APPEAL NO. 991904

On August 2, 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 the appellant (claimant) sustained a compensable injury on _____; (2) whether claimant has had disability; (3) whether (employer) tendered a bona fide offer of employment to claimant; and (4) whether respondent (carrier) should be relieved of liability for treatment provided at the direction of Dr. P, D.C. The hearing officer decided that: (1) claimant sustained only a compensable neck abrasion injury on _____; (2) claimant has not had disability from her injury of _____; (3) employer tendered a bona fide offer of employment to claimant; and (4) per the stipulation of the parties, the issue of whether carrier is relieved of liability for treatment at the direction of Dr. P is not ripe for a CCH. Claimant requests reversal of the hearing officer's decision that she sustained only a compensable neck abrasion, that she has not had disability, and that employer tendered her a bona fide offer of employment. Carrier requests affirmance.

DECISION

Affirmed.

Claimant was employed by employer as a gate guard, which required her to monitor traffic going onto a construction site. MS, employer's project manager, and DR, employer's safety manager, testified that the gate guard job was light-duty work. MS said that claimant could sit in her car while at work. Claimant testified that on Friday, _____, traffic barrels at work were blown over by wind and that as she was putting a barrel upright, another barrel was blown over, which struck her in her neck and shoulder. She said that she stumbled, but did not fall all the way down. She could not recall if she went down on her knees when she was struck by the barrel. Claimant said that she has had pain from her neck to her lower back since her injury.

Claimant was taken to see MS on December 4th. MS said that he saw a scrape on claimant's neck and that claimant said she was fine and did not want to see a doctor. MS said that on Monday, December 7th, claimant said she wanted to see a doctor. DR said that he was a paramedic for nine years and that when he saw claimant on December 7th, claimant had an abrasion on her neck. DR took claimant to Coastal Physician Associates (medical clinic). A medical clinic note states the injury as a right shoulder contusion and neck pain and releases claimant to return to work full duty with no restrictions. Claimant was apparently referred to Dr. T, who saw claimant on January 4, 1999, and diagnosed a shoulder strain and a cervical strain. Dr. T noted that x-rays of the neck and right shoulder were within acceptable limits with no significant traumatic change. Dr. T wrote that claimant was fit for light-duty work with no overhead lifting and no lifting over 15 pounds. Dr. T also noted that claimant's gate guard job was within her restrictions and that she could return to full-duty work.

Between December 7, 1998, and January 6, 1999, claimant worked on approximately 11 days at her gate guard job, but missed work a number of days. She said she was in pain and on medications when she missed work and that after January 6, 1999, she was unable to perform her gate guard job due to pain from her injury.

Claimant said that she chose Dr. P as her treating doctor. Dr. P's records reflect that he first saw claimant on January 12, 1999; that he diagnosed claimant as having a cervical disc disorder, lumbar disc disorder, and rotator cuff syndrome; that on January 12th he noted that claimant was sufficiently recovered to return to work, with restrictions of no workday over four hours, no lifting, no prolonged standing, and no exposure to cold or wet conditions; and that he has continued to provide chiropractic treatment to claimant. Dr. P noted that claimant told him that she was knocked to her knees when the barrel hit her on December 4th.

Dr. F examined claimant on April 27, 1999, and noted an impression of "cervical sprain, contusion, as a result of the injury of _____." Dr. F noted that claimant's injury was aggravating preexisting degenerative changes in the cervical and lumbar spine and that claimant was not at maximum medical improvement.

A surveillance videotape of claimant taken on February 3, 1999; March 26, 1999; and April 19, 1999, shows claimant walking, driving, using both arms, turning her neck, opening and closing a car trunk and doors, pushing a grocery cart, putting grocery sacks in her car, and putting oil in her car. The videotape was sent to Dr. F and he wrote on June 29, 1999, that the diagnosis of cervical strain and contusion had been made based on the history of the injury; that although the videotape showed no evidence of cervical injury, it remained his opinion based on the history and information he was given, that claimant did sustain a cervical sprain and contusion to her neck on _____; that claimant could work as a gate guard; and that "[t]here is no indication from the examination that there was in fact any injury to her cervical spine or lumbar spine by the basis of physical evidence. One must take the history and available studies done to reach a conclusion."

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 has the burden to prove that she was injured in the course and scope of her 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 she had disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993.

The hearing officer found that on _____, while in the course and scope of her employment, claimant sustained harm to her neck, only in the form of an abrasion, and that she did not sustain any harm to her low back, thoracic spine, or shoulders on that date.

The hearing officer also found that claimant has not been unable to obtain and retain employment at wages equivalent to her preinjury wage as a result of her _____, injury. The hearing officer concluded that claimant sustained a compensable neck (abrasion) injury while in the course and scope of her employment and that claimant has not had disability. Claimant contends that the evidence shows that, in addition to the neck abrasion, she also sustained injury to her back, other injury to her neck, and injury to her right shoulder on _____, and that she had disability from the date of her injury to the present. Claimant states in her appeal that she was terminated from employment, but MS testified that claimant simply stopped coming to work after January 6, 1999.

There is conflicting evidence in this case on the issues of injury and disability. 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. 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 the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. 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 on the issues of injury and disability is supported by sufficient evidence and 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).

Section 408.103(e) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5 (Rule 129.5) pertain to bona fide offers of employment. In deciding the issue of bona fide offer of employment, the hearing officer could consider, among other things, her finding that the compensable injury was only a neck abrasion. In evidence is a letter dated January 4, 1999, from DR to claimant in which DR informs claimant that the position of gate guard is available to her at her preinjury wage and sets forth the job duties and other matters. There was testimony from DR and MS that a gate guard job is light-duty work and the job description for that job was in evidence. The hearing officer found that the gate guard job was either light duty or sedentary work. DR testified that he sent the January 4th letter to claimant and that claimant did not respond. Claimant's attorney wrote a letter to employer stating that if employer could "fashion a proper bona fide offer of light-duty employment," claimant's treating doctor would see what could be done.

Claimant contends that the hearing officer erred in deciding that employer made a bona fide written offer of employment to claimant. Claimant states that she made herself available for light-duty work but that employer made no offer of light-duty work. We cannot conclude that the hearing officer's decision on the issue of bona fide offer of employment is not supported by sufficient evidence or that it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We note that the hearing officer made separate findings and conclusions on the issues of disability and bona fide offer of

employment and that the hearing officer's Statement of the Evidence reflects that the disability issue was decided as a separate issue from the bona fide offer of employment issue. Thus, since the hearing officer decided that claimant failed to establish that she had disability as defined by the 1989 Act, claimant would not be entitled to temporary income benefits based on the adverse decision on disability (Section 408.101(a)), regardless of whether a bona fide offer of employment was made.

The decision and order of the hearing officer are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Tommy W. Lueders
Appeals Judge

_____
Judy L. Stephens
Appeals Judge