APPEAL NO. 991999

This appeal arises 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 August 12, 1999. The issues involved whether the appellant, who is the claimant, sustained an injury to his back, neck, and shoulders when he injured his left foot on the job on _____, and had disability as a result of that injury.

The hearing officer, resolving diametrically opposing testimony, held that the claimant sustained a foot injury on _____ but did not injure his neck, back, and shoulders at this time. She held that the foot injury was not serious enough to cause the inability to obtain and retain wages equivalent to claimant's preinjury average weekly wage.

The claimant has appealed, arguing that the witnesses against him were untruthful and that his medical evidence proves his injuries. He said that although he has applied for other jobs, he remains unemployed. He complains about the failure to grant any of his subpoenas, arguing that he could have presented a better case if they had been granted. The respondent (carrier) responds that all findings complained of were fact questions to be resolved by the trier of fact, whose responsibility it was to assess credibility of the evidence. The carrier points out that the discussion of the evidence in the decision indicates the weighing and rationale behind the hearing officer's complained-of findings of fact and conclusions of law.

DECISION

Affirmed.

All dates are 1999 unless otherwise specified. The hearing officer has summarized the facts well and we will only briefly recite facts here for ease of reading. The claimant worked for (employer). On _____, he was working at a client company location in (state) and staying at a hotel while located on this job. According to the claimant, a valve weighing approximately 125 pounds dropped onto his left foot. He said the accident occurred at around 1:45 a.m. Although claimant was wearing a steel-toed boot, he said that the boot was pierced and his foot injured. The claimant said he fell and landed straight on his buttocks. (He agreed that he had earlier stated that he fell backwards and hit his neck and back on something.) The claimant said that his coworker, Mr. T, came over, helped him up, and led him to a trailer. Claimant also identified other men on the scene as Mr. E, a coworker, and Mr. R, a supervisor. According to the claimant, he requested medical assistance and was told by Mr. R to wait until shift change when Mr. W) the project manager, came to the worksite. Claimant said he waited and, when Mr. W came, he specifically asked Mr. W if he could go to an emergency room, but that Mr. W put him off and told him he should try first aid and stay off work for a few days. The claimant said he told Mr. W he hurt "from head to foot." The claimant said he next went into work at 11:00

p.m. on the 18th, which was later than his usual shift began. He said he was not able to seek medical assistance on his own because he was not familiar with doctors in this state, and decided to wait to see his own doctor in (state 2). However, he chose Dr. S, he said, from his telephone book. When it was pointed out that Dr. S was located in a different town from the claimant's residence, the claimant said that he went first to Dr. S's local office and then was sent to see him in the next town. The claimant contended he had done a light job the last day of his work.

According to the claimant, he requested 30 hours of vacation time from the employer on March 22nd. He said that the employer asked him to go to a medical clinic in Texas, but that he wanted to choose his own doctor instead. Dr. S took the claimant off work, and diagnosed cervical and lumbar strain.

Mr. T testified that he was coming down a ladder and happened to be looking down and saw claimant, who was 15 feet from the ladder, fall. He did not recall seeing anything on his foot. He said he helped claimant to the trailer. He said that he heard claimant ask for medical treatment from Mr. W when he was back in the vicinity a little over an hour later, but did not hear a reply.

Mr. H, who was coming on shift the morning claimant got hurt, did not see the accident but said he overheard claimant request medical treatment and complain of foot and neck pain. He did not hear the response, but was surprised to find claimant at the hotel room later that day with his foot unbandaged.

Claimant contended that he was terminated on June 12th, after he had come in, in response to a request for him to turn in his uniform, swipe card, and pager. He said that he was told not to come back on the premises. He said he eventually went to the employer's clinic and took a requested drug test on March 29th, which was negative.

Carrier's witnesses directly disputed much of the claimant's case. Mr. W said he was told that claimant dropped a pipe, not a valve, on his foot. Mr. W denied that he told claimant he could not seek medical treatment. On the contrary, Mr. W said that when he told claimant to go to have the foot treated and to take a required drug test, claimant questioned the drug test aspect and, when told it was a requirement, asserted he did not need medical treatment and was not that seriously hurt. Claimant had asserted that he found out later that Mr. W felt he faked his injury, but Mr. W denied this. He said that the claimant's left foot was scratched and later was swollen and bruised, but that claimant never asserted that he hurt elsewhere. Mr. W said that claimant had not been terminated and that he was asked to turn in his equipment because these items comprised an expense to the employer when they could not recoup the charges from a paycheck. However, a letter from the president of the employer is in evidence and relates to the claimant on May 26th that unless he responds in writing to set forth his intentions with regard to continued employment within 10 days, he will be considered to have voluntarily terminated that employment.

Mr. W said that claimant was not off the next day due to the injury, but because the crew was on "stand-by" status while other work was being done at the client company's plant which could not be done with workers on the site. He said that claimant reported for work on March 18th and thereafter, until the project was complete, and that while he limped the first few days, his limp was gone by the end of the job. Mr. W said he checked on the claimant throughout this time and was told that claimant was okay. Mr. W said that the task performed by the claimant at the end of the job was not light duty but part of the job he would have done had no accident occurred.

The claimant was stated to have been a good worker. Mr. R said that as far as he knew, he and Mr. E were the first persons on the scene after claimant hurt his foot, and they did not see him on the ground, but did help him to the trailer. Neither man saw Mr. T in the area. Both Mr. R and Mr. E said claimant complained of no other injuries than his foot.

Asked about the delayed reporting of the accident, Mr. W said that he discussed the situation with responsible persons for the client company and they determined not to file a report because the claimant had asserted he was okay. Mr. W denied that he had ever said he thought claimant faked a foot injury. Mr. W and Mr. R both said that the accident happened around 4:30 a.m.

Mr. F, the local manager for the employer, stated that he kept notes of daily events. On the 22nd, a Monday, Mr. F recorded that claimant was asserting he had been denied medical treatment by Mr. W, and that he requested his vacation time on this day. Mr. F stated that an appointment was set up by the employer with its own clinic but claimant did not go. Mr. F's notes indicated that the employer made several attempts to contact claimant, unsuccessfully, on the 23rd.

Dr. S's May 19th narrative report listed the date of injury as _____ and said that claimant had a contusion of his left foot, cervical and lumbar radiculitis, and myofascitis. Dr. S prescribed "no work until further notice" on March 22nd.

The claimant filed a claim for compensation on _____, stating that he dropped a pipe on his foot and fell back, injuring his lower, mid, and upper back. If the claimant requested subpoenas, they were not made part of the record nor was any error asserted at the CCH about any denial of subpoenas. The claimant does not specify what additional evidence he feels would have been elicited and it appears that all persons identified as material witnesses, as well as persons who were incidental, testified at the CCH. Because any objection based upon the asserted denial of subpoenas was not properly preserved, we cannot charge the hearing officer with any reversible error.

The burden to prove an injury arising from the course and scope of employment belonged to the claimant. Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and

conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Without a finding of a compensable injury, there can be no finding of disability as that term is defined in Section 401.011(16).

Plainly, most of the testimony was directly at odds. Consequently, it was up to the hearing officer to resolve the most plausible scenario out of these conflicting facts, which necessarily meant believing one witness while disbelieving another. 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 this is the case here, and we affirm the decision and order of the hearing officer.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge