APPEAL NO. 000816

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 March 24, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that the claimant did not have disability. An issue as to the claimant's average weekly wage (AWW) was resolved by stipulation to be $582.70. The claimant appealed, and disputed the fact findings and conclusions of law underlying the holding that he sustained no compensable injury or had disability therefrom. The respondent (carrier) responded by reciting facts in favor of the decision.

DECISION

We affirm the hearing officer's decision as sufficiently supported by the record.

The claimant said he was adjusting the tandems on his truck trailer on _____, while employed by (employer) for whom he had worked about 10 months. He pulled his left shoulder. He said that he experienced a tingling numbness and then constant pain while driving in to the employer's home office and still has pain.

The claimant said that he reported his injury to the headquarters to Mr. B. He said he specifically told Mr. B that he injured his left shoulder pulling on the tandems. The claimant stayed in the home office area for three days until released by the dispatcher then went home to seek medical treatment. The claimant apparently sought the dispatcher records by subpoena on March 15, 2000, and found that the employer was bankrupt.

The claimant had a prior problem involving dizziness. He went to the (Hospital C) emergency room to see about his dizziness on August 30, 1999, because he was concerned he could pass out while driving. However, he said he mentioned that his shoulder was hurting as well but they characterized it as a secondary problem. The hospital records note complaints of left shoulder pain. The claimant said his dizziness problems were eventually attributed to a middle ear infection. He took off time due to this ear infection and he was concerned about passing out while driving.

The first doctor that claimant saw about his shoulder injury after this was Dr. M, a neurologist he was referred to for his dizziness problems. Dr. M referred him to Dr. S on September 16, 1999, for his shoulder. Dr. S diagnosed a possible rotator cuff tear and impingement. The claimant said that prior to seeing Dr. S he had had prior injuries to his shoulder (which he said happened ten years before).

The employer filed both an Employer's First Report of Injury or Illness (TWCC-1) and dispute to compensability on September 27, 1999, contending that the injury had just recently been reported.

The claimant found work with (the personal transport company) on January 10, 2000. He drove a six passenger van taking railroad crews to and from trains. He said it amounted to not much more than driving a passenger car, and was not at all strenuous. His wages with the personal transportation company were less than half of his preinjury AWW. The claimant said that the personal transportation company accepted his old Department of Transportation (DOT) physical and he did not undergo a new preemployment examination.

The claimant did not continue to see Dr. S because he could not afford to pay for treatment. He said that Dr. S indicated he might need surgery but that he definitely needed an MRI. The MRI on the shoulder had not been done by the time of the CCH. His last medical treatment was November 11, 1999, and that is when he discussed returning to work. He said that Dr. S did not give him a sheet of restrictions at this time. Dr. S gave him an anti-inflammatory, which did not work, and he had been on no medication since November 11th.

The carrier presented a statement taken by the adjuster with three employees of the employer. All three said that the first time they were aware of claimant contending a work-related injury was _____. The events leading up to this were described as claimant asking how much his safety bonus was going to be, and being informed that he did not have one coming. Claimant then went into the drivers' room and was irrate and throwing things. In a discussion later that day, claimant contended he had financial and legal problems and needed money.

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). 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 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). 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.

An appeals 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. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ

denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). It is clear that the hearing officer did not believe the claimant's testimony and he outlined why he did not. Whether there were live witnesses or not from the employer, the transcribed statement can serve as evidence in CCHs. Without a threshold finding of a compensable injury, there can be no further finding of disability as defined by Section 401.011(16). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge