

APPEAL NO. 980043

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 26, 1997. With respect to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) was not covered by a method of compensation established under federal law and, therefore, was not exempt from the coverage of the 1989 Act; that the respondent/cross-appellant (carrier) did not waive the right to raise its jurisdictional challenge by failing to timely contest compensability on that basis; that the claimant did not make an election of remedies in this instance; that the claimant did not sustain a compensable injury on _____; and that the claimant did not have disability within the meaning of the 1989 Act because he did not sustain a compensable injury. In his appeal, the claimant challenges the hearing officer's injury and disability determinations as being against the great weight and preponderance of the evidence. In its response, the carrier urges affirmance of those determinations. The carrier filed a conditional cross-appeal, asserting that the hearing officer erred in determining that the claimant was not exempt from coverage under Section 406.091(a)(2) because he is covered by the federal Longshore and Harbor Workers' Compensation Act (LHWCA). The carrier did not appeal the determination that the claimant had not made an election of remedies and the claimant did not appeal the determination that the carrier had not waived its right to raise its jurisdictional challenge by failing to timely contest compensability on that basis; therefore, those determinations have become final pursuant to Section 410.169.

DECISION

Affirmed.

The claimant testified that on _____, he was working as the operations manager of (company) (employer). On that date, the employer was cleaning up an oil spill at the docks. The claimant stated that he was in his truck completing some paperwork when (Mr. G), one of the employees who was cleaning up the spill, radioed him and said that they needed some empty pollution cans. The claimant testified that it was pouring down rain at the time and as he was handing the buckets to Mr. G, he slipped on the bulkhead. He stated that he was able to catch himself before he fell, noting that he twisted his back in the incident. The claimant testified that he felt a burning sensation in his back at the time; however, he went back to the truck and completed his paperwork. He stated that, after the clean-up was completed, he drove his truck to the public launch to pick up the boat and take it back to the office. He stated that when he got back to the office another employee removed the trailer and the boat from his truck. The claimant stated that he then went home to shower and put on dry clothes. He said his back had really begun hurting by that point and he sat down in his recliner to rest and fell asleep; thus, he did not return to work on that day. He stated that he called (Mr. H), the employer's branch manager, at home that evening and told him that his back was hurting and that he believed he had pulled a muscle at work. He stated that he went to work the next day and his back was still

hurting to the point that several employees asked him what was wrong because of the way he was walking. The claimant testified that he again spoke to Mr. H on the evening of _____ and advised Mr. H that he was making a doctor's appointment for the next day because his back was hurting from the on-the-job injury. He stated that just before his doctor's appointment on March 1st, Mr. H paged him and told him to get to work. When the claimant saw Mr. H, his employment was terminated.

On March 4, 1996, the claimant went to the emergency room with complaints of low back pain and left leg pain and numbness. The emergency room records stated that the claimant gave a history of his having slipped carrying a heavy load five days ago. His lumbar x-rays were interpreted as showing degenerative disc disease at L5-S1 and mild spondyloarthritic changes. On March 7, 1996, the claimant saw (Dr. S), who diagnosed a lumbar strain. Dr. S's records also contain a history of the claimant's having slipped on the dock at work and catching himself before falling. On May 16, 1996, the claimant saw (Dr. K), a chiropractor, but he had to stop going after one visit because he did not have the money to pay for treatment. On July 22, 1996, the claimant had his initial appointment with (Dr. B), an orthopedic surgeon. The claimant told Dr. B that he had injured his back when he slipped on the dock on _____. Dr. B noted that two weeks prior to his visit, the claimant experienced back pain of increasing severity, extending into his calf and foot with accompanying paresthesia. Dr. B ordered an MRI, which was performed on July 30, 1996, and revealed a "Large grade V central, and left paracentral disc herniation at L5-S1" and a "Small right paracentral disc herniation at L1-2." In a letter dated September 26, 1996, Dr. B noted that in a follow-up visit the results of the claimant's MRI were discussed. In addition, Dr. B noted that he and the claimant had discussed treatment options of further conservative treatment or surgery. Dr. B concluded his letter by indicating that the claimant was going to consider his options and make a determination of whether or not he wanted to have surgery. The claimant stated that he did not return to Dr. B because he did not have the money to pay for the treatment. He testified that in June 1997, he had spinal surgery at the (hospital). In addition, the claimant stated that he is awaiting a second spinal surgery.

Mr. H testified that while he was on the job site on _____, he did not observe any incident with the claimant. In addition, he stated that when the claimant returned to the office after the clean-up was completed that day, the claimant disconnected the boat and trailer from his truck and pushed it back. Mr. H denied that the claimant called him at home on the evening of _____. He stated that he next spoke to the claimant on the following day at work to ask why the claimant had not returned to work after lunch the day before. He said the claimant told him he had fallen asleep in his recliner; however, he noted that the claimant did not tell him about an injury at that time. Mr. H testified that the claimant called him at home on _____ and said that his back was hurting. Mr. H stated that the claimant told him he did not know how he hurt himself and denied that the claimant had told him he had hurt his back at work. Mr. H stated that he told the claimant that the company had workers' compensation coverage but the claimant said he would file it under group health coverage because he did not believe his injury was work related. Finally, Mr. H stated that he did not learn that the claimant was going to file a workers' compensation claim until after he had been terminated. In his statement, Mr. G stated that on _____, he asked the claimant to hand him some pollution cans and noted that "[w]hen he did so,

he appeared to loose his footing, tripping slightly." In their statements, (Mr. C) and (Mr. L), the other employees on the boat on _____, stated that they were not aware of the claimant's having sustained an injury.

With respect to the issue of whether the claimant was covered by the LHWCA, there was considerable testimony from the claimant, Mr. H and (Mr. O), the attorney who handled that claim for the carrier. The claimant and Mr. H testified as to the amount of time the claimant worked in navigable waterways and the nature of his duties. Mr. O opined that the claimant was within the jurisdiction of the LHWCA, noting that the claims examiner for the Department of Labor had also made a preliminary determination of coverage.

Initially, we consider the claimant's assertion that the hearing officer's determinations that he did not sustain a compensable injury and that he did not have disability are against the great weight and preponderance of the evidence. Both of those questions presented issues of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight, credibility, relevance and materiality of the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness and could properly decide what weight she would assign to the other evidence before her. *Id.* We will not substitute our judgment for that of the hearing officer where her determinations are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

While we have generally noted that injury and disability may be established by the testimony of the claimant alone, Texas Workers' Compensation Commission Appeal No. 931002, decided December 13, 1993, it is well established that a hearing officer is not bound to accept the claimant's testimony at face value; rather, it only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In this instance, the hearing officer noted:

It would be an understatement to say that the evidence regarding Claimant's allegation of having sustained a compensable injury is conflicting. However, the Hearing Officer, having reviewed such evidence, is of the opinion that Claimant has narrowly failed to meet his burden of proof to demonstrate that the injury in question occurred as a result of his job duties with Employer on _____. Therefore, Texas Workers' Compensation Benefits are not payable on account of the injury made the basis of this case, and Claimant's inability to work due to such injury does not constitute disability.

In this instance, it appears that the hearing officer did not believe that claimant's grade V herniated disc, which was not diagnosed until July 1996, resulted from the slipping incident at work on _____, which Mr. G characterized as "slight." The hearing officer was

acting within her province as the fact finder in so finding. Our review of the record does not demonstrate that the determination that the claimant did not sustain a compensable injury is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for reversing it on appeal. Pool, *supra*; Cain, *supra*. Because we affirm the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that the claimant did not have disability as the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16). The fact that another fact finder could have drawn inferences different from those drawn by the hearing officer from the same evidence, which could have supported a different result, likewise does not provide a basis for disturbing the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we will not reach the question of whether the claimant is exempt from coverage under Section 406.091(a)(2). A determination that the claimant is covered under the LHWCA would only be of significance if the carrier had been determined to be liable for Texas workers' compensation benefits. However, in the absence of such a determination, it serves no useful purpose for the Appeals Panel to render an opinion on a federal jurisdictional question.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge