APPEAL NO. 950240

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 19, 1995, a contested case hearing (CCH) was held in (city), Texas, (hearing officer) presiding. The issues reported from the benefit review conference were:

1.did claimant sustain a compensable back injury in addition to his abdominal injury on (date of injury); and

2.did claimant fail to comply with Commission [Texas Workers' Compensation Commission] Rules regarding change of treating doctors, and if so, is carrier relieved of liability for health care provided by or at the direction of [Dr. A].

The second issue was resolved when the parties agreed that claimant had complied with the rules in changing doctors but that carrier disputed liability for medical benefits related to claimant's alleged back injury, and resolution of the first issue would be dispositive of the second issue.

The hearing officer determined that claimant had not sustained a back injury in addition to the compensable abdominal injury on (date of injury) (all dates are 1994).

Appellant, claimant, appealed contending he should be compensated for his low back injury. Respondent, carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

Affirmed.

Claimant testified through a translator. Carrier's attorney, who was obviously bilingual, objected to some portions of the translation as not being precisely correct. In at least one instance, the objection was regarding a potentially important fact.

It is undisputed that on (date of injury), while claimant was employed as a welder's assistant, he was struck in the abdomen by a metal "I-beam" 35 feet to 40 feet in length and weighing over one ton. Claimant apparently either fell forward onto his knees or, at least, doubled over. Claimant testified that his supervisor, (Mr. L), saw the accident as did another supervisor and a coworker. Claimant testified that his stomach was cut. There are minor contradictions among the witnesses whether claimant received a cut, a scratch, or just "a mark" and whether claimant was bleeding, or not, or whether there was some blood. Claimant saw (Dr. B) the same day. Dr. B, on an Initial Medical Report (TWCC-1), recites the history of the injury, notes a past medical history of "Low Back Pain" (claimant testified that he had sustained a low back injury in 1993), and assessed "abrasion to upper

abdomen." Dr. B prescribed pain medication and released claimant back to work. Claimant returned to work the next day and continued working until he was laid off some weeks later. Claimant saw Dr. B again on February 21st, February 24th and on March 8th. Those notes record complaints regarding the upper abdomen and ribs. In a Report of Medical Evaluation (TWCC-69) dated February 25th, Dr. B certified maximum medical improvement on February 21st with a zero percent impairment rating. Dr. B noted "mild to moderate, dull, almost constant" abdominal pain with an abrasion to the upper mid-abdomen which was gradually improving. No mention is made of back complaints or injury.

Claimant testified that he had told Dr. B about pain radiating to his back and that some time in March or April he had seen a doctor in (country). Claimant was subsequently laid off work and applied for unemployment benefits. At some point claimant was referred to Dr. A. Claimant testified that he first saw Dr. A in June or July; however, Dr. A's report of October 3rd indicates claimant may first have been seen on August 5th "for treatment of spinal pain which resulted from an injury to the abdominal and lower thoracic and upper lumbar spine. . . ." Dr. A is of the "opinion that this patient's spinal pain is a direct result of his injury on (date of injury)." Dr. A performed some "adjustments" and referred claimant to (Dr. O), presumably for treatment of claimant's abdominal complaints. Dr. O, in a TWCC-61 dated August 22nd, noted "c/o abd. pain radiating to back." Dr. O's clinical assessment was "DTR's - +2. M&S - intact. ABD. - soft, NT with mild ache to R&LUQ and radiates to back. (CVA areas)." The treatment plan was to continue "meds" and treatment. Claimant testified that Dr. O refused to treat his back injury because carrier refused to authorize treatment for his back. Claimant had not seen a doctor for several months prior to the CCH.

The hearing officer found the back complaints not to be related to claimant's compensable abdominal injury. Claimant's appeal is that he should be compensated for the low back injury he suffered on (date of injury). We accept that appeal as contesting the sufficiency of the evidence supporting the hearing officer's decision.

The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. While the Appeals Panel has held that an injury may be based on the claimant's testimony alone, (Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ) and Texas Workers' Compensation Commission Appeal No. 941522, decided December 21, 1994) the testimony of the claimant as an interested party only raises an issue of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 91089, decided January 15, 1992. Section 410.165(a) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and 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 inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (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 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness, including that of the claimant. Taylor v. Lewis, 553 S.W.2d 153 (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). We find the evidence sufficient to support the determination of the hearing officer that the claimant did not sustain a back injury along with his compensable abdominal injury on (date of injury).

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge