APPEAL NO. 93692

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX LAB CODE ANN § 401.001 *et seq*. On July 12, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) was not injured in the course and scope of employment and therefore has no disability. Claimant asserts that findings of fact in regard to injury and disability are incorrect, pointing out that he was injured when crossing the railroad track with its adjacent potholes and describing deficiencies in a video made by the carrier of the scene. Respondent (carrier) replies that the evidence supports the decision and objects to evidence supplied by claimant as part of his appeal.

DECISION

We affirm.

The issues at the hearing were whether claimant was injured when he drove a tractor and empty trailer over a railroad track with adjacent potholes on (date of injury), and whether claimant has disability therefrom.

Section 410.204(a) of the 1989 Act states that the appeals panel "shall issue a decision that determines each issue on which review was requested."

Claimant asserts on appeal that he was injured at the time he crossed the railroad track in question and has not been able to work since that time; he criticizes the video admitted at the hearing which depicts the scene and a truck driving through the area.

The Appeals Panel determines:

That the record contains sufficient evidence to support the decision of the hearing officer that claimant was not injured when crossing the railroad track in question on (date of injury).

Since there was no compensable injury, there can be no disability under the 1989 Act making the determination of no disability sufficiently supported by the decision as to compensable injury.

Claimant worked for (employer) for approximately four months when he indicates that he injured his back. The injury was described by claimant, a truck driver (tractor and trailer), as occurring on (date of injury), after he had left highway 225 and was within "a block" of the employer's site when he drove over a railroad track. The track is double and claimant stated that he hurt his back as the truck went through a pothole on the second set of tracks on the right side of the road (the track nearest to the job site). Claimant estimated that the potholes are "couple foot wide", but had no knowledge of how deep they are. The co-driver, who was with claimant, (FR), estimated that the potholes were "a foot, foot and a half wide",

and he opined as to their depth, "counting the tracks to the bottom of the holes, they're about 3, 5 inches." Both claimant and FR estimated the speed of the truck as two to three miles an hour as it crossed the tracks.

Claimant said that as the truck hit the pothole his seat "bottomed out" and he felt sharp pain in his back. FR testified that claimant told him he felt a sharp pain. Both described the seats of the tractor as consisting of a cushion that is adjusted with air. Both stated that he used about one-third the maximum amount of air in his cushion. (When a cushion has the maximum amount of air, it will raise the driver higher than when it has the minimum amount of air.) Claimant stated that he stopped after clearing the tracks but decided he could drive the rest of the way since they were so close. When he got home that day, he had his wife call back to say his back hurt, and he could not come in to work.

FR testified that claimant was "laughing" when at the job site upon returning (after the incident) but was not "jumping and joking". Claimant, on the other hand, admitted that he was "joking around" with others upon the return to the job site. Neither reported at that time that he had been hurt crossing the railroad tracks, although FR reported that he felt sick. FR later indicated that he, too, hurt his back going over the track at the same time.

(DR), the wife of FR, says that she has observed claimant since (date of injury), and can tell he is in pain. She added that before (date of injury), claimant did not walk the way she saw him walk thereafter.

Claimant offered into evidence an MRI, dated March 18, 1993, which showed mild degenerative disc disease with mild bulges at L3-4, L4-5, and L5-S1 with no herniation. Claimant offered no other documentary medical evidence, but testified that he had seen Dr. V and Dr. F and was receiving therapy for his back; claimant indicated that Dr. F had told him not to drive. Claimant added that he had no problem with his back before (date of injury).

Carrier introduced statements of two workers, (JL) and (DL) who said that claimant after returning to the job site on (date of injury), was "joking, and laughing" (JL) or "cutting up and joking" (DL) with the other drivers. At the hearing (SI) testified that he a distribution coordinator and is claimant's supervisor. On the morning of (date of injury), when he came to work at 7:00 a.m. (prior to the incident in question), he was told that claimant had complained of back pain and had requested to go home. SI stated that when claimant and FR arrived at about 11:30 a.m., he asked claimant if he still wanted to go home and said further that claimant replied that his back was still bothering him. Claimant did not appear to be in any pain to SI and did not indicate that he had injured his back. SI estimated that the depth of the holes adjacent to the railroad tracks in question was about three to four inches.

(RT) testified that he is the distribution supervisor for employer; as such he supervises all drivers and five coordinators. He described claimant as "jumping around and joking like we always do" upon his return on (date of injury), but claimant did not say anything about being injured. He checked the tractor and trailer that claimant drove and found them satisfactory. He jumped up and down in the seat, and a video in evidence shows him jumping in a cushion seat with a large spring beneath the cushion that moves up and down as the cushion yields to the force exerted on it by its occupant. He has ridden in 18 wheelers across these tracks on many occasions and believes the ride is smoother than that which he gets crossing the tracks each day in his 1991 pickup truck. While he has not crossed the tracks in an 18 wheel truck with no air in the seat, he does not think that the seat would "bottom out" if that were to happen.

(CW) is the terminal manager for employer. Claimant reported an injury to him on (date). On that date CW then had a driver drive him across the tracks in first gear (claimant testified this was the way he crossed the tracks) in the same truck as used by the claimant on (date of injury), and said the movement in the seat was "negligible". He tried the seat "all the way down...all the way up... and I tried to put it in the middle". He queried other drivers (the terminal has 34) about the type of ride crossing these tracks and reported that some laughed and at the other extreme, some stated that the area around the tracks was "rough". CW called FR after claimant reported his injury and FR told him that claimant was jumping around "like a spring chicken" after their return. CW also said that when he asked FR in regard to claimant's injury, "Did it happen the way (claimant) said?", FR replied, "No, it didn't". CW has never seen an injury to a driver from a pothole.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165 of the 1989 Act. She could consider that claimant's description of the injury only presented an issue for the trier of fact to resolve. *See* Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). She could settle conflicts in the evidence, such as that between FR's statement at the hearing that claimant was not joking around and CW's statement at the hearing that FR told him that claimant was jumping around; and that between FR's testimony that claimant stated he felt pain at the time the truck rolled over the tracks and CW's testimony that FR told him claimant's back problem did not happen the way claimant described. *See* TEIA v. Villasana, 558 S.W.2d 917 (Tex. Civ. App.-Amarillo 1977, no writ). She could note that after carrier's witnesses testified, claimant did not present any rebuttal evidence. She could consider the testimony as to the number of trucks that have crossed the tracks in question without incident, the speed that claimant testified he was traveling when he crossed, the testimony of the claimant that he had inflated his cushion to one-third capacity, the fact that springs support the cushion, the testimony as to the depth of the potholes (3, 4, or 5 inches) in relationship to the size of the tires on the 18 wheel truck in question, and the width of the hole to conclude that claimant did not injure his back in this manner. The evidence was

sufficient to support the finding of fact that claimant did not injure his back while traversing the railroad track in question on (date of injury).

With a determination that there was no compensable injury, which was sufficiently supported by the evidence, the issue of disability under the 1989 Act must be found in the negative. By definition, disability "means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." (emphasis added). *See* Section 401.011(16) of the 1989 Act.

The decision and order of the hearing officer are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge