

APPEAL NO. 961953  
FILED NOVEMBER 18, 1996

On August 20, 1996, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were whether the appellant (claimant) sustained an injury to his back in the course and scope of his employment on \_\_\_\_\_, and whether he has had disability. The claimant appeals the hearing officer's decision that he did not sustain an injury in the course and scope of his employment on \_\_\_\_\_, and that he has not had disability. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The claimant is a punch carpenter. He had low back surgery in 1990 and 1994. He testified that on the morning of Wednesday, \_\_\_\_\_, he was working for the employer putting tub strips down in apartments and felt back pain. He went to an emergency room during his lunch hour and was diagnosed as having a lumbar strain; however, according to the medical report the claimant told the doctor that his back pain began on Sunday when he was setting tile. The claimant said he fabricated the story about being hurt on Sunday because when he was at the hospital he thought he just had a back sprain and did not want to file a workers' compensation claim. He said he didn't believe that he worked for the employer the weekend prior to \_\_\_\_\_. He said that the afternoon of \_\_\_\_\_ he worked for the employer adjusting door thresholds. He also said that he worked from 7:30 a.m. to about 6:30 p.m. on \_\_\_\_\_ and that putting in tub strips and adjusting thresholds required him to be on his knees. The claimant worked on March 7th and he went to another emergency room on March 8th. According to the March 8th medical report, the claimant told the doctor that he was doing heavy construction work when he made an "abrupt lift" and had back pain. The claimant said that that report is incorrect. He also said that he did not work on March 8th and that, with the exception of one day, he has not worked since that date.

Dr. B saw the claimant on March 13th and reported that the claimant told him that he irritated his back on March 7th when he was working on thresholds. Dr. B wrote that a March 18th lumbar MRI showed a recurrent disc herniation at L5-S1. Dr. B wrote in August 1996 that within reasonable medical probability the claimant sustained a new injury at work. Dr. M saw the claimant on April 3rd and reported that the claimant told him that on \_\_\_\_\_ he was at work doing a lot of bending over, stooping picking up tools, and climbing stairs when he noticed the onset of back pain. Dr. M diagnosed a herniated disc at L5-S1 and wrote that the claimant sustained a reinjury. A time sheet completed by someone other than the claimant and which is initialed by the project manager and by the construction superintendent, MB, reflects that the claimant only worked four hours on \_\_\_\_\_ and that he was doing foam and frame repairs that day. The claimant said

that the time sheet is incorrect. MB said that the time sheets are not always 100% accurate but that they do give a general description of what an employee was doing on a particular day. He said that the claimant did not return to work the afternoon of \_\_\_\_\_. The claimant said that on March 8th he reported a work-related back injury to his employer. MB testified that the claimant did not report a work-related injury until sometime after March 8th.

The hearing officer found that the claimant did not sustain an injury to his back in the course and scope of his employment on \_\_\_\_\_. There is no doubt that the claimant has a back injury. Whether that injury occurred at work was a question of fact to be determined by the hearing officer from the conflicting evidence. The claimant had 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). The hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995.

While there are medical opinions in evidence which may be favorable to the claimant, those opinions do not compel a determination that the claimant was injured at work as claimed, because it has been held that a trier of fact is not bound by the testimony of a medical witness when the credibility of his or her testimony is manifestly dependent upon the credibility of the information imparted to the witness by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). We note that Dr. B's report of March 13th reflects that the claimant said he was injured on March 7th and that Dr. M's report of April 3rd does not mention work on tub strips or thresholds on \_\_\_\_\_. While we agree that Dr. S's report wherein he states that the claimant had symptoms after lifting a heavy object is dated April 15, 1994, and not April 15, 1996, as stated by the hearing officer in his statement of the evidence, we do not believe that such misstatement by the hearing officer amounts to reversible error inasmuch as the emergency room report of March 8, 1996, reflects that the claimant reported at that time that he had soreness following a lifting incident, which is inconsistent with the claimant's testimony as to how he was injured on \_\_\_\_\_. We conclude that the hearing officer's finding that the claimant did not injure his back in the course and scope of his employment on \_\_\_\_\_, 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). Without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

The hearing officer's decision and order are affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

Elaine M. Chaney  
Appeals Judge

Judy L. Stephens  
Appeals Judge