

APPEAL NO. 001766

On July 18, 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.* The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain an injury in the course and scope of his employment on _____, and that the claimant has not had disability. The claimant appeals the hearing officer's decision, contending that there are two witnesses who were not called to testify on his behalf. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The claimant testified that he has diabetes; that on _____, he sustained a small cut to his right middle finger while performing his job moving a base pan at work; and that he told the employer's nurse, VA, that he cut his right middle finger at work.

VA testified that on January 26, 2000, the claimant told her that he did not know how he had sustained the puncture wound she saw on his right middle finger. VA's testimony was corroborated by nurse's notes.

Dr. L's report of February 3, 2000, reflects that the claimant told Dr. L that he had cut his finger at work. Dr. L diagnosed the claimant as having cellulitis of the right long finger and insulin dependent diabetes. The March 28, 2000, operative report states a diagnosis of osteomyelitis and gangrene, secondary to severe diabetes, right long finger, and reflects that the claimant underwent surgery to amputate a part of his right long finger (middle finger).

The claimant had the burden to prove that he was injured in the course and scope of his employment. There is conflicting evidence in this case. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer found that the claimant did not injure his right middle finger on _____, while working for the employer and concluded that the claimant did not sustain an injury in the course and scope of his employment on _____. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

The claimant requests that another CCH be scheduled so that he can call two witnesses to testify. He states in his appeal that he gave the names of the two witnesses to the ombudsman but that they were not called to testify. He states in his appeal that the two witnesses would testify that he was injured on the job. The claimant testified at the CCH that one of the witnesses named in his appeal saw him cut his finger at work and that

the other saw blood on his glove. The carrier states in its response that the two witnesses listed in the claimant's appeal were not listed in the claimant's exchange of information.

At the CCH, the claimant did not call any witnesses other than himself, present written statements from any witnesses (he did present medical reports), express any dissatisfaction with the assistance provided by the ombudsman, or request a continuance to secure the testimony of any witnesses. In Texas Workers' Compensation Commission Appeal No. 94447, decided June 1, 1994, the Appeals Panel noted that an ombudsman is not a legal representative, that the ombudsman is at the CCH to assist the claimant, and that dissatisfaction with the ombudsman's assistance is not a basis for setting aside the hearing officer's decision. In Texas Workers' Compensation Commission Appeal No. 94358, decided May 11, 1994, the Appeals Panel noted that the decision to present evidence or not present evidence is the responsibility of the claimant. We decline to grant the claimant's request for another CCH.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Manager/Judge

Tommy W. Lueders
Appeals Judge