APPEAL NO. 990724

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 5, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the respondent (carrier) did not waive its right to contest compensability because it filed a timely and sufficient contest; and that the claimant did not have disability within the meaning of the 1989 Act because he did not sustain a compensable injury. In his appeal, the claimant asserts that the hearing officer's determinations that he did not sustain a compensable injury and that the carrier did not waive its right to contest compensability are against the great weight of the evidence. In its response the carrier urges affirmance.

DECISION

Affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The claimant testified that on _____, he was working as a general laborer for a temporary agency and was assigned to a client company assembling racks and shelves. He stated that he had been so employed for about two weeks. The claimant stated that as he was stacking shelves, a rubber mallet fell from the top shelf and hit him on the back of the neck. He maintained that Mr. G, his supervisor at the client company, saw the incident happen. The claimant testified that he reported his injury to his employer on March 4th or 5th after he had been told that his services were no longer required at the client company. He stated that he went for a drug test on March 5th, at the request of the employer. That test was positive for marijuana. He acknowledged that he smoked marijuana before he started working for the employer and that he smoked after his injury for pain; however, he denied that he smoked marijuana on the date of the injury.

Mr. T testified at the hearing that he is the area manager for the temporary agency where the claimant was employed at the time of his alleged injury. Mr. T stated that on March 4, 1998, he had Mr. MG call the claimant to tell him that his services were no longer required at the client company because Mr. G, the supervisor at the client company, had twice caught the claimant sleeping on the job. Mr. T stated that within 10 minutes of that telephone conversation, the claimant called Mr. MG and asked if he was being let go because he had been injured when the mallet fell on his neck, noting that the employer first learned of the alleged injury at that time. Mr. T testified that he called the claimant on March 5th and the claimant told him that he had been injured on (claimant's alleged date of injury). Mr. T stated that he asked the claimant how he had been injured on that date as it was a Saturday and he was not working that day. Mr. T stated that at that point, the claimant said that he had been injured on Tuesday, (3 days after alleged date of injury). Mr. T testified that he contacted Mr. G to ask about the claimant's alleged injury and that Mr. G told him that he did not know anything about an injury. Mr. T explained that the claimant had not been terminated when he was told not to return to the client company and that he would have been reassigned except for the positive drug test.

The claimant initially sought treatment with Dr. F, to whom he was referred by the employer. Dr. F diagnosed a head/face contusion, noting that the claimant gave a history of something falling on his neck. In his Initial Medical Report (TWCC-61), Dr. F noted that his examination of the claimant's neck did not reveal any deformity, swelling or abrasion, and that his neck was "tender to palpation with lateral rotation of neck." The claimant began treating with Dr. K, a chiropractor, on March 19, 1998. Dr. K initially diagnosed cervical IVD syndrome without myelopathy and cervical muscle spasm. Dr. K referred the claimant for MRI testing. The impression of the April 21, 1998, cervical MRI was "[a]nterior spurring at C3-4 which is a remote post-traumatic finding," "[r]eversal of curvature of the C-spine which may correlate with paraspinous muscle spasm," and "2-3mm focal right parasagittal disc herniation at C5-6 that is slightly impinging the C5 nerve root in the right lateral recess. Clinical correlation is advised." On May 11, 1998, Dr. H, D.O., examined the claimant at the request of Dr. K. Dr. H diagnosed cervical, thoracic, and lumbar strain with somatic dysfunction, cephalgia due to cervical/thoracic injury, and bilateral trapezius spasm, noting that he had to rule out cervical disc dysfunction.

On March 17, 1998, the carrier completed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21). In the space provided for listing the reason or reasons that payment was refused or disputed, the TWCC-21 states:

> THE CLAIMANT'S INJURY OCCURRED WHILE THE CLAIMANT WAS IN A STATE OF INTOXICATION; THEREFORE, PURSUANT TO TEX. LAB. CODE ANN. 406.032(1)(A), THE CARRIER DISPUTES THE EXISTENCE OF A WORK RELATED INJURY AND DISPUTES AN INJURY WITHIN THE COURSE AND SCOPE OF EMPLOYMENT.

