APPEAL NO. 980282
FILED MARCH 26, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 16, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. With regard to the issues at the CCH, he determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals, seeks a reversal of the decision and argues that he proved he was injured in the course and scope of his employment with (employer). The respondent (carrier) responds and seeks an affirmance of the decision.

DECISION

We affirm.

The claimant testified at the CCH that on _____, he sustained a low-back injury lifting buckets filled with packages. He stated he felt pain and "groaned" when he lifted the buckets, which weighed 40 pounds each. He introduced into evidence the signed statement of a coworker, Mr. J, that stated he witnessed the claimant lifting buckets on (day before date of injury), and that the claimant "screamed" when he lifted them. The claimant admitted that the employer had recently reprimanded him for "wasting time" and that he had filed a grievance against the employer with his union.

On _____, the employer-selected doctor, Dr. G, wrote, based on a history he took from the claimant, that the claimant "felt sharp pain across back" when he lifted the buckets and noted that the claimant's "back has been feeling tight for 2 days." Dr. G ordered x-rays, diagnosed a lumbosacral strain and returned the claimant to modified duty work. On June 6, 1997, the claimant's treating doctor, Dr. B, diagnosed lumbar radiculitis and lumbar, thoracic, sacral and pelvic somatic dysfunction. Dr. B commented that the lumbar x-rays taken by Dr. G revealed "no visible sign of malignant process or fractures." On June 30, 1997, Dr. G returned the claimant to full-duty work. The claimant testified that he returned to work for the employer at that time.

An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). The claimant argues on appeal that the decision should have been entered in his favor because the carrier did not present any of the employer's representatives as witnesses against him and the medical evidence was uncontradicted. However, the carrier need not present witnesses to controvert a workers' compensation claim. An employee has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994.

The hearing officer, in the "Statement of the Evidence" portion of the decision, states that "[t]his is a spite claim." He elaborates on his belief by explaining that the claimant and the employer had a long-running disagreement as to the claimant's use of his time while at work. Whether an employee advanced a spite claim against an employer and a carrier involves the motivation of the employee in testifying that he sustained a compensable injury. Whether an employee is so motivated goes to his credibility. The hearing officer also criticized the inconsistencies between the claimant's testimony and Mr. J's statement. The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.2(9) (Rule 142.2(9)). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The claimant also complains on appeal that the hearing officer's opinion regarding the nature of the claim affected his neutrality as a finder of fact. Our review of the record indicates that the claimant received a fair and impartial hearing and we do not recognize any error.

We will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. Although some of the evidence indicates that the claimant may have sustained a compensable injury, we conclude that the compensability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability, by definition, depends upon there being a compensable injury. *Id*. The hearing officer found that the claimant did not have disability because he did not sustain a compensable injury. Since we affirm the compensability determination, we affirm the disability determination also.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge