APPEAL NO. 990057

On December 16, 1998, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). Appellant (claimant) requests reversal of the hearing officer's decision that he did not sustain a compensable injury on _____, and that he has not had disability. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

The evening of _____ (all dates are in 1998 unless otherwise indicated) claimant was working as a security officer for the employer at a client's park. Claimant's job duties state that dogs are not to be allowed to remain on the grounds. Claimant said that the evening of _____ he was chasing dogs out of the park when he slipped on an incline and scraped his right ankle on a railroad tie that was a border for a garden, that he worked the remainder of his shift until midnight, and that the next morning he went to a hospital emergency room because his right foot was swollen. Hospital records of (the day after the date of injury) record that claimant reported that he fell 20 feet down an embankment at work the night before, that the claimant had an "old abrasion" on his right ankle with swelling, that he was diagnosed as having cellulitis of the right ankle, and that he was prescribed antibiotics and crutches. The claimant said that it was not an old abrasion, that he had never before had problems with his right foot or ankle, and that part of the scab had come off when he removed his sock.

A radiologist reported that an x-ray of claimant's right ankle done on (the day after the date of injury) showed a soft tissue injury. The claimant returned to the hospital on July 24th and 25th and was treated with antibiotics. A hospital information sheet states that cellulitis is a skin infection that results from the growth of germs underneath the skin and that it sometimes develops around cuts, burns, or scrapes, but that often it develops for no apparent reason in normal, uninjured skin. A hospital record of July 25th states that claimant fell over a railroad tie. Claimant subsequently treated with Dr. H for his right ankle. Claimant said the doctors took him off work for two weeks and then recommended light-duty work, which, he said, the employer did not offer to him. Claimant said that he was scheduled to be off work on (the day after the date of injury) and that on that day he called ST, the employer's operations director, and told him that he had been hurt chasing dogs off the property, that he had been told at the hospital not to work, and that someone would have to take his place at work on July 24th.

ST said that claimant called him on July 24th and told him that he could not work that day because he had an infection of his right foot, that it was just something that he gets on his foot, and that it was a "periodical thing." Claimant denied that he told ST that he had for some time had a problem with his foot. ST said that it was not until July 27th that claimant told him that he had slipped and scraped his foot on a railroad tie while chasing dogs at work.

While the evidence shows that claimant was treated for an injury to his right ankle when he went to the emergency room on (the day after the date of injury) and was subsequently treated for that injury, claimant had the burden to prove that his injury occurred in the course and scope of his employment. Johnson v. Employers' Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer's Statement of the Evidence reflects that he was not persuaded that claimant's injury occurred while working for the employer and that he found ST to be the more credible witness. The hearing officer determined that claimant did not sustain a compensable injury and that, because he did not sustain a compensable injury, he did not have disability.

The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact even if the evidence would support a different result. Appeal No. 950084. This is so even though, were we fact finders, we might have drawn other inferences and reached other conclusions. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and is not contrary to the overwhelming weight of the evidence. The hearing officer did not err in determining that claimant has not had disability, because, without a compensable injury, claimant would not have disability as defined by Section 401.011(16).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge