

APPEAL NO. 991876

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 5, 1999, a contested case hearing (CCH) was held. The issues disputed at the CCH were whether the appellant, who is the claimant, sustained an injury on _____, and whether he had disability from that injury.

The hearing officer held that the claimant was not injured in the course and scope of employment and that he did not have the inability to obtain and retain employment due to any injury.

The claimant appeals, and argues that the hearing officer's decision is contrary to the evidence. The respondent (carrier) responds that the decision is supported by evidence which it recites. The carrier also argues that the appeal is not timely.

DECISION

Affirmed.

We will consider the appeal timely filed; it appears that the decision of the hearing officer was remailed to the claimant on August 12, 1999; the claimant stated that he received it on August 14th, and the appeal was filed on August 26th, which was timely.

We will briefly cover the facts. The claimant was employed as a plumber's helper by Ashley Plumbing Company (employer). He said that on _____, he had been instructed, while working at a residence, to pull out an existing water meter with a pick. He said that he felt back pain when he did this and reported it to Mr. G, the chief plumber on the job. Both Mr. G and the other plumber's helper, Mr. K, took issue with the statement that the claimant was pulling a water meter, stating instead that copper tubing was being laid throughout the residence on that day. Likewise, neither corroborated the claimant's statement that he was injured at work. However, Mr. G did agree that the claimant generally complained of back pain.

The claimant asserted that he continued to work, drank a lot throughout the day that Easter Sunday, and then when he reported to work on Monday, he was fired. He said that while he may have had alcohol on his breath, the usual reaction for the employer was to send such a person home, not fire him.

Mr. A, a vice president for the employer, denied that employees frequently reported to work drunk, as asserted by the claimant. He said that once before, on March 16th, the claimant had come to work intoxicated, and that Mr. A sent him home, with the warning that if it happened again, he would be fired. Mr. A said that after the claimant was fired, he was hollering, threatening to sue, and saying that he had been discriminated against. This

threat was repeated, Mr. A said, when the claimant had gone home and called into the office about 10:30 a.m. Mr. A said that the claimant had frequently complained in the past of pains, which is why he had been assigned to work in the warehouse, but he was transferred out to the "field" at his own request. Mr. A said that the claimant was very drunk on the day he was fired. Mr. A said that the claimant refused to sign a release for medical records from a hospital where he was being actively treated for pain in his body. The claimant denied that he had refused to sign a release, and said that he was not being treated for pain, but for numbness apparently related to a heat stroke he had when he first began working for the employer the year before.

There was evidence that the claimant, after his job was terminated, went into the office of a secretary for the company and inquired about health insurance, indicating that he had an upcoming appointment with a doctor. He was informed that he could purchase continued health insurance under the COBRA program.

The claimant and Mr. A both agreed that the claimant did not report a work-related injury on April 5th. The claimant contended that he could not work due to pain and that the most he could do in one stretch, two to three hours, would have to be followed by a counterpart time period of laying down.

The claimant's doctor, Dr. B, testified that the claimant was examined at his office, by another chiropractor, on April 7th and had indications of an acute, rather than chronic, back injury. However, Dr. B said he had not examined the claimant personally, and that the last time the claimant had been examined by his office was April 14th.

Although not indicated in the decision, Carrier's Exhibit No. 15 was offered and admitted at the end of the CCH, which consists of medical records for the claimant's ongoing medical treatment by University Health System (medical clinic). The claimant was treated primarily through the last few years for addiction but there are various routine medical treatments recorded for various ailments, some of which include neck and upper back pain. The last record is dated November 30, 1998, and the claimant was treated for neck and upper back pain and peripheral neuropathy.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole. The facts set out in a medical record are not proof that a work-related injury, in fact, occurred. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The evidence here was at considerable conflict, and the hearing officer evidently chose to believe that the incident that the claimant contended happened on April 2, 1999, did not occur.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The hearing officer had the opportunity to personally observe all witnesses while they were testifying. Consequently, the decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We cannot agree that her decision on the appealed issues was against the great weight and preponderance of the evidence and hereby affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge