APPEAL NO. 950045
FILED FEBRUARY 17, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 20, 1994, a hearing was held. He determined that appellant (claimant) did not injure his low back on _____, while at work. Claimant asserts the hearing officer erred in not admitting claimant's exhibits 1, 2, and 3; he also asserts that he does not agree with the decision--his disagreement will be taken as asserting that the decision is against the great weight and preponderance of the evidence. Carrier replies that the exhibits not admitted were not exchanged and that the decision should be upheld.

DECISION

We affirm.

Claimant was working for (employer) in remodeling a school during the summer of 1994. On _____, claimant testified that he and others were moving a long counter on rollers. As they came to a door, claimant lifted one end of the counter off the rollers to get through the door. He said that he "felt a strain" in his lower back; he also said that it sounded "like a pop." He did not say that he had any pain at that time, but that night his back hurt. He thought he was tired and overworked, but could not sleep that night. He went to work on August 16, 1994, but talked to (Mr. G) at 11:45 who told him to take the afternoon off to see how he feels. Claimant went to the emergency room at the medical center, reporting that he had back pain. Mr. G's statement stated that when claimant told him on August 16th that his back hurt, he asked claimant how he hurt it--to which claimant replied that he did not know how he hurt it, but surmised that it was from "lifting or moving something."

Claimant's exhibit 2A includes a report dated August 16, 1994, from the emergency room showing that claimant presented at 3:21 p.m. with a chief complaint of "complains of pain lower back onset last night - lifted heavy objects & worked long hours." The nurse noted, "patient complains of lower back pain. Starting last night. States the pain has gotten worse. States he has been [sic] some excessive lifting." Claimant was taken off work for two days and given medication. A medical imaging report showed "negative lumbosacral spine." Claimant began treatment with (Dr. H). She found a sprain/strain, radiculopathy, subluxation, and facet syndrome. Dr. H's prognosis was given in terms of how often his "visits" should occur, but she does not indicate what treatment was to be administered or what it would accomplish relative to the multiple diagnoses she provides. Dr. H does comment in a work-release note that "exercise given for strengthening & rehabilitation."

Claimant testified that he had never filed prior claims under workers' compensation, that he did not drink on the job, and that he did not tell anyone he would fake an injury.

The hearing officer asked for the claims file and noted on the record that claimant had prior workers' compensation claims in 1982 and 1984 for back injuries with one resulting in a settlement. Claimant stated that he did not think these were workers' compensation claims.

Carrier provided statements of (GG), (HH), and (JC). JC stated that he considered himself a friend of claimant; he indicated that he had met claimant that summer when claimant worked on construction at the school. (While the statement does not identify JC's employer, the references made make it appear that JC worked for the school, not employer.) JC said that when he returned from vacation and asked where claimant was, he was told by HH that claimant had hurt his back and had said he would stage an accident. In October JC saw claimant kicking and throwing a football.

GG's statement was given in September; it said that he had worked for employer as a carpenter but no longer was employed by employer. He acknowledged that he was with claimant when he lifted a heavy counter on the day in question, but said that claimant said nothing about being injured until after he was laid off when the job was over. He stated that HH had told him about a week before the injury that claimant had said he would hurt himself because the job was almost completed. He also said that HH told him claimant was also afraid he might be "fired for drinkin'." He added that HH had said "that people could smell it on him."

HH's statement is dated November 1, 1994. He worked for employer as a laborer also; he and claimant had the same supervisor, Mr. G. HH stated that about three weeks before the injury claimant returned late from lunch; people had been looking for him and HH told him he might be let go for being repeatedly late. Claimant then told him that he'll stage an accident. HH said that claimant also "had a drinking problem." HH told GG about the drinking and about the comment about staging an accident. HH added that he thought he told Mr. G.

With claimant testifying that he had no prior workers' compensation claims, never drank on the job, and did not say he would stage an accident, three points were raised in which claimant and statements offered by the carrier were in conflict. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. He is to resolve conflicts in the evidence. *See* Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The hearing officer, as finder of fact, can believe that claimant did not injure his back at work. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The conflicts in the evidence not only raised questions of credibility of the claimant, two of the points, whether claimant said he would stage an accident and whether claimant had shown

the effects of intoxicating liquor on the job, could directly affect whether a compensable accident occurred. While there was no issue as to intoxication in this case, these areas addressed significant aspects of the question of injury with claimant's credibility directly challenged; whether claimant staged an accident or not, he clearly testified that he did not say such a thing and HH clearly stated that he did. In these circumstances, credibility of the claimant could be determinative of the case.

Claimant asserts error in the failure to admit three exhibits. Carrier objected to the submission of each, stating that each had not been exchanged. Claimant stated that he did mail each, saying that he mailed them to the lawyer representing carrier. The lawyer for carrier replied that this was not a case where the material is sent to the carrier and that party fails to get it to the lawyer--claimant asserted that it was sent to the lawyer. Carrier's attorney was certain it had never been received. In this posture it was not an abuse of discretion for the hearing officer to deny admittance of the three documents. (Medical records, claimant's exhibits 1A and 2A, including the initial medical examination made available at the benefit review conference, were admitted.) The documents that were not admitted and for which error was asserted on appeal have been examined; they include one page of progress notes from Dr. H provided in November, eight pages of records from (Dr. VS) prepared in August and September 1994, and a short statement from JC that does not change any part of JC's prior statement described previously in this review. Had it been error to exclude these exhibits we are satisfied that reversal would not be appropriate because exclusion probably did not cause rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The findings of fact, including that claimant did not injure his lower back on _____, while working for employer, are not against the great weight and preponderance of the evidence. The decision and order found at the conclusion of the hearing officer's opinion are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge