APPEAL NO. 92720

On November 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issues at the hearing were whether the claimant sustained an injury in the course and scope of his employment on (date of injury 1); whether claimant had disability; and whether the carrier was entitled to contribution based on earlier compensable injuries of the claimant. The hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment on (date of injury 1), that he did not have disability, and that he was not entitled benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer further determined that the provisions of Article 8308-4.30 relating to contribution were not applicable since the claimant did not sustain a compensable injury. The appellant, hereafter the claimant, disagrees with the hearing officer's decision and with certain findings of fact made by the hearing officer. The respondent, hereafter the carrier, requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified that on (date of injury 1) he injured his lower back and left hip at work while he was working with a large cable. He said that the cable was on a large spool and was about 10 inches in diameter and weighed about 10 or 12 pounds per foot. The cable attaches to a drag line which the employer uses in its surface mining operation. The claimant said that a coworker, (Mr. M), was operating the machine which unreels the cable and that he was holding the cable and cable head, which weighed about 32 pounds, over his right shoulder. The claimant explained that when the cable was unreeled, the weight of the cable and cable head pushed him forward and down on his knee and that he felt pain in his lower back and left hip. He also said that (Mr. M) could not see him from where (Mr. M) was in the machine, that he hollered to him to hold up, and that when (Mr. M) came down off the machine he told the claimant that he could not see him. The claimant said that he told (Mr. M) that he was injured but did not tell anyone in a supervisory capacity about his injury until August 16 or 22, 1991, because he was afraid for his job. The claimant said that he did not miss any work because of his injury until after August 26, 1991, when (Dr. P), M.D., advised him that he could do light work but the employer had no light work available.

The claimant further testified that on (date of injury 2), he injured his back again when he was working with cable with another coworker, (SA). The claimed injury of (date of injury 2), was the subject of a separate contested case hearing and Texas Workers' Compensation Commission Appeal No. 92719. The claimant said that when he was injured on (date of injury 2) he went to a truck to relax and that a supervisor, (BP), saw him relaxing in the truck. He said he did not tell (Mr. P) that he was injured and that as a result of relaxing in the truck he was taken off work for one day by his employer as a disciplinary measure. The claimant testified that after being disciplined he decided to report to his supervisor, (RG), on August

16th or 22nd that he had been injured at work on (date of injury 1), but that his supervisor would not accept a written report of injury from him. The claimant said that after he saw (Dr. P) on August 26th he went to (Dr. M), M.D., at the request of the employer on September 3, 1991, and that (Dr. M) returned him to full duty work on September 5, 1991. The claimant said that he did not work from August 26 to September 10, 1991, the day he was terminated by his employer.

The claimant further testified that he sustained an injury to his lower back and left hip while working for the employer in April 1990, that he was treated by a Dr. Allison for that injury, and that he settled his claim for that injury in April or May of 1992.

In a signed written statement, (Mr. M) stated that he worked with the claimant installing cable on (date of injury 1), that he noticed the claimant grab his lower back, that he got down off the machine to see if the claimant was all right, and that the claimant told him he had hurt his back in the same place as his previous injury. (Mr. M) added that they later tried to file an accident report but the supervisor would not accept it. Sammy Abernathy stated in a signed written statement that he was running cable with the claimant on (date of injury 2) when the claimant picked up the cable and "apparently strained his back." He added that the claimant went to the truck to rest.

(RG) testified that the claimant did not report an injury to him until a week or two after the claimant was given three days off work as a disciplinary measure for being asleep in the truck on (date of injury 2). He also testified that he did not notice the claimant having any problems doing his work and that he did not accept the accident report the claimant tried to give him.

(BP) testified that he saw the claimant working after (date of injury 1) and that the claimant did not appear to be in any pain. He said that on (date of injury 2) he saw the claimant in the truck about 2:30 p.m. in a "very comfortable position" with his arm over his eyes and that when he confronted the claimant the claimant said that he went to the truck to take a break and cool off. This witness said that the claimant did not tell him about a back problem.

A medical record from (Dr. P's) office indicated that the claimant was examined by him on August 26, 1991, and was diagnosed as having a back strain and a possible ruptured disc. (Dr. P) indicated that the claimant told him he had hurt his back at work two years before and that about three and one-half weeks before the examination he felt a sudden burning on his left lower back when he was lifting some cables. In a written certificate to return to work, (Dr. P) stated that the claimant could return to restricted work on "8-9-91" (sic) with no lifting over 10 pounds and no bending. In a patient information form dated August 27, 1991, which was signed by the claimant, but which does not indicate the health care provider the form was provided to, the claimant indicated that he had been injured at work on April 21, 1990, (date of injury 1), and August 9, 1991. On or about August 30, 1991, the claimant had a magnetic resonance imaging (MRI) of his lumbar spine done

at the request of (Dr. M). In a letter to (Dr. M) dated August 30, 1991, (Dr. A) summarized the results of the MRI as follows:

1.Disc degeneration L4-5 with a congenitally small canal throughout the lumbar spine. With a minimal bulging annulus, ligamentous and facet hypertrophy this combination appears to be causing a mild degree of bilateral lateral recess stenosis.

2.Mild facet arthrosis L3-4 and L5-S1 without evidence of focal disc herniation or neural foraminal compromise.

3.At the L4-5 level the canal measures 1.1 cm in anterior to posterior dimension.

On September 5, 1991, (Dr. M) stated in a letter to the employer that "[t]here is no evidence of injury and he [the claimant] has been returned to full duty." However, in a medical absence report dated September 16, 1991, (Dr. M) stated that the claimant had an "acute inflammation left sacroiliac area."

The claimant testified that (Dr. P) referred him to (Dr. W), M.D., a neurologist whom he saw on November 1, 1991, and in May and June of 1992. On November 1, 1991, the claimant filled out and signed a patient information form for treatment by (Dr. W) in which the claimant gave the (date of injury 1) as "April 90." (Dr. W) gave the date of the claimant's injury as April 19, 1990 in an initial medical report to the Commission dated November 5, 1991, and in a subsequent medical report to the Commission dated June 3, 1992. An electro diagnostic examination performed in May 1992 at the request of (Dr. W) indicated that the claimant had "mild and chronic left L-5/S-1 radiculopathy, perhaps with more L-5 nerve root involvement." In a letter dated June 5, 1992, (Dr. W) stated that he initially saw the claimant on November 1, 1991, that the claimant related that he had sustained an injury to his back at work in April 1990, that his low back pain worsened in February 1991 when he lifted objects at work, and that on (date of injury 1) he lifted cable at work and had low back pain radiating down the left leg. (Dr. W) further stated that he did not see the claimant again until May 29, 1992. In a letter dated August 10, 1992, (Dr. W) stated that it was his impression that the claimant has a left L5-S1 lumbar radiculopathy and possibly a right C7 radiculopathy. He also stated that the claimant "has been unable to return to work since I initially saw him in November of 1991."

The hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment on (date of injury 1). Pursuant to Article 8308-6.34(e), the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. Civ. App.-Corpus Christi 1983, writ ref'd n.r.e.). There were matters in evidence which may have cast doubt on the claimant's claim that he

was injured at work on (date of injury 1). For example, the claimant did not report his alleged injury to his supervisor until after he was disciplined for relaxing or sleeping in the truck. The hearing officer could infer that if the claimant was having back problems from work at the time he was found in the truck and was in the truck for that reason, it would have been reasonable for him to report that problem to his supervisor before disciplinary actions were taken in order to try to avoid such actions. Some doubt was also cast on (Mr. M) written statement because while (Mr. M) indicated in the statement that when he was in the machine he saw the claimant holding his back, the claimant testified at the hearing that (Mr. M) told him on (date of injury 1) that he could not see him. Having reviewed the record, we conclude that the complained of findings of fact and the decision of the hearing officer are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Without a compensable injury, the claimant could not have disability as defined by the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge