

APPEAL NO. 990137

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 29, 1998, a hearing was held. He (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_. Claimant therefore has had no disability from April 14, 1998, forward. Claimant asserts that he was being actively treated for a groin injury at the time he sustained a back injury in \_\_\_\_\_, and cites medical evidence of an injury in \_\_\_\_\_. Respondent/cross-appellant (carrier) states in its appeal that claimant was terminated for cause and that there was insufficient evidence to support a determination of inability to work at preinjury wages, due to the claimed injury. Carrier also replied that the decision and order should be affirmed.

DECISION

We affirm.

Claimant worked as a welder-fabricator. He testified that he had prior injuries including a prior back injury. He said that on \_\_\_\_\_, he sustained a "deep injury in my right leg" while using a jackhammer, which left a "numb feeling" in his right leg; he then added, "I feel like I sustained a new injury." He also said that he had never had numbness down his leg with no feeling in his toes causing his toes to "curl up." While his appeal refers to a groin injury, claimant testified that he has not had any groin pulls. Claimant also indicated that he was still on restriction and should not have been using a jackhammer.

Mr. B, safety manager, testified that after claimant's (prior date of injury) injury, claimant was on restricted duty, but Mr. B said he examined claimant's medical record, and "those restrictions had been lifted . . . around September."

Claimant's assertion of a new injury is said to be supported by the record of Dr. S, who claimant saw on March 4, 1998, at a minor emergency center; Dr. S wrote that claimant was having an "acute exacerbation of previous back problems" and diagnosed radiculopathy. An initial medical record of Dr. L, D.C., who first saw claimant on March 19, 1998, shows a history of use of a jackhammer with a feeling of "tingling like pain" down his right leg. Dr. L on August 5, 1998, also stated that claimant's back problems are worse and said that claimant "sustained a compensable injury to his back on \_\_\_\_\_, and disability continues."

While one doctor, Dr. H, in October 1997, withdrew from treatment of claimant because he thought claimant's problem was "non-orthopaedic," other doctors continued treating claimant's back.

An MRI of the lumbar spine dated September 26, 1997, was reported as "moderately severe" L3-4 and L4-5 degenerative disc bulging "with thecal sac compression at both levels"; both discs were dehydrated with the L4-5 disc also said to have a "severe loss of

height." Approximately two months and one week before the reported injury in \_\_\_\_\_, Dr. M provided a consult to Dr. S in which he said that claimant reported having radiating pain down his right leg in 1982; in 1990 he said there was another injury with right leg radicular pain. In 1993 the radiating pain down the right leg went to the ankle and was "associated with numbness." Dr. M then says, in this report of December 18, 1997:

The patient had an MRI scan performed of the lumbar spine, one month previously, and says it was negative. (Emphasis added.)

It was for the hearing officer to consider how an MRI could be "negative" that has two discs compressing the thecal sac. More importantly, Dr. M, a referral doctor, found that both nerve conduction studies and an EMG were abnormal, indicating lumbar radiculopathy, and Dr. M also said the EMG showed "chronic neuropathic changes affecting the L4-5 nerve roots." These observations in December 1997, may be compared to an IME doctor's, Dr. P, comments in 1994 that claimant "complained of" low back pain with "numbness in the right leg." He also found multilevel degenerative spine disease. In addition, Dr. S's records show that claimant was treated in January and February (February 23, 1998) for pain in his right leg and buttock, with the February entry mentioning a bone scan. Added to this medical information is the peer review of Dr. C in which he says that he reviewed documents and found "no objective findings or evidence of new or further acute structural injury."

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. He is also the judge of medical evidence. See Texas Workers' Compensation Commission Appeal No. 970834, decided June 23, 1997. The hearing officer commented in his Statement of Evidence that the medical evidence was conflicting, which is a fair observation of the state of the medical evidence presented. He also noted that claimant was being treated at the time of the alleged back injury. The medical evidence sufficiently supports that claimant's \_\_\_\_\_, incident was a continuation of a prior lumbar injury.

While carrier appealed the determination that claimant's termination was not for cause, the hearing officer points out that it was based on claimant's testimony which the hearing officer considered credible on this point. We note that this finding of fact could have some effect on disability, but with no compensable injury found, and affirmed, there can be no disability. See Section 401.011(16).

Carrier also attacks a finding of fact that states, "[d]ue to the claimed injury Claimant was unable to obtain and retain employment at preinjury wages equivalent to his preinjury wage . . . beginning 4-14-98." We believe that this finding was provided in case the Appeals Panel reversed the determination of no compensable injury. In that the determination of no compensable injury has been affirmed, this finding of fact may be considered not to be necessary to the decision.

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).

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Joe Sebesta  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Judy L. Stephens  
Appeals Judge