APPEAL NO. 94307

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 16, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issue considered was whether the respondent, PB, who is the claimant herein, sustained a compensable injury to his back on (date of injury), and whether he had disability and, if so, for what periods.

The hearing officer determined that claimant injured his back and had disability from this injury from September 20, 1993, through the date of the hearing.

The carrier has appealed, arguing the evidence it believes to be in its favor. The claimant responds by asking that the decision be affirmed as sufficiently supported by the evidence.

DECISION

We affirm the hearing officer's decision.

Claimant said he was lifting 50-pound sacks on Saturday, (date of injury), in the warehouse of the employer, (employer). He was working a half day and felt a sharp pain in his lower back with approximately 20 minutes of work left. He maintained that he told his supervisor, (Mr. Mc), and indicated he would be taking Monday morning off (as his half day that he would get for working Saturday). Claimant said that he spent the weekend in bed, and when he arose Monday to get ready for work, his back popped while he was pulling on his socks. Mr. Mc stated that he did not recall claimant saying he hurt his back, but allowed for the possibility that he could have been told and just didn't remember. Mr. Mc did recall claimant calling that Monday afternoon, September 20th, and reporting that his back hurt while he put on socks. Claimant testified he was six feet tall and weighed approximately 400 pounds. He agreed he had not at first told his doctor this was work related, but says that the employer's headquarters advised him not to claim it as workers' compensation.

Claimant saw (Dr. J) on Wednesday the 22nd and was diagnosed with a severe back strain. He was released to light duty. Dr. J's notes indicated that claimant reported he began hurting at home. However, a note made that same day says that claimant does heavy lifting at work. On January 19, 1994, Dr. J wrote to the adjuster for the carrier and said that, in his opinion, claimant's back complaints were work related.

Claimant was released and returned to light duty and worked a half day on Monday the 27th and Tuesday the 28th. Claimant testified, and manager (Mr. B) agreed, that it was determined that light duty was no longer to be made available when claimant asked for a workers' compensation reporting form on Wednesday, September 29th. A report was eventually filled out September 30th, but revised after claimant expressed disagreement with the first report. Both claimant and Mr. B also agreed that a conversation about claimant's work performance took place after the request for the reporting form. Claimant

testified that he still felt he could perform light duty for the employer, if available. Interview transcripts with Mr. B and Mr. Mc stated that, prior to the date of injury claimant wore a back brace which was issued to employees.

Evidence was conflicting. However, 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). It was for the hearing officer, as trier of fact, who had the opportunity to observe the demeanor of witnesses, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). Whether or not an injury has occurred (including a contended "aggravation") is an issue for the trier of fact. Dealers National Insurance Co. v. Simmons, 421 S.W.2d 669 (Tex. Civ. App.-Houston [14th Dist.] 1967, writ ref'd n.r.e.).

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.). That is not the case here.

Where a subsequent injury is alleged to be the sole producing cause of a disability, the proponent has the burden to prove this is the case. American Surety Company of N.Y. v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.). The trier of fact was evidently not persuaded that the action of pulling on socks was the cause of the incident, as opposed to a flare-up of pain from the (date of injury), injury.

For the reasons stated above, the decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge