APPEAL NO. 001475
FILED AUGUST 8, 2000

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 May 24, 2000, in_____, Texas, with _____presiding as hearing officer. The hearing officer determined that on _____, (employer) was the employer of the appellant (claimant); that the claimant was not injured in the course and scope of his employment on or about_____; that the claimant reported the claimed injury on _____, and that the respondent (carrier) is not relieved of liability for late reporting; that since the claimant did not sustain a compensable injury, he does not have disability; and that the claimant's average weekly wage is $500.00. The claimant appealed, contended that the hearing officer erred in adding the issue of whether he was injured in the course and scope of his employment, urged that the determination that he was not injured in the course and scope of his employment is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the carrier waived the right to raise the issue of injury in course and scope of employment. In the alternative, the claimant requested that the Appeals Panel reverse the hearing officer's determination that he was not injured in the course and scope of his employment and render a decision that he was. As another alternative, the claimant requested that the decision of the hearing officer be reversed and the case be remanded for the hearing officer to make determinations consistent with the Appeals Panel decision reversing the decision of the hearing officer. The carrier responded, contended that the hearing officer did not err in adding the issue, urged that the evidence is sufficient to support the appealed determinations of the hearing officer, argued that the claimant should not be given another opportunity to prove his case, and requested that the decision of the hearing officer be affirmed.

DECISION

We affirm.

We first address the claimant's contention that the hearing officer erred in adding the issue of whether the claimant was injured in the course and scope of his employment. The carrier responded to the benefit review conference (BRC) report, requesting that the issue be added. (Mr. M) testified that he represented the carrier at the BRC, that one of the issues discussed at the BRC was whether the claimant was injured in the course and scope of his employment, that that issue was not resolved at the BRC, that it was his understanding that that would be an issue at the CCH, and that it was not included as an issue in the BRC report. During cross-examination, Mr. M stated that three Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) forms were filed and are in evidence; that the issue of injury in the course and scope of employment is based on the TWCC-21 dated December 15, 1999; and

that at the BRC, they discussed whether the TWCC-21 disputed the claim. The claimant contended that the benefit review officer did not include whether he was injured in the course and scope of his employment as an issue because the TWCC-21 dated December 15, 1999, was not sufficient to dispute that he was injured in the course and scope of his employment. The hearing officer did not make a determination of whether good cause existed to add the requested issue, did not specifically state that he added the requested issue, but said that to receive benefits a claimant must show damage to the physical structure of the body. Injury is defined as damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. Section 401.011(26). If a hearing officer determines that there is no injury and that determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, the carrier's failure to contest compensability in a timely manner cannot result in a compensable injury since there was no injury. Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.).

In Finding of Fact No. 4, the hearing officer found that the claimant did not suffer an injury to his neck or shoulder on or about _____, while working on the motor as the claimant contended. That finding of fact is beyond what is required in Williamson*, supra.* The hearing officer also made a finding of fact that a TWCC-21 filed by the carrier on December 15, 1999, is sufficient to notify the claimant that an issue of whether there was an injury was in dispute. That TWCC-21 indicates that the carrier received first written notice of the claimed injury on December 9, 1999, and states:

> Carrier disputes injury in course of employment with [employer]. Our investigation reveals that the claimant was not an employee, but a seller of property to [employer] and had contracted to test and set up equipment sold to our insured. Claimant was never hired as an employee and not subject to direction and control by our insured, and not furthering the interest of [employer], and, thus, not an employee. Further, no injury was reported to [employer] within the statutory 30-day limit.

In a TWCC-21 dated December 29, 1999, the carrier wrote "[word cut off because of the way the copy in the record was made] continues to deny claim in its entirety. Carrier further disputes change of treating Dr. to. . . ." The hearing officer should have made a determination of whether good cause existed to add the requested issue. The test for error in making a determination on good cause is whether the hearing officer abused his discretion. The testimony of Mr. M is sufficient to show that the hearing officer did not abuse his discretion in making an implied determination that good cause existed to add the issue.

We next address the determination that the claimant was not injured in the course and scope of his employment on_____. The claimant testified that on _____, he was rebuilding an engine that was on an engine stand; that it is

necessary to turn the engine so that at times the top is up and at other times the bottom is up; that he pushed on the engine to rotate it; that it was temporarily stuck; that it then began to move; that he thought the engine stand was going to go over; that he pushed and leaned against the engine to keep it from going over; that his neck and shoulder started hurting; that he was not able to work after that day; and that he told the owner of the employer what had happened. He said that the first doctor he went to for the injury was (Dr. N). A report from Dr. N dated November 15, 1999, states that he had previously treated the claimant for a lumbar injury; that the claimant told him that a couple of weeks ago he had injured his left side, left shoulder, and low back at work; and that the claimant had severe muscle tenderness up to the scapular area on the left and decreased range of motion (ROM) of the left shoulder. On December 15, 1999, (Dr. HB) reported that the claimant told him the injury occurred when he caught an engine that started to roll; stated the results of his examination; diagnosed cervical radiculopathy, herniated nucleus pulposus of the cervical spine, and rotator cuff tear of the left shoulder; prescribed therapy; and stated that the claimant should remain off work. In a report dated January 4, 2000, (Dr. KB), an orthopedic surgeon, stated that the claimant had diminished cervical spine ROM and palpable muscular spasm, diminished sensation along the forearm and ulnar two digits of the hand, limited abduction of the left shoulder with tenderness over the AC joint and posterolateral shoulder; noted that x-rays demonstrated a narrowed C5-6 disc; diagnosed left shoulder rotator cuff strain, cervical spine strain, and cervical radiculopathy; and said that the claimant's injuries are consistent with the mechanism of the injury and are directly related to the _____, injury.

An adjuster interviewed four persons who worked for the employer. Transcripts of the interviews indicate that each of them said they did not see the claimant get hurt and none of them heard the claimant say he had been injured. (Mr. L) testified that he is a friend of the owner of the employer, that he and the owner bought and sold vehicles, that the employer worked on vehicles he had, that he went to the employer's business every day, that he talked with the claimant, and that the claimant did not tell him he was injured. Mr. L said that he owns two engine stands, is familiar with the engine stand the claimant was using, that the engine stand has four legs and would not be tipped over unless a car ran into it, and that an experienced person like the claimant would not try to keep a heavy engine like the one the claimant was working on from tipping over.

The burden is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. The testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the

trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appeals level body is not a fact finder, and it 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). The hearing officer could believe the claimant's testimony concerning the issue of whether the claimant was an employee of the employer and not believe his testimony concerning the issue of whether the claimant was injured in the course and scope of his employment. The determination of the hearing officer that the claimant was not injured in the course and scope of his employment on _____, is not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. When an employee sustains a compensable injury, receives a light-duty release, returns to her employer at light duty and then is terminated by the employer, we must consider whether her termination was for cause. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. If the termination was for cause, the employee must establish her disability after the termination by credible evidence. *Id.* Disability, by definition, depends upon there being a compensable injury. Appeal No. 92147, *supra.*

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Robert E. Lang
Appeals Panel
Manager/Judge