APPEAL NO. 931100

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). A contested case hearing was held on November 4, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) was injured in the course and scope of his employment on (date of injury), and whether he has disability. The hearing officer found for the claimant on both issues. The appellant (carrier) appeals urging that there was no evidence to support the findings and conclusions of the hearing officer.

DECISION

The decision of the hearing officer is affirmed.

In reviewing a "no evidence" challenge on appeal to the Appeals Panel, we consider only the evidence and reaso nable inferences drawn therefrom which, when viewed in their most favorable light, support the hearing officer's decision. All evidence and inferences to the contrary are disregarded. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992.

The claimant testified that he worked as a floorhand on a pulling unit for (employer). He stated that on (date of injury), he and a fellow employee pulled a pump out of a well. They then had to move the well head by picking it up enough to slide it about 10 feet. After completing this task he felt no pain, completed his shift, and went home. He testified that he woke up about 2:30 the next morning with a numbness and sharp pain in his lower back, right leg and buttocks.

He stated that he had previously asked for and gotten the next day (a Thursday) off. Friday was a scheduled day off. He returned to work at 7:00 on Saturday morning, (date), and told both a coworker and his supervisor that his back hurt and he had a hard time bending over. He admitted that he also mentioned to his supervisor that he must have twisted his back sleeping. On July 20, 1993, he went to a chiropractor who was unable to help him. So on July 23, 1993, he sought treatment from (Dr. H), his treating doctor who, after two orthopedic consultations, diagnosed lumbar strain. Posttraumatic grade I spondylolysis with a trace of spondylolisthesis was also diagnosed by a referral physician.

The claimant also recounted his conversation with Dr. H who, as part of his treatment, asked the claimant to explain the events leading up to his experience of pain. The claimant told Dr. H about moving the well head, which he estimated to weigh between 200 and 500 pounds. He stated to the doctor that he did not feel pain right away when the well head was moved, so he thought he might have twisted his back while sleeping. However, Dr. H told him that a person does not always feel pain from a back strain right away. Dr. H also reportedly said he had never heard of anyone straining their back while sleeping, thought this injury was work-related and that the claimant should apply for workers' compensation

benefits. The claimant contends that he never connected his back problem with work until he had this conversation and Dr. H made his diagnosis. Dr. H took him off work effective July 23, 1993.

On cross-examination the claimant testified that the incident moving the well head was the only strenuous thing he recalled doing before waking up with his pain. His last day at work was a 13-hour day on July 20, 1993, which the claimant described as "pretty easy." He stated that in all his discussions with coworkers and supervisors prior to seeing Dr. H, he attributed his back problems to twisting his back while sleeping. All medical reports in evidence relate his back condition to trying to move the well head.

The claimant's immediate supervisor, (MM), testified that the claimant never told him that he hurt his back lifting a wellhead. On the Monday following the alleged injury, the claimant told him he twisted his back reaching for a blanket in bed. He was able to do his job and never mentioned his back pain as being job related.

Similarly, (MR), the officer manager and vice-president of the employer testified that he first learned of the claimant's back problems on the Tuesday following the incident. The claimant told him he hurt his back. When asked if it was job related, the claimant said no and "I guess I slept wrong." He never said he got hurt trying to move the well head. According to MR, the claimant asked a couple weeks later about employer health coverage or benefits for being off work and was told there weren't any. MR heard later that doctor advised claimant later that due to the seriousness of the injury, claimant probably hurt his back on the job.

A transcript of a phone conversation between coworker (JM) and an adjuster discloses that JM never saw the claimant get hurt nor did the claimant ever complain to him about an injury. He did overhear a conversation between the claimant and MM in which the claimant said he hurt himself in bed.

Another coworker of the claimant, (JR) in a transcribed telephone conversation reported that the claimant told him he hurt his back while he was sleeping. He never saw him do any lifting on the job where he might hurt himself. He reports the claimant as telling him that his doctor thought it possible that he got hurt lifting something.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The questions of whether an injury occurred in the course and scope of employment and whether such injury results in disability, are ordinarily ones of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993; Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993. The hearing officer, as fact finder, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. To this end, the hearing officer may believe all, part or none of the testimony of any witness.

The appeals panel has also held that the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). A claimant's own testimony, if credited by the trier of fact, can support a finding both of injury in the course and scope of employment and disability. Texas Workers' Compensation Commission Appeal No. 93972, decided December 8, 1993; Appeal No. 93854, *supra*,

There is evidence that until his treatment with Dr. H, the claimant believed his injury occurred while sleeping. When, according to the claimant, Dr. H pointed out that he had never heard of sleep causing back strain and when both he and the claimant reviewed his activities leading up to the strain, the claimant could point to nothing but the lifting incident as the cause of his injury. Dr. H told claimant (who was not a doctor) that back strain pain could manifest itself some time after an incident. There was thus some evidence from the claimant and his treating physician, albeit somewhat conflicting with the accounts given by his supervisors and coworkers about the claimant's role in moving the wellhead, which supports a finding that he sustained an injury in the course and scope of his employment. We do not believe that the self-diagnosis of an injured employee under such circumstances as this is entitled to greater weight than the eventual diagnosis made after claimant reviewed his activities with his doctor. Similarly, the claimant introduced evidence of disability in the form of his own testimony and Dr. H's note of July 30, 1993, advising the claimant not to work while he remained under his care. For these reasons, we can find no basis for concluding that there is "no evidence" to support the decision and order of the hearing officer. Nor do we find the hearing officer's findings, conclusions and decision and order to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

Accordingly, the decision is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge