APPEAL NO. 991327

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 (CCH) was held on May 19, 1999. He determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment on _____, and that since he did not sustain a compensable injury, he did not have disability. The claimant appealed, extensively reviewed evidence favorable to his position, attached an affidavit that was obtained after the CCH, stated that the respondent (carrier) did not offer medical evidence to controvert medical evidence that he presented, contended that the hearing officer erred in permitting hearsay testimony, urged that the determinations of the hearing officer are against the great weight and preponderance of the evidence, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that he sustained an injury in the course and scope of his employment on _____, and that he had disability. The carrier replied, stated that the affidavit submitted by the claimant should not be considered on appeal, urged that the evidence is sufficient to support the determinations of the hearing officer, and requested that his decision be affirmed.

DECISION

We affirm.

The claimant testified that he worked for the employer since 1988; that he drove a truck and picked up and delivered items; that he injured his left shoulder in March 1997; that he does not remember how he injured his left shoulder; that Dr. M performed surgery on his left shoulder; that he returned to work in May or June 1998; that at first he worked four hours a day; and that later he worked full days, but did not work full days five days a week. He stated that on _____, he was standing on the ground behind a truck; that he lifted a box to place it on a shelf in the truck that was slightly above his head; that the weight in the box shifted; that the box came back on his right shoulder; that he has a burning sensation deep inside his shoulder; that he thought that he had pulled a muscle; that he took a break; that he went to the downtown office of the employer; that he talked with a supervisor; that he was given a 1-800 telephone number to use to call the employer's safety office; that he made the telephone call; that he knew from experience that the remainder of the places on his route would have light items to pick up; that he completed the route; that he went to the employer's location that he worked out of; that Ms. E was the only person in the office; that he did not see Mr. S, the business manager; that he talked with Ms. E; and that he completed an accident report. The claimant said that Mr. B advised him that accident reports were no longer filled out, that he was to call a 1-800 number to provide the information, that he did so, that Mr. B got him an appointment at a clinic, that he was not pleased with his treatment at the clinic, that he went to Dr. M, that Dr. M told him that he needed a shoulder decompression, that both doctors took him off work, and that he has not been able to work because of the injury to his right shoulder. He testified that he was given a warning letter because of attendance problems, that he was placed on working termination, that that meant that he could continue working until he had

a hearing and a decision was made on his termination, that a union representative told him that it would be helpful if he obtained letters from customers, that he worked for a number of days obtaining letters, and that he did not tell customers that _____, was his last day working for the employer. The claimant said that he had a grievance hearing in (City), (Country), in November 1998 and that he was terminated by the employer.

Mr. S testified that from June to October 1998, the claimant's attendance was poor; that on _____, he saw the claimant before and after work; that after work, he saw the claimant pick up a small duffel bag, place it on his right shoulder, and walk by him facing him; and that the claimant did not say anything about being hurt and did not appear to be having any problem. Mr. W, the operations supervisor, testified that on October 21 or 22, 1998, he was training another driver; that he accompanied the other driver on the route that the claimant had been working on; and that about four or five customers, including two shipping clerks at a hospital, said that the claimant had told them that he had been terminated and would not be returning to work. The claimant objected to the testimony of what customers told Mr. W because it was hearsay. The hearing officer did not sustain the objection.

In an Initial Medical Report (TWCC-61) dated October 22, 1998, Dr. R stated that the claimant reported that on _____, he was lifting a box that weighed about 55 pounds and felt pain and pull in his right shoulder; that no crepitus, clicks, swelling, or obvious effusion was noted; and that the claimant refused x-rays. Dr. R diagnosed a right shoulder strain and returned the claimant to work on that day with no lifting, pushing, or pulling and limited use of the right arm. Medical records concerning the 1997 injury to the left shoulder are in the record. In a report dated November 30, 1998, Dr. M stated that he treated the claimant for an impingement of his left shoulder; that on _____, the claimant had an injury to the opposite shoulder; that he is having symptoms and signs almost identical to those on the left that were treated; that examination revealed normal appearance of the shoulder and good range of motion (ROM), although ROM was painful at the extremes; that he has markedly positive impingement signs; that plain x-ray films show a Type II, borderline Type II, acromion; and that he recommended an arthroscopic decompression of the shoulder.

We first address questions related to evidence. Hearsay evidence may be admitted at a hearing. Texas Workers' Compensation Commission Appeal No. 93753, decided October 7, 1993. The hearing officer stated that the rules of evidence did not apply and that he would consider the objection as going to the weight to be given to the statement of Mr. W and not to admissibility. He did not commit reversible error. As a general rule, the Appeals Panel considers the record developed at the hearing and does not consider new items of evidence not offered at the hearing. Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. The claimant had the transcript of the interview of Mr. W prior to the hearing and could have obtained the affidavit of (Mr. V) disagreeing with part of the statement of Mr. W prior to the hearing. We will not consider the affidavit of Mr. V.

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.-(City) [14th Dist.] 1984, no writ). The hearing officer is not bound by the testimony of a medical witness when the credibility of that testimony is manifestly dependent on the credibility of information imparted to the medical witness by the claimant. Texas Workers' Compensation Commission Appeal No. 952044, decided January 10, 1996. An expert's deductions from facts are not binding on the hearing officer even when they are not contradicted by another expert. Texas Workers' Compensation Commission Appeal No. 961610, decided September 30, 1996. In his Decision and Order, the hearing officer stated why he had problems with the credibility of the claimant. 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). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant was not injured in the course and scope of his employment on _____, is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. 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.

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). Disability, by definition, depends upon there being a compensable injury. *Id*. Since we have found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury, the claimant cannot have disability.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge