APPEAL NO. 990033

Following a contested case hearing held on December 17, 1998, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury to his side, neck or head on _____, and that because he does not have a compensable injury, he does not have disability. Claimant has appealed these determinations on evidentiary sufficiency grounds. The respondent (carrier) asserts in response that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

Claimant testified that on February 2, 1998 (all dates are in 1998 unless otherwise stated), he commenced employment at (employer) as an assistant maintenance associate; that on _____, as he was carrying a bag of salt in each hand up the stairs into the east attic of the clubhouse for the water purification system, he turned at the top of the steps, lost his balance, and fell against the platform; that he got up, filled the unit and went back downstairs for two more bags of salt which he carried up the stairs; and that he then proceeded to check the air conditioning units and piping in the attic for leaks or strange sounds. Claimant said he saw a leak in the west side air conditioning unit; that he got underneath the equipment with a flashlight to check it; that he hit his head on the underside of the unit and lost consciousness; and that the next thing he remembers is his foreman, Mr. L, who was accompanied by the golf pro, Mr. G, kicking him. He said that Mr. L helped him down the stairs, that he asked to see a doctor but was "detained" in the office by Mr. L, who was not being helpful, so he made an appointment for the same day with the doctor who treated his injuries from a 1993 motor vehicle accident (MVA), Dr. R, and left the premises. Claimant further stated that Dr. R took him off work and has not released him to return to work, that he has not since worked anywhere, and that Dr. R wants diagnostic testing which the carrier will not authorize.

Mr. L testified that on the morning of _____, when he could not find claimant, who had been previously reprimanded for tardiness and harassment, he began to look for him. He said he found claimant asleep in the west attic by the air conditioning unit, that claimant was laying on his back with his hands crossed across his stomach and using a piece of 2" x 4" for a pillow, and that claimant was snoring. He said he went downstairs and got Mr. G, that both of them then went up into the attic where claimant was still asleep, that he nudged claimant with his foot and claimant woke up, rolled over towards the air conditioning unit and began to talk about problems with that unit, and that claimant then said he had hurt his head and also said he may have been stung by a bee. Mr. L further testified that claimant put his arm around Mr. L's neck and asked to be helped down the stairs, that he offered to call an ambulance which claimant declined, that the employer's human resources manager called a clinic and arranged for claimant to be seen, and that claimant declined this offer of

treatment and instead called his own doctor and drove off. Mr. L further stated that there was no leak or other problem with the air conditioner unit and that claimant had no reason to be in the west attic, which had to be accessed by a different staircase than the east attic, for any of the tasks he had assigned claimant to complete that day. Incidentally, the high point of claimant's cross-examination of Mr. L was asking the witness to imitate claimant's snore. Claimant testified in rebuttal that he has been unable to snore since an operation in 1996 for a deviated septum.

Mr. G's testimony was essentially the same as Mr. L's concerning claimant's being asleep in the west attic except that Mr. G said he did not hear claimant snoring and that claimant had his hat tilted down over his face. He, too, expressed the opinion that claimant was asleep when Mr. L woke him up.

The history portion of Dr. R's _____ report states that while carrying bags of salt, claimant slipped and fell on his left side, that he experienced soreness and numbness in the left side of his neck and to a lesser degree in the legs but continued working, and that he later hit his head checking a leak in an air conditioning unit and "was in a daze for several minutes." Dr. R diagnosed posttraumatic headaches secondary to closed head injury with transient loss of consciousness, neck pain with radicular features, and previously stable thoracic outlet syndrome. In an undated report, Dr. R wrote that claimant was in an MVA in April 1993, that he first examined claimant on November 7, 1995, and that his findings then were consistent with cervical radiculopathy, a thoracic outlet syndrome, and a lumbar radiculopathy, as a consequence of the MVA. Claimant's undated Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) states his injury as possible head injury, excessive pain on left side, and frequent headaches now and since the accident.

Claimant had the burden to prove by a preponderance of the evidence that he sustained the claimed compensable injury and that he had disability as a result of that injury. The hearing officer found that claimant did not suffer injuries to his sides, neck or head while at work on _____, that Dr. R has kept claimant off work pending certain diagnostic testing, and concluded that because claimant does not have a compensable injury, he does not have disability within the meaning of the 1989 Act. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel does not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer could and quite obviously did reject claimant's testimony and credit the opinions of Mssrs. L and G that claimant was asleep when found in the attic on _____ and that he had not sustained an injury on the job that day.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge