APPEAL NO. 93688

On July 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the hearing were: 1) whether the appellant (claimant) was injured in the course and scope of his employment on (date of injury); and 2) whether the claimant has disability. The hearing officer determined that the claimant was not injured in the course and scope of his employment and that the claimant does not have disability. The hearing officer decided that the claimant is not entitled to workers' compensation benefits. The claimant disagrees with certain findings of fact and conclusions of law and contends that the hearing officer's decision is against the great weight and preponderance of the evidence. The respondent (carrier) responds that the hearing officer's decision is supported by the evidence.

DECISION

The decision of the hearing officer is affirmed.

On (date of injury), the claimant was employed as a bus driver by the employer, (employer). The claimant testified that on that date he experienced chest, back, and shoulder pain when he pulled a client in a wheelchair onto the electronic lift. The claimant testified that he completed his route and then the same day told the bus route scheduler, (Mr. W), that he had had chest, back, and shoulder pain when pulling the client onto the bus lift. The claimant said that Mr. W said he had to see his own doctor so he went to the hospital on (date of injury) and obtained a prescription for medication. He said he did not tell the doctor at the hospital that his injury was work-related. The claimant said that he did not go back to work and that on March 11th he called the employer's general manager, (Mr. H), told Mr. H that he was injured at work on (date of injury), and Mr. H arranged an appointment for him with (Dr. G) whom he saw on March 12th. The claimant said that Dr. G gave him a prescription for medication and released him for work. The claimant said the prescription medication made him drowsy and unable to drive. On March 16th the claimant said he went to (Dr. P) who has kept him off work since the initial visit. In a written accident report dated March 16, 1993, the claimant reported to the employer that on (date of injury), he started having chest, shoulder, and back pain when loading a client in a wheelchair onto the bus and that he reported it to Mr. W. The claimant testified that prior to the alleged date of injury he had an arrhythmia and high blood pressure.

Dr. G reported that the claimant stated that he was pushing a wheelchair and started having pains. Dr. G diagnosed a sprain/strain of the left shoulder. Dr. P reported that the claimant told him that he developed a sudden onset of chest, back, and shoulder pain when he was lifting a client in a wheelchair. Dr. P initially diagnosed back pain. On April 29th Dr. P reported that a spinoscopy of the claimant's cervical spine revealed a "severe restriction of the intersegmental mobility in the lower cervical segment particularly at C/7 and C7/T1." Dr. P further reported that the claimant was to be off work until further notice.

Mr. W testified that on (date of injury) the claimant told him that he, the claimant, was having chest and back pain. Mr. W said he suggested that the claimant see a doctor, but the claimant said he didn't have any money and asked Mr. W if the employer would send him to a doctor. Mr. W said that when he asked the claimant if he was injured on the job, the claimant said he was not. Mr. W testified that another employee had been injured lifting a wheelchair so he specifically asked the claimant if the claimant had hurt himself lifting a wheelchair and the claimant replied "no." Mr. W said the employer's office manager, (Ms. M), was present during part of the conversation. Ms. M testified that on (date of injury) the claimant was complaining of chest pain and she asked the claimant if anything had happened to him on his bus route and the claimant replied "no." She said that she told the claimant that since his problem was not work related she could not send him to a company doctor. Mr. H, the general manager, testified that Mr. W called him the evening of (date of injury) and told him that the claimant had complained of chest pain that day and wanted to see a company doctor. Mr. H said he talked to the claimant on March 12th and that when he asked the claimant if his chest pains started on the bus route, the claimant said he didn't know, but that he had never had the problem before "doing wheelchairs." Mr. H said that he was concerned about letting the claimant continue to drive with chest pain so he arranged for the claimant to see Dr. G. Mr. H said he first learned that the claimant was claiming an on-the-job injury on March 19th when the claimant's attorney called him. In a sworn written statement (Ms. L) stated that on March 5, 1993 (three days before the date claimant said he was injured at work), she heard the claimant complaining of back and shoulder pain and she asked the claimant if he had been hurt on the job to which the claimant replied "oh no, don't worry, every now and then it hurts because I hurt my back awhile back."

The hearing officer found that the claimant did not injure his neck, chest or shoulder while at work on (date of injury), and concluded that the claimant was not injured in the course and scope of his employment on that date. The hearing officer further concluded that the claimant had no disability. Having reviewed the record, we conclude that the hearing officer's findings, conclusions, and decision are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Griffin v. New York Underwriters Insurance Company, 594 S.W.d 212 (Tex. Civ. App.-Waco 1980, no writ). Pursuant to Section 401.011(16), "disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Consequently, without a compensable injury, there cannot be disability as defined by the 1989 Act.

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. Section 410.165(a). As the trier of fact the hearing officer is privileged to believe all, part, or none of the testimony of any witness, and resolves conflicts and inconsistencies in the evidence. Burelsmith v.

Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). A doctor's recitation of the history of the injury as reported to the doctor by the claimant does not necessarily compel a determination that the injury in fact occurred on the date alleged by the claimant. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge