APPEAL NO. 931089

At a contested case hearing held in (city), Texas, on November 3, 1993, the hearing officer, (hearing officer), determined that the respondent (claimant) suffered a back injury on (date of injury), in the course and scope of his employment with (employer) on (date of injury). In its appeal pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 410.202(a) (1989 Act) (formerly V.A.C.S., Article 8308-6.41(a)), the appellant (carrier) challenges the sufficiency of the evidence to support such determination. The claimant's response urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified that on (date of injury), while he was working for employer, a fire broke out at the top of a reactor unit and he left the control room and ran up 140 steps to the scene of the fire. A steam line was unrolled to put out the fire but it blew apart so claimant and coworker (Mr. S) ran back down the stairs for fire extinguishers. Claimant hoisted onto his shoulder a fire extinguisher, which he estimated, variously, to weigh approximately 50 and 75 pounds, and ran back up the stairs. When he reached the top, he said he slammed the fire extinguisher down and sat down as he was tired and he hurt. After the fire was extinguished and claimant had returned to the control room, he said he told Mr. S that his back was bothering him. An affidavit from Mr. S corroborated this testimony.

Claimant said that later on, his right leg began to bother him and that on or about March 2nd he visited his HMO doctor, (Dr. B), because he could hardly straighten his leg and walk on it. He said his leg then hurt worse than his back which also hurt. Dr. B obtained a CT scan on March 3rd and diagnosed lumbar disc disease (herniated disc). Dr. B opined that claimant's most recent back problems were the aggravation of a pre-existing lower back condition and were caused by his activities in helping to extinguish the fire on (date of injury). Claimant also stated that Dr. B referred him to (Dr. S), a neurosurgeon, whom he saw on March 12th. Dr. S opined that while claimant's episode of low back pain a year earlier while doing squats with weights may have been an aggravation to his back, the ruptured disc did not occur until the episode he experienced at work on (date of injury). Claimant said he was next seen by Dr. S's associate, (Dr. M), who performed a right L4-5 lumbar hemilaminectomy and diskectomy on March 18th. Dr. M related claimant's history of running up the stairs with the fire extinguisher and feeling as though he had pulled a muscle. Dr. M diagnosed claimant as having a pinched nerve in his back caused by a ruptured disc and opined, based on the history provided, that claimant's "back problems were related to his accident in the emergency fire situation." Dr. M, too, did not feel claimant's ruptured disc occurred prior to the accident at work.

Claimant acknowledged having submitted medical bills to his group health carrier for payment. He also acknowledged that when he called his supervisor, (Mr. B), about being taken off work by Dr. B, he did not initially report his condition as work related. Claimant explained that he did not realize that his leg pain was related to his back injury and that his back and leg problems were a work-related injury until such was discussed by Dr. S. There was, incidentally, no disputed issue concerning the timeliness of claimant's notice of injury to his employer.

The carrier's theory was that claimant's back injury was associated with his prior weight lifting workouts, that claimant was in employer's discipline program because of absences and tardiness, and that his report of injuring his back at work on (date of injury) was contrived to provide a cover story for the absences from work associated with his back injury and surgery. Claimant acknowledged that he had earlier experienced back pain and pulled back muscles associated with playing high school football and baseball, and that he had also experienced back pain associated with his lifting weights. However, he also said that he did not earlier have the leg pain, did not earlier see a doctor, for such, that his back pain stopped when he stopped lifting weights, and that his gym membership had expired before his injury at work. Claimant also acknowledged having been disciplined for absences but essentially denied contriving a work-related injury to provide a cover story for absences associated with the treatment of his back problem.

The hearing officer, finding that on (date of injury) claimant climbed 140 stairs with a 50-pound fire extinguisher on his shoulder and suffered a ruptured disc as a result, concluded that claimant sustained a compensable back injury on that date. We find the evidence sufficient to support this determination. Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses and the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports the findings and they are not so against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-

661 (1951).

Finding the evidence sufficient to support the challenged factual findings and legal conclusions, we affirm the hearing officer's decision.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge