APPEAL NO. 990789

This appeal is brought 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 15, 1999. He determined that on _____, the respondent (claimant) injured his low back in the course and scope of his employment when he fell in a silo; that he had the normal use of his mental and physical faculties and was not intoxicated when he fell in the silo; that the appellant (carrier) is not relieved of liability; and that the claimant sustained a compensable low back injury on _____. The carrier requested review, urged that the evidence is not sufficient to support those determinations, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in its favor. A response from the claimant has not been received.

DECISION

We affirm.

The claimant testified that he worked for a temporary agency and was assigned to work on _____, at a location that required that he ride on three different buses to get to work; that he left his residence at about 5:30 a.m. to get to work on time; that it took at least two hours for him to get to work; that he drank alcoholic beverages the night before, but that he did not drink alcoholic beverages that day; that he first cleaned in a warehouse; that he then cleaned in a silo by himself; that a machine started, startled him, and caused him to trip over a pipe that came out of the machine; that there was corn or potato powder on the floor of the silo; that there was water under the powder in part of the silo; that he fell from the wet side to the dry side; that he fell on his left side and hurt it and his lower back; that he wiped the powder from his clothing; that he went out of the silo and told a person what had happened; that he told Mr. D, his supervisor, what had happened; that persons went into the silo to see what had happened; that Mr. D took him to a clinic; that he told the person at the clinic that his lower back hurt; that at the clinic he gave a urine sample for a drug test; that he tried to use a breathalyzer, but it would not work; and that he refused to give blood for a blood alcohol test because he is afraid of needles. He said that after he went to the clinic, he was treated by a chiropractor; that the chiropractor told him that he could no longer treat him and said something about intoxication; and that on November 26, 1998, he went to a county emergency room because he needed medication for his back. He stated that he has not worked since the accident because he has not been able to work and that his mother has helped him pay his bills.

In an unsigned letter dated June 22, 1998, Mr. D stated that the claimant said that he had fallen in a silo in which he was working; that the floor of the silo was covered with corn dust and that there was water on part of the floor; and that the tops of the claimant's shoes were coated with corn dust, but there was no corn dust on his pants or shirt. In a handwritten note on the letter, Mr. D states that the claimant was requested to perform a breathalyzer test; that he, Mr. D, was told that the claimant did not blow hard enough; and that the claimant was requested to let an attendant draw blood, but that the claimant

refused. In an unsigned statement dated June 26, 1998, Mr. D provided the same information and stated that the claimant's clothes would not have dried by the time he saw the claimant and that the corn dust cannot be taken from clothing by simply brushing them. Mr. D also said that it was brought to his attention that the claimant had a strong alcohol odor and that when he spoke to the claimant at close range he noticed alcohol on the claimant's breath. The record also contains an unsigned transcript of an interview of Mr. S, on June 30, 1998, by an adjuster. Mr. S's comments concerning the silo and the claimant's clothing are consistent with those of Mr. D. In addition, Mr. S said that the claimant appeared to be a little slow in his speech when he was sent to the silo; that, when the claimant came back from the silo, he staggered a little bit and walked kind of unsteadily; that he sat down, closed his eyes, and was half asleep; that he had a strong odor of alcohol; and that he was told that the claimant refused to give a urine sample.

Notes made at the clinic on _____, state that the claimant fell over a two-inch pipe. The carrier pointed out that the Initial Medical Report (TWCC-61) also completed on that day in handwriting appears to say the claimant fell off a two-inch pipe. The claimant did not offer into evidence reports from a chiropractor, stating that he left them at home. A report from the county hospital district dated November 26, 1998, states that the claimant had a lumbar strain from lifting heavy objects and that he could return to work performing light duty for the next two weeks.

In its appeal, the carrier takes exception to some of the hearing officer's comments concerning compensable injury. Compensable injury is defined as an injury that arises out of and in the course and scope of employment for which compensation is payable. Section 401.011(10). Course and scope of employment is defined as any activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. Section 401.011(12). In its appeal, the carrier was confused about those two terms, and the comments of the hearing officer do not indicate that he wrongfully used the term compensable injury.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation

Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The hearing officer's determination that the claimant was injured in the course and scope of his employment is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Finally, we address the issue of whether the claimant was intoxicated at the time he was injured. Section 406.032(1)(A) provides that a carrier is not liable for compensation if the injury occurred while the claimant was in a state of intoxication. The record contains no tests showing alcohol concentration in the claimant's blood. Intoxication may also be established by proof that the claimant did not have the normal use of mental or physical faculties resulting from voluntary introduction into the body of an alcoholic beverage. Section 401.013(a)(2)(A). The burden was on the carrier to prove that the claimant was intoxicated at the time of the injury. The hearing officer's determination that the claimant was not intoxicated at that time is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust.

We affirm the decision of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge