

APPEAL NO. 980059

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 2, 1997, a contested case hearing was held. He determined that appellant (claimant) did not sustain a cervical injury in the course and scope of employment on _____, and therefore had no disability. Claimant asserts that the hearing officer should not have relied upon the written statements of other employees to find that claimant sustained no cervical injury, pointing out the "shady nature" of the statements. Claimant also says that because the injury should be compensable, disability does exist. Respondent (carrier) in its reply questioned the timeliness of the appeal and asks that the decision be affirmed.

DECISION

We affirm.

The appeal was timely; it was filed within 15 days of the date of receipt of the hearing officer's decision.

Claimant testified that he was injured while at work for (employer) on _____; he had begun work for this employer on June 6, 1997. Claimant was taken by ambulance from the job to a hospital with what was diagnosed by at least one doctor as a myocardial infarction, but other doctors believed that claimant did not have a myocardial infarction. The initial note at (hospital) on _____, indicates that claimant complained of chest pain after arriving by ambulance; the chest pain was stated to radiate "thru to his back." The history showed "tightness," shortness of breath, dizziness, and "nausea/vomiting." This report also said, "pain began this AM at [about] 730 while loading a truck."

There was no issue of heart attack at this hearing. Claimant claimed that he hurt his neck when lifting barricades the morning of ___ prior to having been taken to the hospital with a suspected heart attack. (Dr. S) D.C., who claimant began seeing in August 1997 said that claimant reported to him that he had been lifting "heavy" barricades before having been taken to the hospital. Based on this, Dr. S gave an opinion that the injury caused a neck injury, but agreed that "degenerative changes" occur over a period of time and that there was nothing in the medical records indicative of an injury as opposed to a natural progression of degenerative changes. (An MRI provided in July 1997 showed degenerative disc changes at three levels in the cervical area with a small protrusion at one level said to be "suspicious for a herniated" disc.)

While claimant's hospital stay in June lasted several days and does reflect several instances of his complaints of "back" pain, there is no reference specifically to neck or cervical pain.

Claimant further testified that a tractor used to move the barricades had a flat tire that day so the barricades were moved by hand. However, (Ms. H), the safety coordinator for employer testified that there are two loaders and a bobcat on that job. Her investigation showed that one of the two loaders was working on the day in question. She also testified as to how she procured the statements of (Mr. G), (Mr B), and (Mr R).

Mr. G said that a loader moved the barricades and several workers, including himself and claimant, would straighten them after they were placed in the area where needed. He added that he "never saw" claimant lift any heavy barricades "by himself." He said that when claimant got sick on _____, he was grabbing his stomach. Mr. B said that claimant had helped him straighten barricades after the loader unloaded and placed barricades in the street. He added that when claimant got sick he was "bending over holding himself." Mr. R did not indicate that he was with the claimant when the barricades were placed in the street, but did say that he had claimant and five others doing that job. He also said that the barricades are loaded by a front-end loader on a trailer and then are unloaded "the same way" with the crew then straightening them. He did add that claimant came back to the job site with the tire repair man, saying that he was going to show the repairman where the loader was. Mr. R's statement then said that he told claimant to get some pressure couplings out of a trailer and soon the tire repairman came to tell him that claimant was sick. Mr. R said claimant was holding his left chest, saying it hurt to breathe. Mr. R called 911 and an ambulance came.

Ms. H further testified that she asked each of the three what happened the morning of the suspected heart attack. She said that all understand English but are not fluent so she had a bilingual employee present. After she asked what happened, when the employees would reply, she would then ask questions; she made notes of the replies made by each and then typed the statements. She said that each employee's replies were in Spanish and relayed to her in English by the bilingual employee. Each employee then signed his statement that was in English only, after the respective statement was read to the employee in Spanish. Ms. H then notarized each. Ms. H did say that Mr. R at one time was not sure about a loader, but later came back and said that he did remember seeing a loader "coming down a street with barricades on the bucket." While claimant indicated that Mr. R had wanted to change his statement, no other statement was proffered nor did Mr. R testify.

(Mr. D) identified himself as an investigator with the (ABI) and described a video he took at some distance of claimant walking around a basketball court with young people, occasionally lobbing a basketball. This video appeared to show little and was not said by the hearing officer to have influenced his decision.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. While claimant's appeal questioned the reliability of the statements of other employees, the hearing officer could believe that the statements of Mr. G and Mr. B, who worked with claimant in regard to the barricades, should be given weight. There

was no evidence that the statements were taken in any way other than that described by Ms. H. With the statements of Mr. G and Mr. B conflicting with claimant's testimony and the history he gave Dr. S of heavy lifting, the hearing officer then had to resolve that conflict. See Bullard v. Universal Underwriter's Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer does not have to accept the testimony of any interested witness. See Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The evidence was sufficient for the hearing officer to resolve the conflicting evidence, as to what work claimant did the morning of the suspected heart attack, by determining that claimant did no heavy lifting. The hearing officer could also consider that no complaint as to a neck injury was made for several weeks. The evidence sufficiently supports the determination that claimant did not sustain a cervical injury on _____. With an affirmable determination of no compensable injury, there can be no disability under the 1989 Act. See Section 401.011(16).

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge