

APPEAL NO. 032158
FILED OCTOBER 6, 2003

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 23, 2003. The hearing officer determined that the appellant/cross-respondent (claimant herein) sustained a compensable injury on _____, but did not have disability resulting from this injury. The claimant appeals the hearing officer's resolution of the disability issue as being contrary to the evidence and argues that the evidence established he had disability from March 5, 2003, continuing through the date of the CCH. The claimant contends that the hearing officer also erred in not permitting the claimant's children to testify on his behalf. The respondent/cross-appellant (carrier herein) responds that the evidence supports the hearing officer's finding of no disability through the date of the CCH. The carrier also files a request for review in which it contends that the hearing officer erred in his resolution of the injury issue. The carrier contends that the evidence fails to support a finding that the claimant was injured at all, or alternatively, that any injury he suffered was not in the course and scope of his employment. The claimant responds that the hearing officer's finding of injury in the course and scope of employment was supported by the evidence.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

There was conflicting evidence on both the issues of injury and disability. The claimant testified that he was injured on _____, when he slipped and fell while assisting Mr. H, his supervisor, in changing Mr. H's flat tire. The claimant testified that Mr. H directed him to assist in changing the tire. Mr. H testified that the claimant volunteered to help Mr. H with flat tire on the claimant's lunch hour and denied that he saw the claimant fall. The claimant testified that after his injury he did not seek medical treatment and continued to work in pain because Mr. H had promised to arrange medical treatment for the injury, but did not do so. The claimant also testified that Mr. H later instructed him to sign a paper that the claimant could not read because of his inability to read or write the English language. The paper turned out to be a letter of resignation. Mr. H testified that the claimant continued to perform his regular work, but that when the claimant was reprimanded for poor work performance, the claimant insisted upon resigning. The claimant testified that after his termination he sought medical treatment for his injury and put into evidence medical records concerning this treatment.

Whether or not an injury took place is a question of fact. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies

and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard, there is certainly sufficient evidence that the claimant suffered an injury in the claimant's testimony and the medical evidence he presented. While there is certainly conflicting evidence from Mr. H, it was the province of the hearing officer to resolve the conflicts in the evidence. Whether this injury took place in the course and scope of the claimant's employment is a mixed question of fact and law, but in the present case this question turns upon whether the claimant was assisting Mr. H with his flat tire voluntarily or upon the instructions of Mr. H. Resolving the conflicts between the claimant's testimony and that of Mr. H is again the province of the hearing officer.

Disability is a question of fact, and the claimant bore the burden of proof upon the issue of disability. While the claimant presented evidence that his injury resulted in disability, the hearing officer found that the claimant's evidence failed to meet his burden of proof. Applying the standard of review set out above, we cannot say the hearing officer erred as matter of law in finding no disability up to the date of the CCH.

As far as the claimant's evidentiary point is concerned, the claimant contends that the hearing officer erred in not permitting the claimant to call his children to testify. The hearing officer's ruling took place when the claimant called his son to testify and the carrier objected that the son had not been timely disclosed as a witness. The claimant argued that he timely disclosed that he and members of his family would testify. The carrier argued that this disclosure failed to specifically identify the claimant's son by name. The claimant argued that the name of the claimant's son and daughter were provided in answers to the carrier's interrogatories. The carrier argued that by the time that the interrogatories were answered the time to timely disclose witnesses had passed. The hearing officer requested that the claimant provide good cause for not timely disclosing the names of the witnesses and the claimant's attorney argued that at the time she did not know the names of the claimant's children and that she did not speak Spanish. The hearing officer found there was not timely disclosure of the identity

of the claimant's son and no good cause for not timely disclosing his identity. He ruled that the claimant's son would not be permitted to testify.

The claimant's son is the only witness that the claimant actually sought to call and the only witness that hearing officer specifically ruled would be excluded. Thus, the only issue before us is whether the hearing officer erred in excluding the testimony of the claimant's son. We also note that during the discussion concerning whether or not the son's testimony would be excluded, the hearing officer specifically asked the claimant's attorney about what she was going to examine the claimant's son if he were permitted to testify and she replied, "Injuries relating to the Claimant. His observations of those injuries on the date of injury."

To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must show that the admission or exclusion was an abuse of discretion and that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 992078, decided November 5, 1999; see *also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The carrier has not shown and we do not find any prejudicial error in the exclusion of the testimony of the claimant's son. The claimant represented that the only matter about which the son would have testified was the issue of injury and the hearing officer ruled in the claimant's favor on this issue. Thus error, if any, in the exclusion of this testimony would be harmless.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Chris Cowan
Appeals Judge