APPEAL NO. 93977

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On September 10, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) did not injure his back when he injured his ankle on (date of injury); there is therefore no disability due to claimant's back condition. Claimant asserts that the finding of fact that he did not injure his back is error because when he stepped in a pothole he fell on his side. He adds that he cannot work because of the pain from the injury. Respondent (carrier) replies that the decision of the hearing officer should be upheld.

DECISION

We affirm.

At the hearing the issues were stated to be whether claimant injured his back, as well as his ankle while in the course and scope of employment, and if the back was injured, does claimant have disability.

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

On appeal the claimant indicates that he injured his back when he stepped in a pothole on (date of injury), and fell on his side. He adds that he had no other accident. He believes he should be found to have disability because he cannot find "suitable" employment because of his pain and cannot perform when on the job.

The Appeals Panel determines:

That the finding of fact that claimant did not injure his back on (date of injury), is sufficiently supported by the evidence.

That the conclusion of law that claimant had no disability is sufficiently supported by the finding that no compensable back injury occurred.

Claimant worked as a nightwatchman for an apartment house (employer). He stepped in a hole while running or walking after people encroaching on the property. He sprained his ankle and reported that to his supervisor. He saw (Dr. M) the next day, a few days later, and on March 30, 1992. Dr. M's notes indicate no back complaints; his note of March 30th indicates that the ankle sprain had resolved. Claimant worked until July 22, 1992, (and "didn't miss a day") when he was fired. Employer indicated that the firing was not tied to the injury and that claimant did not complain of back pain while on the job. Claimant agreed that no one indicated he was being fired because he was physically unable to do the job.

Claimant then went to work for (subsequent employer). He was fired from that job

on September 21, 1992, after certain merchandise was missing from the store in which he was employed. He at first indicated that he was fired because he was unable to do the job.

Claimant stated that during these periods he worked with pain. While his answers at the hearing were not always responsive in regard to his back pain, he indicated that the back started hurting in May 1992. Claimant saw a (Dr. D) who stated that he was limited by the insurance carrier to only checking claimant's ankle. In May 1993, Dr. D noted that a bone scan of the feet, ankles, and legs was negative, showing no abnormality. Claimant had also seen (Dr. G). Dr. D acknowledged that Dr. G suggested the bone scan, and Dr. D further indicated that he agreed with Dr. G's opinion. Dr. D thought the ankle was sufficiently healed but also thought some testing of claimant's back should be done.

A note in the medical records indicates that claimant was seen in the Hospital emergency room on July 22, 1992, with "3 day (history) of (right) leg pain involving calf & back of thigh up to buttock. . . .3 wks ago (patient) sprained (right) foot & feels this may be related because he was keeping his (weight) off that foot for a while." Claimant was also seen by (Dr. H) who in September 1992 estimated claimant would need eight to 10 weeks of treatment pending reevaluation and noted, among other findings, "positive swelling." In February 1993, Dr. H estimated that it would be six to 12 months before an estimate of disability could be made.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. She could give weight to the lack of any complaint by the claimant of his back to employer or a doctor prior to July 1992 in determining whether the back condition was related to the ankle injury of (date of injury). She could question the credibility of the claimant based on the history recorded in the emergency room notes of July 22nd which referred to "a sprained foot. . .3 weeks ago" (not 4 and 1/2 months ago) and the claimant's testimony as to why he was fired by subsequent employer. The question of whether a condition, which appears weeks or months after an injury previously recognized by an employee, is tied to the same incident is for the hearing officer as finder of fact to determine. Compare this case to Texas Workers' Compensation Commission Appeal No. 92503, decided October 23, 1992, which reversed a hearing officer's decision that a later reported injury was not tied to the same incident; among other points, the claimant in that case could show that he had pain from the later condition within days of the incident. The Appeals Panel will not overturn the hearing officer on a determination based on her fact finding responsibilities unless the determination is against the great weight and preponderance of the evidence. *See* In Re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1952).

The decision and order are sufficiently supported by the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge