

APPEAL NO. 94035

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. §401.001 *et seq.* On September 20 and December 2, 1993, a contested case hearing was held in (City), Texas, with (Hearing Officer) presiding, to determine whether (claimant), who is the respondent, was injured on (date of injury), in the course and scope of his employment with (employer), and whether he has disability as a result of his injury.

The hearing officer determined that claimant was injured in the course and scope of his employment, and that he had disability from April 1, 1993, until December 2, 1993, from his injury. The hearing officer ordered that temporary income benefits be paid until the claimant no longer has disability or has reached maximum medical improvement (MMI).

The carrier has appealed, arguing that claimant's testimony was against the great weight and preponderance of the evidence with respect to the occurrence of an injury. The carrier points out the inconsistency of the accounts of the accident reflected in the medical records, and the divergence of claimant's testimony from that of eyewitnesses. The carrier further notes that the hearing officer erred by finding the existence of disability past the date of MMI as certified by the doctor for the carrier to be October 25, 1993. No response was filed.

DECISION

We affirm the hearing officer's decision.

Because the statement of evidence is very short, the facts will be developed more here. Aside from claimant, there were several witnesses to the accident, most of whom testified in person at the hearing. There are conflicting accounts as to the particulars and the details of how the accident happened and what happened immediately thereafter. Be that as it may, it is clear that no matter who the trier of fact believed over another, the inescapable conclusion is that claimant fell when he slipped on a pallet on which he was standing. In the course of his fall, he twisted. The fall was witnessed by a warehouse supervisor, to whom claimant came after the accident and reported he was hurt. He thereafter was taken to the doctor. His medical condition was ascertained as a lumbosacral strain. To some extent, what occurred is not entirely clear from the record because it is apparent that witnesses were also demonstrating what occurred, and clarifying verbal descriptions were not always supplied.

The accident happened in the warehouse of the employer while sacks of an unaggregated material were being loaded by the claimant either onto or from a forklift. Coworker (Mr. C) did not see the accident. He said that about a week before it happened, the claimant told him he had hurt his back. Mr. C said that it occurred to him that this happened because claimant lifted sheetrock regularly, and he told claimant he should have reported it.

(Mr. D), the warehouse foreman, saw the accident. He said that claimant was

standing on a pallet, which was three feet high. Another pallet was next to it. Claimant was loading a forklift. He "somehow twisted and turned and fell onto another pallet with his hands laying forward, and he was stretched out." Mr. D said claimant was face down, that he was able to put his feet on the ground and stand up, performing a "push up" to do this. Mr. D said claimant did not fall to the ground nor did anything fall on him. Afterwards, he finished loading a customer's pickup, then came back to the office, collapsed on some sheetrock, and said he was hurt. Mr. D drove claimant to the doctor. Mr. D said that he didn't move to help claimant when it happened, not thinking he was hurt immediately, but then believed that he was. He said he assumed claimant had taken a leave of absence due to being hurt and didn't know he had been fired.

(Mr. CH) was driving the forklift. He said that claimant was standing on a pallet and was pulling off some plastic from the side of the pallet in order to reach bags of unaggregated powder. Mr. CH said he yelled, "look out" as some rolls of materials began to fall. He said that claimant jerked back to get out of the way and fell across the pallet he was standing on. He said claimant fell hands down.

Mr. CH said that there was a gap between the two pallets but it was not as wide as four feet. He agreed that claimant twisted sideways as he fell. Claimant then hopped down from the pallet onto the floor. Although the accident happened fast, Mr. CH did not see anything hit claimant nor did he see claimant hit his back or head. He was three or four feet away when the accident occurred and looking directly at claimant. He didn't think claimant was hurt at the time.

(Mr. L) said he was sitting around a heater with Mr. D about 12' to 15' away when the claimant fell as he went to pull some plastic off some bags. He agreed that claimant was standing on a pallet which was about three feet high. The pallet next to it was about eight inches higher or lower, and the gap between the two pallets was about 12" wide. He said that claimant fell stretched out and did not hit the floor. He stepped down and came over and told Mr. D he was hurt. Mr. L responded that there was nothing wrong with him and he needed to get back to work. He said that claimant then went back and assisted a customer with loading. Mr. L said he thought claimant was joking because workers occasionally would pretend to fall. He said that nothing fell on claimant, because there was nothing around to fall on claimant or hit him in the back.

All witnesses testified they received safety bonuses, small in amount, for periods of time that the work place was free of accidents. All agreed that the size of the bonuses would not be worth lying about.

Claimant's testimony differed markedly as to some details of the accident. He said that there was a four foot gap between the pallets, and he fell between them onto the floor in a sitting position, from which he immediately hopped up. During the fall, claimant hit his back on the edge of the second pallet. He denied that Mr. L told him that he wasn't hurt, and he said that materials fell and were laying around on the pallet afterwards. However, claimant agreed that nothing had fallen on him and hit him, and he did not have bruises or

broken skin after the accident. Claimant reported his injury to (Mr. M), his immediate supervisor, and was directed to do so by Mr. D. Claimant disagreed that he finished helping load a customer's truck. He denied telling anyone that he hurt his back lifting sheetrock.

Claimant said that Mr. D drove him to the company doctor, (Dr. C), on the day of the accident and that he saw her a number of days thereafter. She told him that he had to sit 100 percent of the time (supported by clinic return to work slips). He agreed that on March 25th he had declined to be examined, but said he was in pain. He said that thereafter he was not given light duty work as such, but basically sat in a chair before and after visits to the company doctor, until near the end, when he was put on very light duty with a five pound lifting limit. This was the situation from March 18, 1993, until he was fired (March 31, 1993), an action he was told was based upon the company's investigation of the accident. Claimant said he received only half his regular pay during this time. (Payroll records evidently led the hearing officer to conclude otherwise).

Claimant said he had been told by his current doctor, (Dr. P), that his left lung was fractured, and he testified he was unable to work as of the day of the hearing. (Dr. P, however, recorded diagnoses relating to lumbosacral sprain and spondylolisthesis and disc syndrome, with no mention of lung problems). He said he had pain in his back, shoulder blade area, and some pains in his legs, and headaches. Claimant said he claimed injury to his head as well as his back because he essentially hit his whole body when he fell. He had worked for three weeks for (employer 2) in July 1993, for less than he made from employer. Claimant received physical therapy through the employer doctor's clinic.

Briefly summarized, the medical records indicated some varying accounts in the history of how the accident occurred. (With respect to Dr. P, claimant said that she recorded what he told her inaccurately). Dr. C, and a doctor for the carrier, (Dr. G), noted that claimant's subjective symptoms seem to exceed the objective injury or were exaggerated. Dr. G, however, completed a Report of Medical Evaluation (TWCC-69) form stating that claimant reached maximum medical improvement (MMI) on October 25, 1993, with 8% impairment rating. His diagnosis was lumbosacral spondylolisthesis. A letter from Dr. C written in August 1993 noted that she last saw claimant March 31st, and that she could not say when he should have returned to regular duty because he still had limitations when she saw him.

At the second session of the hearing, there was no additional testimony offered as to whether claimant had, or had not, returned to work since the first session of the hearing. It may be inferred from the work history section of Dr. G's narrative report dated October 25, 1993, that claimant's only employment between the injury and his examination was the (employer 2) job.

The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). The hearing officer is the sole judge of the

relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). As we've noted above, regardless of inconsistencies among the witnesses, there was material consistency as to the fact that claimant fell and twisted. The injury sustained is not inconsistent with the accounts given. Although the appeal argues its points as if the hearing officer entirely believed the claimant and disbelieved the witnesses, he could have reached the determination that claimant was injured by believing any one of the witnesses accounts over that of the claimant.

Any inconsistencies in versions of the accident as reported by doctors were a matter for the trier of fact to resolve. The reports all recite that claimant fell at work.

Regarding disability, the issue is separate from whether an injured worker has reached MMI. See Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992. Temporary income benefits are due when an injured worker has not reached MMI and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Disability can be found where a person has returned to work, but nevertheless has diminished wages. Appeal No. 92064, *cited above*. Therefore, although the carrier argues that the hearing officer ignored the fact that claimant worked after he was terminated by employer, the hearing officer expressly noted this employment but observed that the wages earned were less than claimant's pre-injury wage. Consequently, he was free to find that claimant had disability even though he briefly worked. (Although temporary income benefits would still be due, the carrier may adjust the amount paid taking into account the wages earned. Section 408.103 (a)).

Further, regarding the carrier's point that the decision requires it to pay benefits for a time period after MMI, we would note that the order of the hearing officer provides for ending of temporary income benefits when disability ends or MMI is reached. The existence of MMI was not an issue before the hearing officer to decide, and, to the extent that a controversy exists, would have to be adjudicated through the dispute resolution process as an issue in its own right.

In summary, we do not agree that the great weight and preponderance of the evidence is against the decision of the hearing officer, and the decision and order of the hearing officer are accordingly affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge