APPEAL NO. 030780
FILED MAY 22, 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 March 3, 2003. The hearing officer decided that the respondent/cross-appellant (claimant herein) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals these determinations as being contrary to the great weight and preponderance of the evidence. The appellant/cross-respondent (self-insured herein) responds that the evidence supported the hearing officer's determinations of no compensable injury and no disability. The self-insured appeals the factual findings by the hearing officer that the claimant suffered a lumbar strain without disc involvement on _____, which prevented the claimant from obtaining and retaining employment from September 19, 2002, through October 10, 2002. There is no response from the claimant to the self-insured's request for review in the appeal file.

DECISION

We reform the decision of the hearing officer by striking two factual findings of the hearing officer as surplusage. 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 as reformed.

The question of whether an injury occurred in the course and scope of employment is a question of fact. Texas Workers' Compensation Commission Appeal No. 92251, decided July 29, 1992; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case 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 in the course and scope of employment contrary to the testimony of the claimant, who testified that he injured his back pulling on a pallet jack, and some medical evidence which supported the claimant's contention that he was injured on the job. 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.).

With no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011(16). Thus we find no error in the hearing officer's finding of no disability based upon his finding of no compensable injury.

The self-insured requests that we reverse two of the hearing officer's findings of fact--Finding of Fact No. 4 and Finding of Fact No. 6--which state as follows:

FINDINGS OF FACT

4. On or about _____, the Claimant suffered a lumbar strain without disc involvement.

6. As a result of his lumbar strain, the Claimant was unable to obtain and retain employment at pre-_____, wages beginning September 19, 2002, through October 10, 2002, and at no time thereafter through the date of the [CCH].

We note that the issues reported out of the benefit review conference were injury and disability. There was no issue on extent of injury. We have encouraged hearing officers to indicate the nature of the injury when determining whether an injury existed. However, we have also stated that it is not appropriate for a hearing officer to make a final determination on the issue of extent of injury when the issue of extent of injury is not before the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 001239, decided July 13, 2000, and Texas Workers' Compensation Commission Appeal No. 002898, decided January 29, 2001. As we have done in earlier cases, we consider all findings by the hearing officer concerning the extent of the claimant's injury to be beyond the scope of the issue before him, and we consider them surplusage. Therefore we reform the hearing officer's decision by striking both Finding of Fact No. 4 and Finding of Fact No. 6.

The decision and order of the hearing officer are affirmed as reformed.

The self-insured represents that the true corporate name of the insurance carrier is **(a certified self-insured)** 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:

_____
Veronica Lopez
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury. Whether the claimant was injured in the course and scope of his employment was a factual matter for the hearing officer to resolve from the conflicting evidence. Without a compensable injury, the claimant would not have disability. Section 401.011(16). I do not think it is necessary to strike Findings of Fact Nos. 4 and 6. It is clear from the hearing officer's decision that he did not find that the lumbar strain was sustained in the course and scope of employment. Since disability was an issue before the hearing officer, the hearing officer should not be faulted for making a finding regarding the nature of the claimed injury so that an evaluation could be made as to whether the injury would prevent the claimant from obtaining and retaining employment at his preinjury wage.

_____
Robert W. Potts
Appeals Judge