

APPEAL NO. 990458

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 February 9, 1999. The issues at the CCH were whether the respondent, who is the claimant, sustained a compensable injury on _____, and whether he had disability as a result of that injury.

The hearing officer found that the claimant injured his back and stomach on _____, and that he had disability from this injury from _____, through the date of the CCH.

The appellant (carrier) has appealed, arguing that the claimant is not credible on either the matter of injury or disability. The claimant recites evidence in favor of the decision and asks that it be affirmed.

DECISION

Affirmed as not being against the great weight and preponderance of the evidence.

Claimant was the last witness to testify, so the account of the accident was not immediately clear. He was employed to work on construction of a parking garage and the shift ran from 7:00 a.m. until 3:00 p.m. What was stated from witnesses for the company, Mr. B, and Mr. S, was that investigation of the accident through interviewing four to five workers on the job site showed that no one was aware of any accident. Mr. S, the safety director, said he specifically asked two persons identified as witnesses and neither was aware of an accident. Both Mr. S and Mr. B stated that one identified witness, Mr. RH, said he was given a statement to sign which had been prepared by the claimant's attorney to assert that he saw the accident happen, but he refused to sign it because it was not true. However, Mr. RH also declined to give a statement to this effect to the employer or carrier because he was related to claimant. There was no indication at the CCH that either party attempted to compel the presence of Mr. RH as a witness or any of the other persons in the area who told Mr. B and Mr. S that they did not see or hear of any accident happening on the date in question.

Mr. B was the project manager. He said that he approached the claimant at around 3:00 p.m. on _____, to ask if he would work overtime. He said claimant told him that he was not feeling well and did not wish to work overtime. Mr. B said that claimant did not contend he was hurt on the job.

Mr. H testified that he was working on _____, with the claimant. He saw claimant carrying a "four by four" piece of wood on his shoulder and saw him slip and fall. Mr. H said that he helped him get up. Mr. H said that the fall resulted in a tug on his cable. He said he was present when claimant reported the fall to his supervisor. Asked to explain, he said that he was asked by the supervisor the next day why the claimant did not report to work,

and he told the supervisor that claimant fell at work. Mr. H then said that the accident was also reported about 1:00 or 2:00 in the afternoon. He said he had no animosity toward the company because he was laid off for not working fast enough. Not until he was briefly recalled after the claimant testified did Mr. H said that claimant was dangling in the air.

Mr. B said he laid off claimant and Mr. H on the same day and that Mr. H asked if he could get the claimant's paycheck. Mr. B said that Mr. H did not mention that the claimant had an injury and, when claimant's wife picked up his paycheck a few days later, she also did not mention it. Mr. B said he first found out about the injury sometime in October from the company. Mr. B and Mr. S both said that the interconnected safety harness system would mean that a fall would create a sharp tug throughout this system that would make other workers aware of a fall. Mr. B said there were roughly 40 people in the area and it would be impossible for someone to fall and other workers not to know about it.

The claimant, whose account of the fall in his answers to interrogatories was similar to that testimony of Mr. H (that he slipped and fell while carrying the wood), was somewhat enhanced during the CCH by his assertion that he fell entirely off the platform and was left "hanging" by his cable and had to be helped up onto the platform by Mr. H. He said just he and Mr. H were working together and other workers in the area were not hooked up to him. Claimant said that no one had ever told him, to the date of the CCH, that he was terminated. Claimant filled out a claim of injury on October 1, 1998.

On February 2, 1999, claimant filed answers to interrogatories propounded by the carrier. His answer as to how the injury happened was:

Claimant was on the second floor a [sic] five story building, claimant was carrying a 4 x 4 when he slipped and fell on one knee causing the 4 x 4 to hit his stomach and the harness protected me from falling.

Asked on cross-examination if this is what happened, claimant said that if he hadn't had the harness, he would have fallen off the second floor. He stated that he was dangling for 15 minutes. He said that the accident happened around 1:30 or 2:00 p.m.

The records of claimant's doctor, Dr. G, do not recite any history of how the accident occurred, other than to say that the claimant "was injured at work." Dr. G stated that the claimant had abdominal pain and back pain radiating down his legs. Dr. G stated that the claimant (on October 16, 1998) was found to have muscle spasms and loss of lordosis. However, palpation of facets at all lumbar levels was found to be non-tender. He found some pain centrally on palpation of L4-5 and L5-S1. There was pain with "extremes" of range of motion. Claimant had only generalized pain in the epigastric area. As far as whether the claimant could work, Dr. G took claimant off work from December 11, 1998, through February 18, 1999.

Clearly, this is a case that presents conflicting evidence from which different inferences could be drawn on both issues. For example, there was no direct evidence, through the medical records and through testimony, that claimant's injury caused an

inability to work from the date he was laid off until the first effective date that Dr. G took him off work, in December 1998. But the hearing officer, who has the opportunity to observe the demeanor of persons testifying, is the sole judge of the weight and credibility of 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 of 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.). 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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

While the testimony concerning the claimant "dangling in the air" would seem to be refuted by evidence concerning the harness system, as well as the claimant's initial answers to interrogatories that omitted this pertinent fact, the hearing officer could nevertheless believe that the claimant indeed fell and that injury resulted and his recollection of this event was somewhat incomplete in retrospect. She can disbelieve this dramatic testimony and yet still believe that the claimant sustained some injury from falling forward on his knee. As there is some sufficient support for the hearing officer's decision, notwithstanding the existence of equally plausible contrary inferences, we will affirm the decision and order.

For the reasons set forth in this decision, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge