APPEAL NO. 94190

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 15, 1993, and January 13, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent's (claimant) compensable injury of (date of injury), extends to his current back pain. Appellant (carrier) asserts that claimant did not prove that his pain is the result of claimant's compensable injury of (date of injury), specifically pointing to the absence of medical evidence that relates pain to injury and stating that pain alone is not compensable. Claimant asks that the hearing officer be upheld.

DECISION

We affirm.

Claimant injured his back on (date of injury). (Dr. R) saw claimant that day and diagnosed a lumbar strain. (date of injury) was a Friday and Dr. R asked claimant to return on Monday, August 19th. Claimant returned and was kept off work until August 22, 1991, when Dr. R allowed him to return to light duty. Claimant had worked for (employer) as a toolmaker since January 1987. On September 6, 1991, Dr. R returned claimant to full work.

On (date), while at work, claimant reported his back hurting again. He testified that he thought it was a continuation of his (date of injury), injury but that the employer referred to it as a new injury. Claimant talked to (MP), Personnel Manager, at that time and indicated that he wished to see his personal doctor, (Dr. L). He testified that MP told him to see his doctor and then report to a clinic employer used to do drug tests. Claimant went to see Dr. L, but discovered that Dr. L was not available that day. He testified that he reported to the clinic after MP told him late in the afternoon that day to get the drug test; he added that after reporting in, telling the receptionist why he was there, and waiting until 5:00 p.m., he told the receptionist he would be back the next morning at 8:00 a.m. and left. MP testified that the (date) pain was reported to her, and she called the carrier to determine whether it should be treated as a new claim or continuation. She treated the incident as a new claim, triggering the need for a drug test. MP testified that claimant questioned why he had to have a drug test, but was sent with another employee to see his doctor and then to get the drug test at the clinic. MP said when she found out that claimant had returned to work, she was told that claimant could not see his doctor that day and that he told the employee he was with that since he did not see his doctor he would not go to the clinic for a drug test; he was said to have taken the position that since he was told to do one after the other, the inability to do the first obviated the second at that time. Upon learning of this, MP told claimant at approximately 4:00 p.m. to report to the clinic for a drug test. Claimant's testimony was that he then reported to the clinic at approximately 4:12 p.m. When employer learned the claimant had no drug test that day, he was suspended and then fired.

The only issues at the hearing were whether "claimant's present back pain is a result of a compensable injury of (date of injury)," and did the claimant timely file a claim. When the hearing officer read the issues at the beginning of the hearing, neither party objected to

either nor asked for any rewording. In his decision, the hearing officer correctly noted that the carrier, prior to the end of the hearing, agreed that there was no dispute as to the timely filing of a claim. Therefore, the only issue to be decided questioned the linkage between pain and the compensable injury of 1991.

Claimant testified repeatedly that he did not think the injury of (date of injury), was serious. He recalled some problem sleeping after some passage of time and then had pain while working on (date). He then testified that he did not seek medical care for his back after the initial attempt on (date) and his visit to Dr. L's office on March 23, 1992, until he saw a (VA) doctor in December 1993. (The medical report of March 23, 1992, does not indicate injury to the low back but refers to the mid and upper back.) He referred to having asked the Texas Workers' Compensation Commission to allow him to change treating doctors in July 1993. Claimant also stated that he did tell VA doctors, who he saw from time to time since the injury, that his back hurt, but none recorded it. Claimant said that since (date) his back did not hurt very badly but has gradually worsened so that he again sought treatment. He described it as giving him a problem sleeping. The hearing officer queried claimant as to why he sought no treatment for such an extended period of time. Claimant said that he talked himself out of seeing a doctor because of lack of money, the fact that injury worsened gradually, and his inability to cope with any problem other than his firing. Claimant also testified that he had no back problem before the injury and had done nothing since to cause low back pain.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He does not have to reach a finding based on medical evidence except in certain occupational diseases (*See* Texas Workers' Compensation Commission Appeal No. 93705, decided September 27, 1993) and in regard to issues of maximum medical improvement and impairment rating, neither of which was before him. (*See* Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992.) The hearing officer could have questioned the credibility of claimant in regard to his testimony that he told VA doctors of his back injury when no note of such was made even though notes as to glaucoma and rhinitis were made; the hearing officer obviously did not find an absence of credibility in claimant from such evidence and was not compelled to do so. The hearing officer did question claimant about the lengthy absence of treatment (*see* Texas Workers' Compensation Commission Appeal No. 92543, decided November 23, 1992, in which a claimant who could not explain such a lengthy absence was denied benefits) and apparently satisfied himself as to the connection between the compensable injury and the current pain. *See also* Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993, which pointed out that in instances of lengthy delay between injury to one area and identification of another area of the body as injured, the matter is one of fact for the hearing officer to decide. Issues of injury and disability can generally be decided as questions of fact in either party's behalf based on lay evidence alone. *See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. The evidence was sufficient to support the finding of fact that the claimant's back pain resulted from his 9date of injury), injury.

Carrier's comment concerning pain not being compensable does not control in this case. The issue defined the (date of injury), injury as being compensable; therefore a compensable injury exists. This issue is simply whether current pain stems therefrom. While the Appeals Panel has noted that pain alone does not result in a compensable injury, that does not indicate that pain is not subject to medical treatment when there has been a compensable injury. While not an issue at this hearing, Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991, citing Oswald v. Texas Employers Ins. Assn., 789 S.W.2d 636 (Tex. App.-Texarkana 1990, no writ), and other cases, said that pain could be considered in determining disability.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Alan C. Ernst
Appeals Judge