

APPEAL NO. 950121

On December 19, 1994, a contested case hearing was held in _____, Texas, with _____ presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The appellant (claimant) disagrees with the hearing officer's decision that he was not injured in the course and scope of his employment on _____, and that he is not entitled to workers' compensation benefits. The respondent (carrier) responds that sufficient evidence supports the decision and it requests affirmance.

DECISION

Affirmed.

The claimant, who is 24 years old, testified that he started to work for Burger King (employer) in August 1992. He said that in _____ he injured his back at work when he lifted a box of meat, that the employer sent him to Dr. S (Dr. S) for treatment, and that he did not miss any work as a result of that injury. The claimant also testified that he injured his back a second time at work in _____ when he lifted a box of lard, that the employer sent him to Dr. S for treatment, and that he did not miss any time from work as a result of that injury. He said he last saw Dr. S in June 1993 and that Dr. S told him at that time that he was fully recovered. However, the claimant testified that he continued to have back pain. In regard to the current claim, the claimant testified that on _____, he injured his back a third time while working for the employer when he pulled a box of Coke syrup off a shelf and carried it. He said he felt muscles tighten in his back when he carried the syrup and that he felt back pain. He said he immediately told the assistant manager that he had been injured. There is no dispute that the claimant timely reported to his employer that he was injured at work. The claimant further testified that when he reported his current injury to his employer he told his employer that he did not want to go to a doctor and that he would advise the employer when he wanted to go to a doctor. He said he assumed that if he told his employer that he wanted to go to a doctor, his employer would send him back to Dr. S and he said he was not comfortable going to Dr. S because Dr. S had not taken him off work for his prior two back injuries and because Dr. S only gave him pain medication and ointments. He said he was not aware that he could chose the doctor he wanted to see.

The claimant further testified that he continued to work for the employer until about September 15, 1993, and that he worked in pain while performing his regular duties. He said he did not request to go to a doctor prior to leaving his employment to attend a vocational school as a full-time student. He testified that his back hurt while he was attending school and that it started to hurt more when he had to sit for long periods of time

during final examinations in February 1994. He said he graduated from school in March 1994 and about two or three months later began working at a temporary employment agency where he was given several assignments. The first assignment involved stocking paint at a paint store for about three weeks, the second assignment involved stocking 12-packs of soft drinks for about three weeks, and the third assignment which he started in August 1994 involves data entry for a bank. He said he first asked the carrier if he could see a doctor in March 1994 and the carrier refused his request. He testified that he first saw Dr. Sa (Dr. SA) about a week before the hearing and that Dr. SA told him that his pain was from his injuries and that he had some inflammation in his back. He said he paid for that doctor visit. He said he did not see a doctor any sooner because he could not afford to go to a doctor. The claimant further testified that his back hurts now and that it has been hurting since his first back injury in _____. The Texas Workers' Compensation Commission received the claimant's claim for compensation for his claimed injury of _____, in _____ and the claim is dated _____. Also in evidence is the Employer's First Report of Injury or Illness which is dated _____.

WP (WP) testified that he is the employer's director of operations and that he did recall receiving a report of injury on _____, but the report indicated that the claimant did not want to see a doctor. He said he was not aware of the claimant ever having asked to see a doctor for the claimed injury of _____, and that the claimant continued to work until he quit his job to go to school.

In a narrative report dated December 13, 1994, Dr. SA reported that he examined the claimant on that date for evaluation of injuries he sustained following a work-related incident on _____. Dr. SA noted that the claimant had two previous back injuries and that on examination he had mild low back pain. He diagnosed "chronic low back pain secondary to 3 work related injuries with the most recent of _____." Dr. SA then stated "[a]ssuming the patient's history is correct; these problems are the result of the work related injuries." Dr. SA also stated that the claimant has a "history of chronic low back pain secondary to lumbar sprain," that the claimant is still symptomatic, and that he requires an MRI of the lumbar spine.

The sole issue at the hearing was whether the claimant was injured in the course and scope of his employment on _____. The hearing officer found that the claimant failed to establish that he suffered an injury on _____. The claimant disagrees with the hearing officer's decision that he was not injured in the course and scope of his employment on _____.

The claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts

and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and to determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The claimant was an interested witness and the hearing officer was not required to believe his testimony that he suffered an injury on _____. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Since the credibility of the recitation of the history of the injury as reported in Dr. SA's report was manifestly dependent upon the credibility of the information the claimant imparted to Dr. SA, the hearing officer was not bound to accept such recitation as evidence that an injury in fact occurred on the date alleged. See Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1973, writ ref'd n.r.e.); Presley, supra. While the claimant may have felt back pain at work on _____, that does not necessarily compel a finding that he sustained an injury, which is defined as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(26). We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge