

APPEAL NO. 990156

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 6, 1999, a hearing was held. The hearing officer determined that the respondent (claimant) sustained a compensable back injury on _____, and had disability since September 20, 1998. Appellant (carrier) asserts that claimant had previously incurred a back injury in 1998, had "lingering effects" of the prior injury, and has "not presented evidence to show an aggravation" in stating that the decision is against the great weight of the evidence. The appeals file does not contain a reply from claimant.

DECISION

We affirm.

Claimant worked for (employer) for 10 years. He testified that on _____, within an hour of the end of the workday, he and another worker lifted a heavy steel grating; when he turned with it to place it on "skids," he felt pain in his low back and down his right leg. He worked the remainder of the day, which entailed drilling holes for bolts with no more heavy lifting. That night, he said, the pain became worse; it was also worse the next morning. There was no issue of notice. The evidence was clear that claimant gave notice no later than September 21, 1998, when Mr. K, a vice president, testified that he listened to a message on an answering machine. In addition, claimant testified that he reported the injury to his foreman, Mr. S, the morning after the accident, when he arrived at work. We note that Mr. S did not testify and did not provide a statement, so there is no denial of claimant's testimony that he told Mr. S the next morning.

Claimant saw Dr. O, on September 21, 1998; Dr. O noted a history of pain for two days and diagnosed a strain. Dr. O referred claimant to Dr. D on September 23, 1998. While Dr. O did not record a history of a job injury, Dr. D, on October 2, 1998, did. Dr. D referred to lifting material at work "2 weeks ago" when claimant had back pain radiating into the right leg. Dr. D also noted that claimant reported a prior back problem with the latest flare-up in July or August, when claimant was able to take aspirin and keep working. (Claimant testified that he had not missed any time at work because of his back in over a year since he hurt his back at home in January 1997 when he picked up a box weighing very little and felt a pop in his back. He was seen in an emergency room after that incident.)

While Dr. D referred to flare-ups in July or August, the medical records show that claimant, in June 1997, had seen Dr. S, who noted that claimant was hurting in his "his neck, back, legs all on the right side" and had indicated pain on awakening. Dr. S referred to the January injury. In 1998, prior to the _____, accident in question, there is one medical record in evidence, from Dr. S, in July 1998, which only mentions the neck, which received "manipulation" on that date—there is no reference to the back or low back.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. She indicates in her opinion that she gave some credit to Mr. K's statement that Mr. S had noticed claimant walking "abnormally" soon after the accident and, when he asked what was wrong, claimant told him he hurt his back installing a grating. She also commented that claimant stated his prior back injury did not interfere with his work prior to this injury; this comment is supported by the absence of any medical record indicating back treatment during 1998.

A prior back injury does not preclude an affirmable finding of fact that a back injury occurred more recently, as the hearing officer correctly noted in her opinion. Contrary to the carrier's appeal that said claimant sustained a "devastating injury to his back in January 1998," the evidence shows no back injury in 1998 prior to the _____ injury in question. The January 1997 back injury was diagnosed as "back pain," with no adjective found in the medical records. With no active treatment for a back problem, whether claimant had any "lingering" effects of the January 1997 back pain or not does not preclude a finding that he injured his back in _____. Claimant's testimony alone, when accepted by the fact finder, may support a finding of injury; certainly there is nothing in the description given by claimant (lifting a heavy steel grating at work) that would cause the Appeals Panel to overturn the hearing officer's determination of a compensable injury as being against the great weight and preponderance of the evidence. The evidence sufficiently supports the determination that claimant sustained a compensable back injury on _____.

Dr. D provided notes indicating that claimant was unable to work from October 2, 1998, until recovery. This medical evidence plus claimant's testimony sufficiently support the finding that disability exists beginning on September 20, 1998.

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:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge