APPEAL NO. 033217
FILED FEBRUARY 2, 2004

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 November 17, 2003. The hearing officer decided that the appellant (claimant herein) did not sustain a compensable injury on _____. The claimant appeals, contending that the decision was contrary to the evidence and that the hearing officer erred in excluding an exhibit he offered and in admitting an exhibit offered by the respondent (carrier herein). There is no response from the carrier to the claimant's request for review in the appeal file.

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.

The claimant testified that he worked for the employer as a bus driver. He testified that on _____, he was "cushioning." This means that after driving a bus to a location for his employer, he was riding as a passenger on one of the employer's buses to reach his home location as there was no assignment available for him to drive a bus back to his home location. It was stated at the hearing that "cushioning" is comparable to the term "deadheading" in the airline industry. The claimant testified that he was injured when the bus on which he was "cushioning" hit a drop off in the highway causing his neck to jerk back. The carrier argued at the CCH that the claimant's description of the injury was inconsistent with his prior statements concerning the mechanism of the alleged injury, that the medical evidence did not support the alleged injury, and that the claimant only reported an injury after he was terminated from employment for other reasons. The carrier contended that the claimant failed to prove that he suffered an injury on _____.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. 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 to 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).

A finding of injury may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, as an interested party, the claimant's testimony only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In the present case the hearing officer found no injury contrary to the testimony of the claimant. The claimant had the burden to prove that he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant failed to meet this burden. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Nor do we find a basis for reversal in the claimant's evidentiary arguments. The hearing officer admitted the carrier's exhibits without objection and thus no error has been preserved concerning the admission of the carrier's exhibits. The hearing officer admitted all the claimant's exhibits except one. The one claimant's exhibit the hearing officer excluded was a decision of the Texas Workforce Commission (TWC) granting the claimant unemployment benefits and finding that the employer failed to establish that the claimant was terminated for good cause as defined for purposes of entitlement to Texas unemployment benefits. The hearing officer excluded this exhibit on an objection of relevancy. 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 claimant has not shown and we do not find any prejudicial error in the exclusion of the decision of the TWC. Thus error, if any, in the exclusion of the claimant's exhibit would be harmless.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN M. MOUNTAIN
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300
IRVING, TEXAS 75063.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Michael B. McShane
Appeals Judge