APPEAL NO. 991010

On April 8, 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). With regard to the issues at the CCH, the hearing officer decided that respondent (claimant) sustained a compensable injury on _____; that he had disability from _____, through the date of the CCH; and that appellant (carrier) specifically contested compensability. Carrier requests that the hearing officer's decision on the issues of compensable injury and disability be reversed and that a decision be rendered in its favor on those issues. No response was received from claimant.

DECISION

Affirmed.

"Course and scope of employment" means "an 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). "Injury" means "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). "Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16).

There was much conflicting evidence in this case concerning whether claimant, who was employed as a forklift driver, was accidentally struck by a forklift at work on _____, whether he sustained an injury if he was struck by a forklift, and whether he had disability. Claimant testified at the CCH. MH, who was driving the forklift that is claimed to have struck claimant, and RR, a manager, also testified at the CCH. Generally, the issues of injury and disability in workers' compensation cases may be established by the testimony of the claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). 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). Claimant also had the burden to prove that he has had disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993.

The hearing officer found that on _____, claimant was looking for a forklift to use in the warehouse of the company his employer had assigned him to work at, when he was struck by a forklift being driven in reverse by MH; that following that accident claimant sought medical attention on _____, with Dr. L, who diagnosed claimant's injuries as a contusion of the chest wall and a lumbar sprain; that Dr. L excused claimant from work; that since September 10, 1998, claimant has been treated by Dr. M, who has noted claimant's low back pain, muscle spasms in his low back, and limited range of motion and has

excused claimant from work since he first saw claimant; that claimant has undergone physical therapy for his injuries and Dr. M has recommended additional therapy; that on _____, claimant sustained a contusion to the chest wall and lumbar sprain injuries in the course and scope of his employment; and that the claimant's inability to work from _____, through the date of the CCH was due to the injury of _____. The hearing officer concluded that claimant sustained a compensable injury on _____, and has had disability from _____, through the date of the CCH.

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 finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Claimant testified that after he was struck by the forklift he was able to walk to a supervisor's office and report the accident and then drove himself to see Dr. L, his family doctor. RR testified that claimant was not happy when he was informed just prior to the alleged accident that he was being transferred and that if claimant had been hit by the forklift, he would have been struck in the legs and body and would have been seriously injured. MH testified that when he was driving the forklift in reverse, he heard claimant's clipboard hit the forklift, that he does not think the forklift hit claimant, and that claimant would not have been able to walk if he had been hit by the forklift.

The hearing officer found that claimant credibly testified that he was struck by the forklift and that claimant's injuries were promptly diagnosed, although a lumbar herniation was later ruled out by an MRI. The fact that a lumbar spine MRI was reported to be normal and that lumbar x-rays were negative for fractures does not preclude a finding of injury as defined by the 1989 Act. Sprains and strains are compensable. Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.). Although there is evidence to the contrary, claimant's testimony and the reports of Drs. L and M support the hearing officer's findings of injury in the course and scope of employment and disability. An appellate 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 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. We conclude that the hearing officer's findings, conclusions, and decision 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).

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Judy L. Stephens
Appeals Judge