APPEAL NO. 001891

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 July 19, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury and did not have disability. The claimant appealed the adverse determinations on the grounds of sufficiency of the evidence. The claimant also complained about the assistance he received from the ombudsman assigned to assist him contending that the ombudsman should have supoenaed a witness for him which he felt was integral to his case. The respondent (carrier) replied that the evidence was sufficient to support the determinations and should be affirmed.

DECISION

Affirmed.

We first address the claimant's contention that he did not receive adequate assistance from the ombudsman. We note that the claimant did not avail himself of some of the discovery options available under the 1989 Act and the Texas Workers' Compensation Commission's rules. He could have requested the subpoena himself for the witness to appear and give testimony. Section 410.153; TEX. GOV'T CODE ANN. §2001.189 (Vernon Pamph. 1999); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 142.1 and 142.2 (Rules 142.1 and 142.2). He also could have requested the authority to take a deposition on written questions of the witness. Section 410.158(a)(1); Rule 142.13(e). He did not make either request. At the hearing the claimant offered a written statement prepared by the witness which was admitted by the hearing officer. Generally we do not review whether an ombudsman satisfactorily assisted an employee and, it was the responsibility of the claimant rather than his ombudsman, to request a subpoena for a witness to appear at a CCH. We therefore dismiss the claimant's complaint regarding such assistance as there has been no showing that the claimant requested the ombudsman to request the subpoena or made an effort to obtain the subpoena himself. Texas Workers' Compensation Commission Appeal No. 981823, decided September 18, 1998.

The claimant testified that he was hired as a service technician for the employer on February 7, 2000, but also performed duties which required him to pick up and deliver appliances. He contended that on Friday, _____, he sustained an injury to his neck and shoulder in the process of loading and unloading riding lawnmowers. He asserted that later in the day, in a separate incident, he sustained an injury to his eyes when dust from a vacuum cleaner was blown into his eyes. The claimant testified that he sought medical treatment for the injuries and began losing time from work on February 28, 2000. He contended that he was unable to work through the date of the CCH because of pain in his neck and shoulder.

The claimant testified that when he returned to work on Monday, February 28, 2000, he was fired for failing to make a merchandise pickup on Friday, _____, which he contended he could not do because it was raining and his eyes were watering and burning from the injury to his eyes he sustained earlier in the day. He testified that the rain and his eyes watering caused him to be unable to find the correct location.

The carrier offered the testimony of the claimant's supervisors who testified that the claimant did find the right location but refused to wait and that when the claimant came to work on Monday, February 28, 2000, he did not assert an injury until after he was fired.

An injury is "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). A compensable injury is "an injury that arises out of and in the course and scope of employment . . . ." Section 401.011(10). The claimant had the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury as claimed on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not sustain a compensable injury on _____.

The claimant appealed the hearing officer's finding of no disability. 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). Disability, by definition, depends upon there being a compensable injury. *Id*. Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

We affirm the hearing officer's decision and order.

Kathleen C. Decker
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge