APPEAL NO. 000629

This appeal arises pursuant to the Texas Workers= Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 8, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that he did not have disability. In his appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (self-insured) urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was working as a forklift driver in the self-insured's warehouse and had two stacks of pallets on the forks. He stated that several of the pallets fell; that he had to restack them manually; and that he developed low back pain while he was doing so. He further testified that his injury occurred at about 9:00 a.m., after he started work at 4:00 a.m.; that he tried to report his injury to Mr. E, his supervisor, shortly after it happened but that Mr. E was on his lunch break; and that eventually he reported his injury to Mr. C, another supervisor, who advised the claimant that he could leave. The claimant acknowledged that _____ was his first day back after he was suspended for a day because of attendance problems. However, he denied that he was advised when he was given his November 24th suspension that the next time he had an occurrence of absence or tardiness would result in the termination of his employment.

Mr. E testified that he was the claimant's direct supervisor on _____, and that _____ was the claimant's first day back after a suspension for attendance problems. Mr. E stated that he went to lunch at about 9:50 a.m. on _____ and, thus, that he was at work at the time the claimant alleges he sustained his injury. In addition, Mr. E testified that he learned that the claimant was alleging that he sustained a work-related injury from Mr. C at about 10:45 a.m.

Mr. T, a warehouse superintendent for the self-insured, testified that the claimant had two more occurrences of absence or tardiness following the November 14th occurrence, which resulted in his one-day suspension on November 24, 1999. Thus, Mr. T explained that the claimant had accumulated over 10 points in the self-insured's progressive discipline policy such that his employment would be terminated if he had one more occurrence of absence or tardiness. Mr. T testified that on _____ he saw the claimant shortly before 9:50 a.m. when Mr. T and Mr. E went to lunch. He stated that the claimant was standing next to a forklift at that time; that the claimant did not report an injury to Mr. T; that the claimant did not ask Mr. T where Mr. E was so that he could report an injury to Mr. E; and that the claimant did not appear to be injured. Finally, Mr. T testified that he found the claimant's explanation of how he was injured

suspicious because he believes that the claimant would have used the forklift to stack the pallets that had fallen rather than manually moving them.

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before her. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass=n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it 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. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury on _____. In her decision the hearing officer specifically noted inconsistencies in the claimant's testimony and that the testimony of Mr. E and Mr. T contradicted the claimant's testimony. She determined that the claimant did not sustain his burden of proving injury, stating that his "accounting of the mechanism of his injury was not credible" and further noting that the claimant's testimony "concerning the events leading up to and following the claimed injury" was not persuasive. The hearing officer was acting within her province as the fact finder in deciding to discount the claimant's evidence. Our review of the record does not reveal that the hearing officer=s determination that the claimant did not sustain a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the Ainability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage.@ Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Alan C. Ernst
Appeals Judge