trip.

7. Employees were not expressly or impliedly expected to attend the picnic or the fishing trip or to participate in either activity in any way.

8. An employee's participation in the picnic or fishing trip would not result in the employee's receipt of a salary increase or any benefit other than an opportunity to socialize with co-workers.

9. The claimant was injured in a automobile accident while en route to the picnic and fishing trip.

10. Although the Claimant was injured as a result of the automobile accident, the Claimant was not working for the Employer or under the direction, supervision, and control of the Employer at the time the accident occurred.

CONCLUSIONS OF LAW

2. The claimant was not injured in the course and scope of his employment on (date of injury).

The claimant complains that the hearing officer's refusal to consolidate his case with that of his deceased co-employees "prejudiced him by lessening the impact of the common evidence relating to the issue of course and scope . . . ." We have seldom seen this issue of consolidation raised. In Texas Workers' Compensation Commission Appeal No. 93033, decided March 1, 1993 (unpublished), we stated as follows on the subject:

Neither the 1989 Act nor the rules of the Commission address consolidation of hearings. Alamo Express v. Union City Transfer, 158 Tex. 234, 309 S.W.2d 815 (1958) addressed the question by saying "(a)n administrative agency has the sole discretion to determine whether or not it will consolidate into one hearing applications pending before it involving the same commodities, routes, parties, etc." In the case on appeal, we see no reason why that rationale should not apply, especially in view of no evidence that the hearing officer's action was designed to deprive either party of any rights in refusing to consolidate.

This reasoning seems to apply to the present case as well. The hearing officer considered evidence adduced at the other hearings in the present case. There is no evidence that the procedures she used in adding that evidence to the record of the present case lessened the weight she gave the evidence. Under the circumstances, we do not find that she abused her discretion or harmed the claimant.

Section 406.032 provides in relevant part as follows:

An insurance carrier is not liable for compensation if:

(1) the injury:

(D) arose out of voluntary participation in an off-duty recreational, social, or athletic activity that did not constitute part of the employee's work-related duties, unless the activity is a reasonable expectancy of or is expressly or impliedly required by the employment; . . .

The claimant argues that he was expressly or impliedly required to attend the fishing trip and points to evidence that supports this position. There is, however, contrary evidence in the record supporting the view that the claimant's participation was voluntary. One of the key evidentiary conflicts is the testimony of the claimant that while he did not attend in past years, he felt his attendance was required in (year) because his supervisor had told him that his attendance would affect his annual review and his raise. This testimony is contradicted by the supervisor who testified that he did not tell the claimant this. Thus, the question of whether the claimant's participation in the fishing trip was expressly or impliedly required is one of fact about which the evidence is in conflict.

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). 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). 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.).

Under the above standard of appellate review we cannot say that the hearing officer committed error in finding that the claimant was not expressly or impliedly required to participate in the employer's fishing trip and picnic. Therefore, under Section 406.032 (1)(D) we must affirm her decision that the claimant was outside the course and scope of his employment at the time of his injury. Finally, with no compensable injury found, there

is no loss 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:

Lynda H. Nesenholtz
Appeals Judge

Tommy W. Lueders
Appeals Judge