Initially, we will consider the claimant's assertion that the hearing officer's determination that he did not sustain an injury in the course and scope of his employment on _____, is against the great weight of the evidence. The claimant had the burden of proving that he sustained an injury in the course and scope of his employment. Generally, the hearing officer, as the fact finder, can find injury based on the claimant's testimony alone, if it is considered credible. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the hearing officer is not bound to accept the claimant's testimony. A review of the hearing officer's decision demonstrates that she was not persuaded by the claimant's testimony that he was injured when a mallet fell on his neck on _____, while he was working for the client company. She was acting within her province as the sole judge of the weight and credibility of the evidence under Section 410.165(a) in rejecting the claimant's testimony. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not sustain an injury in the course and scope of his employment is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Therefore, no sound basis exists for us to reverse that determination on appeal.

Next, we consider the claimant's assertion that the hearing officer erred in finding that the carrier sufficiently contested compensability and, thus, had not waived its right to

do so. The claimant contends that the carrier's dispute only raised a defense of intoxication and that the hearing officer's interpretation that the dispute raised by the carrier was sufficient to raise a compensability challenge "is completely without support." The claimant maintains that the hearing officer erred in considering only a portion of the contest filed by the carrier and determining that it was sufficient, in isolation, to raise a course and scope defense. The carrier responds that the claimant's contention is that it either "semantically or grammatically improperly formulated the sentence on the TWCC-21 disputing the claim." It states that the claimant has raised a "superfluous argument" that "illustrates the prohibition of raising form over substance." At issue is the question of whether the statement on the carrier's TWCC-21 is sufficient to raise a course and scope defense in addition to an intoxication defense. As noted above, that statement provides "[t]he claimant's injury occurred while the claimant was in a state of intoxication; therefore, pursuant to Tex. Lab. Code Ann. 406.032(1)(A), the carrier disputes the existence of a work related injury and disputes an injury within the course and scope of employment." We have previously noted that "magic words" are not required to dispute compensability and that we look to the reason or reasons stated as a whole to see if any reason would be a defense to compensability. Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993. In this instance, it appears that the hearing officer read the last part of the sentence, which provides that the carrier "disputes the existence of a work related injury and disputes an injury within the course and scope of employment," by itself and determined that the TWCC-21 contained "a full and complete statement of the grounds for Carrier's refusal to begin payment for Claimant's alleged injury." In order for the hearing officer's interpretation to prevail, the word "therefore" on the TWCC-21 must be interpreted as the word "and." We find no basis for so interpreting that word. Giving the statement on the TWCC-21 its plain meaning, it is apparent that the carrier's dispute of this claim is based on intoxication. If the carrier had listed more than one reason for contesting or disputing the claim, the hearing officer could have considered each of those reasons in order to determine if any was sufficient to raise a course and scope defense. However, where, as here, a single reason for disputing the claim is advanced, the hearing officer could not pull a portion of a single sentence out of context and interpret it as a course and scope challenge. Accordingly, we reverse the hearing officer's determination that the carrier timely and sufficiently contested compensability in this case and render a new decision that the carrier's contest was not sufficient to raise a defense other than intoxication which was not in issue. *See* Section 409.022(b). As such, we likewise determine that the carrier has waived its right to contest compensability pursuant to Section 409.021(c).

The hearing officer determined that the claimant did not have disability because he did not sustain a compensable injury. Given our determination that the carrier waived its right to contest compensability in this instance, the claimant's _____, injury has become compensable as a matter of law. Thus, we reverse the hearing officer's disability determination and remand for her to make findings and conclusions as to whether the claimant had disability as a result of his compensable injury.

We affirm the hearing officer's determination that the claimant did not sustain an injury in the course and scope of his employment on _____. We reverse the hearing

officer's determination that the carrier timely and sufficiently contested compensability in this case and render a new decision that the carrier has waived its right to contest the compensability of the _____, injury. Accordingly, the claimant's injury became compensable as a matter of law under Section 409.021(c). The hearing officer's disability determination, which was premised upon her determination that the claimant did not sustain a compensable injury, is reversed and the issue is remanded for the hearing officer to reconsider and resolve the issue of whether the claimant had disability as a result of his compensable injury. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Judy L. Stephens
Appeals Judge