APPEAL NO. 950063
FILED FEBRUARY 24, 1995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 14, 1994, a contested case hearing was held. The issues were whether the respondent who is the claimant herein, sustained a compensable injury to his back in the course and scope of his employment with (employer) on _____, and whether he had disability (the inability to obtain and retain employment equivalent to the pre-injury wage because of a compensable injury).

The hearing officer determined that claimant sustained a compensable injury to his back and had disability from his injury beginning on May 9, 1994, and continuing to the date of the contested case hearing.

The carrier has appealed the hearing officer's findings and conclusions and contends that the evidence overwhelmingly refutes claimant's testimony concerning his injury. The carrier cites evidence it believes to be in its favor. The carrier also asks that the finding of disability be overturned. There was no response from the claimant.

DECISION

We affirm the hearing officer's decision.

Claimant testified that on _____, he was working at a job site for the employer on what he described as a contract job. Claimant said that he was at the bottom of a six feet deep by six feet wide "hole," lifting concrete forms up to his foreman, who stood on the rim of the hole. Claimant said he was the only one in the hole, for about five to six hours that day. The hole had at least a foot of water in it. Claimant stated that the forms were two feet by six feet, and weighed 50-60 pounds dry, but as they were wet, he estimated that this added about 15-20 pounds in weight. Claimant said that as he lifted these overhead, he would twist his back. It was sometime during the course of this activity that his back began to hurt.

Claimant said he complained of back pain to his foreman, (Mr. P), and was permitted to take a brief break. He stated that he got back in the hole and completed his day's work.

According to claimant, he wanted to work out the rest of the contract. He said he worked in increasingly severe pain until the end of the contract, May 9th, at which time he went to (Hospital). Claimant was told he had inguinal strain, but he said that he continued to experience back pain so he called the company owner, (Mr. C), complaining of back pain. He said he asked to be sent to a company doctor. On May 13th, Mr. C sent claimant to the company clinic and, according to a letter from the clinic, he was initially diagnosed with prostatitis. On May 16th, at a follow-up visit, he was complaining of back

pain and was given some therapy. The clinic letter does not specify what the diagnosis was, although claimant was restricted from lifting.

Claimant began treating with (Dr. G), who stated in July 1994 that claimant had lumbar strain. An August 1994 MRI of the spine found mild spondylosis at several lumbar levels, with a suspected disc protrusion at L5-S1. Claimant stated he had a laminectomy about a week before the contested case hearing.

Claimant denied he had experienced back pain prior to _____. He agreed that he had a work-related injury to his cervical spine in October 1993, but stated he received no benefits for this. Claimant also agreed that he moved on May 10th and 11th, but denied he did any lifting. A friend, (Mr. J), testified at the hearing that he and another friend helped claimant move on that day because claimant had back pain and could not lift. Mr. J said he did not see claimant lift anything, and that claimant limped around.

A signed affidavit from Mr. P denied that claimant said he had been hurt on _____. Mr. P's statement agreed that claimant was helping to carry "panels," and stated only that claimant contended he did not feel well later that day, which Mr. P interpreted as "ill" rather than "injured." Mr. P stated that claimant called in sick on May 10th but did not say he had been injured. Mr. P's statement said that claimant called on May 11th saying that he had suffered a groin injury three or four weeks before, and asked Mr. P to back him up on his workers' compensation claim. An unsigned transcript purporting to be an interview with (Mr. W), whom claimant identified as the company owner's son-in-law, indicates that claimant was observed by Mr. W lifting and carrying things on his moving day with no apparent problem. Mr. J stated during his testimony that Mr. W had been there before Mr. J arrived. Claimant testified that he had been unable to work since May 9th because of severe back pain.

As the hearing officer indicated in the discussion of the evidence, the evidence is clearly conflicting. While another finder of fact could have believed it more likely that claimant injured his back while moving, rather than on the job, the hearing officer here quite obviously believed that claimant hurt his back as he said on _____. We will not set aside the decision as it is based on sufficient evidence. As we have stated before, it is the sole responsibility of the hearing officer to resolve and weigh conflicting evidence, because 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, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A claimant's testimony alone, when believed by the trier of fact, may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, 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.). We do not find that to be the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Alan C. Ernst
Appeals Judge