

APPEAL NO. 990585

On February 17, 1999, 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). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury on _____; and (2) whether claimant has had disability. The claimant requests reversal of the hearing officer's decision that: (1) claimant did not sustain a compensable injury on _____; and (2) claimant has not had disability. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant, who is 56 years of age, testified that on _____, he broke his right foot at work when he stepped off a forklift, his right foot twisted, and all his weight came down on his right foot. He said he has not been able to work since his injury. Claimant went to the office in the warehouse where he was working and soaked his foot in water. JL, who was in the office, testified that claimant told her that his foot was hurting and that his gout was acting up but did not tell her that he had had an on-the-job injury. JL said she saw claimant's right foot when he soaked it and that it did not look swollen. Claimant said he mentioned gout to JL because another employee had told him that it looked like he had gout. Claimant said that when he got home on _____, he fell on his front porch because he could not bear weight on his right foot and that he hurt his left arm and backside when he fell.

Claimant's wife lives in City 1. She said that claimant called her on February 12th and told her that he thought he had broken his foot at work and that he had fallen on the porch when he got home on _____ because he could not bear weight on his right foot. Claimant was seen at a hospital on February 14, 1998, and the hospital records of that date note that claimant complained of having right lower extremity swelling for four days, that claimant's right foot was swollen, and that claimant denied "known trauma." Claimant said that he did not know what trauma meant at that time but that he did tell the doctor at the hospital that he injured his foot when he stepped off the forklift. Claimant's wife also said that claimant told the doctor that he had hurt his foot stepping off the forklift. An x-ray of claimant's right foot taken on February 14, 1998, showed a fracture of the os calcis (heel bone) and the doctor at the hospital diagnosed him as having a calcaneal fracture of the right foot and prescribed crutches and no weight bearing on the right foot. Claimant returned to the hospital on February 23, 1998, and hospital records of that date note that claimant said he fell off a forklift at work. A doctor's note states that claimant is unable to work. Claimant denied having made several statements that appear in a transcript of a recorded statement taken by the employer.

The hearing officer found that on _____, claimant did not sustain damage or harm to the physical structure of his body while he was engaged in the exercise of his job duties

with the employer and she concluded that claimant did not sustain a compensable injury on _____. Claimant had the burden to prove that he was injured 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 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. We conclude that the hearing officer's finding that claimant was not injured at work on _____, and her decision that claimant did not sustain a compensable injury on _____, are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Without a compensable injury, claimant would not have disability as defined by Section 410.011(16).

Although, as pointed out by claimant, the hearing officer incorrectly listed the written statement of BT as having been admitted into evidence when it was actually excluded, we conclude that claimant has not shown reversible error because there is no indication in the hearing officer's summary of the evidence or discussion of the evidence that she relied on BT's statement in making her findings and BT's statement is essentially cumulative of JL's testimony.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge