

APPEAL NO. 991871

On July 29, 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 has had disability. Claimant requests that the hearing officer's decision that claimant did not sustain a compensable injury on _____, and that claimant has not had disability be reversed and that a decision be rendered in his favor. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(10) defines a "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." 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 sustained disability as defined by the 1989 Act. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993.

Claimant testified that on _____ (all dates are in 1999 unless otherwise indicated), he was working as a material handler for (employer) when he injured both shoulders and his mid-back area loading 40- to 50-pound bundles of PVC pipe into trucks. He said that on the same day he also loaded lawnmowers and hot water heaters into trucks. He said that most of the pain was in his left shoulder. Claimant has not worked for employer since injury date. He called in to his employer on Friday, and on Monday, and reported that his shoulder was hurting. He said that he reported to his employer that his injury was work related.

Claimant went to Dr. A on April 27th and gave a history of left shoulder pain and pain in the back of his left shoulder from loading trucks on _____. Dr. A diagnosed claimant as having a shoulder sprain/strain and has been treating him since April 27th. Dr. A took claimant off work from April 28th to May 12th. Employer sent claimant to a medical center on April 28th where he was diagnosed as having a left trapezius strain and was released to modified work that day.

In a work-status form dated May 11th, Dr. A noted that claimant could return to light work with specified restrictions on May 12th. Claimant said that on May 12th he was still in pain and unable to work so he altered Dr. A's work-status form of May 11th to show that he

was released to return to light work on May 17th instead of May 12th and that he took the altered form to employer. Claimant continued to see Dr. A, and Dr. A noted on work-status forms that claimant should be excused from work from May 12th to June 15th. Claimant was terminated from employment on May 14th for altering Dr. A's work-status form of May 11th. A radiologist reported that an MRI of claimant's left shoulder done on May 28th showed a "5MM subchondral cyst located in the greater tuberosity of the humerus, either post-traumatic [sic] or degenerative in etiology." Claimant said that Dr. A eventually released him to return to work and that on June 29th he obtained a job with another employer driving a forklift for one dollar per hour less than he was making at employer.

The hearing officer found that claimant's testimony was not persuasive because claimant had altered the work-status form; that claimant did not sustain a compensable injury on _____; and that claimant has not been unable to obtain and retain employment at his preinjury wage because of a compensable injury. The hearing officer concluded that claimant did not sustain a compensable injury on _____, and that claimant has not had disability. Claimant contends that the fact that he altered the work-status form should not defeat all entitlement to benefits and that the hearing officer's findings and decision are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

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 of the evidence. Section 410.169(a). 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, even if the evidence would support a different result. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge