

## APPEAL NO. 990971

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 April 8, 1999. The issues at the CCH were injury, disability, and average weekly wage (AWW). During the CCH the parties stipulated that the appellant's (claimant herein) AWW was \$396.21, resolving that issue. The hearing officer concluded that the claimant did not sustain a compensable injury on \_\_\_\_\_, and that the claimant did not have disability because he did not suffer a compensable injury. The claimant appeals, arguing that the hearing officer's resolution of these issues is contrary to the great weight and preponderance of the evidence and pointing to examples of what he considers indications of bias by the hearing officer. The claimant also objects to the hearing officer determining the issue of occupational disease when that issue was not before him. The respondent (carrier herein) replies that there was sufficient evidence to support the decision of the hearing officer, that the hearing officer was not bound to determine the case based upon the allegation that the claimant filed the claim to retaliate for an adverse personnel action, and that the issue of occupational disease was tried by consent.

### DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The claimant testified that his duties for his employer included cleaning tanks. The claimant testified that after cleaning a small tank on \_\_\_\_\_, he became dizzy due to fumes and fell backwards hitting his head, neck, left shoulder, and back. The claimant testified that he did not report the accident that day because no supervisor was available, but did go home early. The claimant testified that he did report the accident the next morning and was given a drug test and taken by a supervisor to the company doctor. The company doctor diagnosed cervicodorsal strain and cervical strain. He released the claimant to work with restrictions. The claimant testified that he worked with these restrictions and on November 20, 1998, sought treatment with Dr. L who placed him off work. The claimant testified that he was unable to work thereafter as a result of his injury.

There was also evidence in the testimony of the claimant and medical records that the claimant developed coughing with discharge of mucous and blood. The claimant was treated for this condition by Dr. W who related it to his exposure to fumes at work. The claimant testified that he was exposed to chemical fumes cleaning tanks at work without the use of a mask or respirator. A supervisor testified that the tanks are used to haul saltwater from oil wells, freshwater to drilling rigs, drilling mud, and brine water. He testified that the employer does not haul toxic materials, gasoline, or oil in the tanks. The supervisor testified that he had cleaned the tanks himself and had never been exposed to toxic chemicals while doing so.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given 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 regarding 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

A finding of injury may be based upon the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298,299 (Tex. App.-Houston [1st Dist.] 1987, no writ). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found no injury contrary to the testimony of the claimant. The claimant had the burden to prove he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The claimant complains that the hearing officer seemed to be interested in developing evidence at the hearing through his own questioning of inconsistencies between the claimant's testimony concerning the accident and the history of the accident in the medical records. The claimant also complains that the hearing officer did not mention inconsistencies in the supervisor's testimony in his decision. While the claimant argues this shows bias on the part of the hearing officer, we will not infer bias from this. It was up to the hearing officer to determine what weight to give the evidence.

The claimant argues that it was error for the hearing officer to find that the claimant did not suffer an occupational disease due to exposure to toxic chemicals on \_\_\_\_\_.

The claimant argues that this was not an issue before the hearing officer. The stated issue before the hearing officer was whether the claimant sustained a compensable injury on \_\_\_\_\_. The thrust of the evidence dealt with an asserted injury due to a fall at work, but there was also evidence presented by the claimant that he suffered an injury due to exposure to toxic chemicals while cleaning out the tank on \_\_\_\_\_. Under these circumstances, we find no error in the hearing officer addressing whether the claimant suffered an injury due to chemical exposure on \_\_\_\_\_.

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. See Section 401.011 (16).

The decision and order of the hearing officer are affirmed.

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Robert W. Potts  
Appeals Judge