

APPEAL NO. 991478

On June 23, 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). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury on _____; and (2) whether claimant had disability. Claimant requests that the hearing officer's decision that he did not sustain a compensable injury on _____, and that he has not had disability be reversed and that a decision be rendered in his favor on those issues. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant was hired as a saw filer in employer's sawmill on December 24, 1997, and was terminated from employment on January 10, 1998. He said that on Monday, _____, he and a coworker named KC (phonetic spelling of surname) were sliding a crate of band saws off the forks of a forklift when the crate came apart and he felt pain between his shoulder blades and that evening felt pain in his right arm. Claimant said LH, employer's foreman, helped pull the crate boards away from the saws. Claimant said he reported his injury to SH, the employer's plant manager, on January 7th and SH sent him to Dr. B. Dr. B reported that claimant told him that on _____ he was moving heavy saws around at work and felt pain in his right arm. Dr. B prescribed pain medication and wrote that claimant may have a nerve injury in his neck.

Claimant was seen by Dr. K on January 19, 1998, and Dr. K reported that claimant told him that he was doing lifting at work on _____ when he felt pain in his right scapular area and later developed pain down his right arm and that he had not had a problem like that before or any neck problems. An MRI done on January 22, 1998, showed a large right disc extrusion at C6-7. Dr. K wrote on January 26, 1998, that the MRI confirmed a fresh, soft tissue disc rupture at C6-7 on the right, that that was a fresh injury and not a degenerative process, that in reasonable medical probability claimant's disc rupture is a recent event, that claimant needs urgent surgery, and that claimant is disabled. On January 29, 1998, claimant underwent a discectomy and fusion for a herniated disc at C6-7. Claimant said he was unable to work for about six months after his surgery.

An invoice reflects that employer received a shipment of band saws on December 30, 1997. OS, who worked in the saw filing room with claimant, stated in a recorded statement that claimant had complained of his shoulder hurting about the second day after they came back to work after Christmas but that claimant did not say he had been hurt at work, and that claimant continued to complain about his shoulder until claimant left employment with employer. OS said he never saw claimant get hurt at work. Claimant disagreed that he had complained of shoulder pain between Christmas and New Year's Day. LF, who drives a forklift for employer, stated in a recorded statement that he was not aware of claimant being injured. RS, who operates saws for employer, stated in a recorded

statement that claimant had been complaining about his arm since he began working for employer but that claimant did not say why his arm was hurting. Claimant disagreed that he had complained about arm pain since beginning work for employer.

JB stated in a recorded statement that the morning of _____, SH asked him to locate claimant and that he found claimant apparently asleep in claimant's car in the parking lot. Claimant testified that it was not true that he was sleeping in his car the morning of _____. LH, employer's foreman, stated in a recorded statement that on the morning of _____, he asked claimant why claimant had been out in his car after he had already punched in and claimant told him that he went to his car and went to sleep because he was taking pain medication because he had hurt his arm the night before. Claimant and LH said claimant did not work on Sunday, January 4, 1998. LH said he sent claimant to SH.

BS, employer's office manager, stated in a recorded statement that claimant came to the employer's office the morning of _____, and told her that his right shoulder was hurting and that when she asked him from what, he said he had no idea what he had done but that he was hurting and needed to see a doctor. BS said that claimant then talked to SH. SH testified that LH had been looking for claimant the morning of _____, after claimant had punched in, and that JB had found claimant asleep in claimant's car in the employer's parking lot that morning. SH said that when he asked claimant the morning of _____, why he had gone to his car after punching in, claimant admitted that he had been asleep in his car that morning and that he had taken a bottle of Tylenol the night before because his shoulder was hurting. SH said that when he asked claimant when he had hurt himself, claimant said that he did not know how or when he got hurt but that his shoulder was hurting. SH said that claimant did not say he had been hurt at work. SH said that he was concerned about claimant so he had BS make an appointment for claimant with Dr. B. SH said that claimant was supposed to go to Dr. B on _____, that claimant left work that day, and that he later found out claimant did not go to Dr. B until January 7th.

SH further testified that OS told him that claimant had been complaining about his shoulder hurting since claimant first came to work for employer. SH said that LF told him that one of the corners of the crate was crumpled a little bit but that LF had no knowledge about claimant being injured when the crate was lifted. SH was of the opinion that the crate of band saws that came in on December 30, 1997, was put up prior to _____. SH said that when he terminated claimant on January 10, 1998, he was not aware that claimant was claiming he had been hurt at work. He also said that the employer does not have an employee named KC, but that employer does have several employees who have the first name of Ken. There was much conflicting evidence concerning claimant's time records.

The hearing officer found that claimant did not sustain an injury while he was engaged in the exercise of his job duties with employer and concluded that he did not sustain a compensable injury. 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). It is clear from the hearing

officer's Discussion section of her decision that she believed that claimant sustained an injury which prevented him from working, but that she was not persuaded that the claimant met his burden to prove that his injury occurred at work on _____, as claimed by claimant. A trier of fact may believe that a claimant has an injury, but disbelieve that the injury occurred at work as claimed by a claimant. Johnson.

The 1989 Act makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). There is much conflicting evidence in this case. As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084. 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. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is 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). Without a compensable injury, claimant would not have disability as defined by Section 401.011(16). Thus, the hearing officer did not err in deciding that claimant has not had disability.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge