APPEAL NO. 000191

On January 4, 2000, 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 hearing officer resolved the disputed issues by deciding that appellant (claimant) did not sustain a compensable injury on _____, and that claimant has not had disability. Claimant requests that the hearing officer's decision be reversed and that a decision on both issues be rendered in his favor, or in the alternative, that the decision be reversed and the case be remanded to the hearing officer. Respondent (carrier) requests that the hearing officer's decision be affirmed.

DECISION

Affirmed.

On June 26, 1999, employer demoted claimant from being a driver to being a driver's helper for alleged unsafe driving practices and on July 1, 1999, claimant tendered a written resignation to employer but continued to work for employer (he had discussed employment with another company in May and late June 1999). PF, employer's director of distribution, testified that claimant was out of control and yelling when told of the demotion. Claimant testified that the evening of _____, he and a coworker were delivering a sofa to a customer of employer who lives in a third floor apartment when the sofa tilted at the second story staircase landing and he felt his back snap and had back pain. On July 6, 1999, claimant notified employer that he had injured his back while working on _____. Claimant stated in his accident report dated July 6, 1999, that the date of injury was _____ and in responding to the request to describe how the accident occurred wrote "unknown started on Friday after I made my delivery." Employer sent claimant to a medical clinic on July 6, 1999, and the clinic doctor noted that claimant had lifted a lot of furniture the evening of _____, and hurt his back. The doctor diagnosed claimant as having a back strain and noted that claimant could return to modified duty the next day. Claimant went to Dr. G on July 7, 1999, and Dr. G wrote that claimant stated that he was injured on _____, while working for employer carrying furniture upstairs when he felt a twinge in his low back which got progressively worse. Claimant said that he has not had any prior back problems and that is noted in Dr. G's reports. Dr. G took x-rays and diagnosed claimant as having a lumbosacral sprain/strain and lumbar segmental dysfunction and myospasm. Dr. G took claimant off work.

Claimant had the burden to prove that he was injured in the course and scope of his employment and that he has had disability. Claimant's delivering of a sofa to a customer of employer the evening of _____, would be an activity in the course and scope of employment. However, whether claimant was injured while performing that activity was a fact question for the hearing officer to determine from the evidence presented. The hearing officer noted in his decision that he did not find claimant's testimony sufficiently persuasive to sustain claimant's burden of establishing an injury. The hearing officer found that

claimant did not injure himself in the course and scope of employment on _____, and that claimant was not rendered unable to obtain and retain employment at his usual wages as of July 7, 1999. The hearing officer concluded that claimant did not sustain a compensable injury on _____, and that claimant did not have disability because there was no compensable injury. Without a compensable injury, claimant would not have disability as defined by Section 401.011(16).

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). 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 witnesses or substitute its own 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 findings, conclusions, and decision are supported by sufficient evidence and that they are 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).

Claimant complains of employer's and other persons noncompliance with subpoenas duces tecum and carrier's failure to adequately respond to interrogatories and failure to comply with an order to answer an interrogatory. The subpoenas, interrogatories and answers thereto, and order were not made a part of the CCH record and thus there is nothing for us to review on appeal regarding these complaints. Claimant contends that the hearing officer erred in admitting a July 20, 1999, memorandum from PF and a July 12, 1999, memorandum from DN over his objection. Claimant states that these memorandums were exchanged by carrier but objected to their introduction on the bases that they are self-serving and that carrier failed to disclose in answers to interrogatories the information or documents upon which the memorandums were based. Claimant also contends that the hearing officer erred in allowing PF to testify about his July 20, 1999, memorandum because the memorandum, which, among other things, sets out alleged unsafe driving practices by claimant, should have been excluded. Claimant did not object to PF's testimony until after PF had already testified about demoting claimant for unsafe driving practices. We conclude that claimant has not shown that the hearing officer erred in admitting the complained-of documents and testimony or that error, if any, was reasonably calculated to cause and probably did cause rendition of an improper decision and has thus not shown reversible error. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge