APPEAL NO. 000920

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 April 12, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant and the claimant's attorney have appealed. Very generally, the claimant's attorney simply asks that we "review" the case and the claimant lists a few findings of fact and conclusions of law with which he disagrees regarding injury and disability. The respondent (carrier) responds by citing facts in favor of the decision.

DECISION

The hearing officer's decision is affirmed.

The claimant said that he worked for (employer) about two and one-half days when he said he was injured on _____. The claimant was working at a client company and, he said, was carrying a large sheet of heavy fiberboard with five other men. He said he knew no names except one was "Martin," who was a supervisor. The claimant said that he set the board down on a pallet and, as he turned, he slipped and fell to the ground. He said this happened in the afternoon or evening and he could hardly drive home due to shoulder and back pain. The claimant went to the emergency room (ER) of a hospital the next day. He said that he told a male nurse there how the accident happened, but did not tell the doctor, and maintained that he was unable to tell his story as the medical personnel were not interested. He also testified that the staff would have known his problem because he had been admitted there previously for a heart attack or stroke. He said that the ER took him off work for two days; he then was seen by Dr. O, who took him off work entirely.

The claimant's testimony on when he notified his employer of his injury is somewhat confused in the record. First, he testified that he took the slip from Dr. O to the employer's headquarters on June 2nd, and was told by the woman who took it that she would put it in his file. Then, he maintained that he took the ER report to the employer and to the client company on May 28th and followed up later with Dr. O's report. When asked on cross-examination about statements he had given in his interview with the adjuster that were somewhat inconsistent, the claimant then maintained that Dr. O gave him two off-work slips and was advised to take one of them into the employer with a witness. Finally, he stated that his wife may have taken the slip in on June 2nd and he waited in the car and then found out from her what was said. Mr. J, who supervised claims for the employer, testified that it was not until June 4th that one page from the ER was delivered to his office and it did not identify the employee or any work-related injury. He said that sometime after June 4th, the off-work slip from Dr. O was delivered. However, Mr. J said that the decision had been made to terminate the claimant from the job on May 31st because he did not report to work.

Although the records show extensive chiropractic adjustment treatment and several pain injections, it was the claimant's position that there was no work he could have done after _____, to the time of the CCH. He said he could not bend due to his back. Dr. O had not released him to work. Asked about his Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41), the claimant said he could not read very well. He agreed he had not typed it but was unsure who did, although he had signed it at Dr. O's office. The TWCC-41 is dated July 7, 1999, and claimed injuries to the shoulder, lower back, neck, and whole body.

The ER records report that the claimant complained of left shoulder pain which had gone on for months. There is no mention of any accident, work related or otherwise. The ER records diagnosed chronic bursitis. The claimant agreed that he did not complain of back or neck pain at the ER. The claimant was asked if he had problems prior to his asserted injury. He stated that his shoulder had not "really" bothered him before and that while he had "some" pain, he assumed it was arthritis. He could not explain why the ER records recorded a history of shoulder pain and denied he had told them this.

A summary sheet attached to the initial medical report from Dr. O noted a history of slipping and "almost" falling on May 27th. An MRI of the left shoulder was done July 26, 1999; there was no evidence of rotator cuff tear but the claimant had severe tendinosis with subchondral cystic changes. Dr. B performed nerve conduction studies on August 9, 1999, and reported evidence consistent with left carpal tunnel syndrome and ulnar nerve entrapment. An MRI of the lumbar spine on July 26, 1999, showed only mild facet arthropathy at L5-S1 and no herniations or compressive disc disease. Dr. B's nerve conduction test regarding the lumbar spine, however, reported "significant" radiculopathy.

Mr. S testified at the CCH. He had worked as a forklift driver for the client company on the day the claimant asserted injury. He said that he did not see the claimant fall, but noted that there were several men crowded around an area and when he went to see what happened, the claimant was lying on the ground. Others in the crowd said he had fallen. Mr. S said he knew the claimant outside of work and was a family friend.

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). 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). 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 facts set out in a medical record are not proof that a work-related injury in fact occurred. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.- Texarkana 1977, 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).

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). 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." Unless there is a finding of compensable injury, there can be no "disability" according to the manner in which it is defined in the 1989 Act.

In considering all of 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). We cannot agree that the record in this case presents such a great weight and the hearing officer's decision is sufficiently supported by the evidence.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Dorian E. Ramirez
Appeals Judge