

APPEAL NO. 990309

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 8, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that respondent (claimant) had sustained a compensable low back injury on \_\_\_\_\_ (all dates are 1998, unless otherwise stated) and that claimant had disability from September 25 through the date of the CCH.

Appellant (carrier) appeals, contending that the claimant's testimony was not credible, and asking us to assess the inconsistencies in the testimony and a videotape, and to reverse or remand the hearing officer's decision. Attached to carrier's appeal is a medical report dated November 12th, which carrier states "was inadvertently omitted from carrier's exhibits." Claimant responds that the decision is supported by the evidence and urges affirmance.

DECISION

Affirmed.

First we briefly note that the hearing room is apparently directly under the flight path to the airport and every few minutes a large jet going overhead would almost drown out what was being recorded on the audiotape. That difficulty was exacerbated by someone coughing in the proximity of a microphone, all of which made this tape somewhat difficult to review.

On the merits, although there was substantial testimony on the circumstances of claimant's being hired, it is undisputed that claimant was the director of technology for a benefits (employer) on \_\_\_\_\_. It is further undisputed that Ms. KS, employer's comptroller, and Mr. JG, were unpacking a large 31-inch television set, which was represented to weigh 130 pounds, and that Ms. KS asked claimant and another male employee to help pick up the television from the floor and set it on a stand. It is also undisputed that claimant had a history of back problems going back to at least 1987 and had apparently been diagnosed as having a herniated disc at L5-S1. Claimant had continued to receive treatment for his back through the years. The testimony also was that an MRI of claimant's back was performed in 1987 and another MRI more recently, perhaps in 1996. These MRIs were not available and carrier has apparently refused to authorize another MRI until the previous MRIs are produced for comparison purposes.

Claimant testified that he was reluctant to assist in helping lift the heavy television because of his history of back problems. Ms. KS, Mr. JG and two other witnesses testified that claimant made no verbal protestations about helping lift the television. Claimant testified that everyone in the office knew about his bad back. This is denied by all the witnesses but nearly all the witnesses agree that claimant would periodically do back stretching exercises at work. Claimant points out that it is curious that the employees all

agree he did back stretching exercises but none knew he had back problems. Claimant testified that as he was helping lift the television he felt something "pull or slip out of place."

Claimant testified that the incident took place at about 3:00 p.m. and that he finished the afternoon working. \_\_\_\_\_ was a Friday and claimant testified that his back got progressively more painful over the weekend. Claimant said that he went to work on Monday, (the Monday following the injury), and told his supervisor, Mr. BB, the employer's chief financial officer, that he had hurt his back the previous Friday lifting a television. Mr. BB denied that claimant reported an injury at that time, and although notice to the employer is not an issue, carrier emphasizes that point in attempting to impugn claimant's credibility. Claimant testified that his position was eliminated the next day, (Tuesday), effectively terminating him. Claimant testified that he had started working for the employer a few months prior to August in a temporary position and that the employer had only recently bought out his contract from the temporary employer. There was conflicting testimony regarding that matter.

Claimant apparently sought medical benefits through his group health plan and initially sought unemployment benefits. The circumstances surrounding those actions are not entirely clear. The hearing officer comments:

The claimant sought unemployment benefits, receiving them for a week, but he had to terminate them when it became clear to him that he had to be willing and able to work, but he could not work because of his back pain.

What, if any, medical care claimant received between (the Monday following the injury) and September 25th, when claimant was referred to Dr. C, also is not clear. Claimant began seeing Dr. C on September 25th, with a history of a disc herniation at L5-S1, and aggravation "lifting television." Dr. C prescribed therapy and exercises and took claimant off work. In a report dated November 11th, Dr. C wrote:

[Claimant] presented to our office status post a lifting injury at work. I have been treating [claimant] since September 25, 1998. [Claimant] has a lumbosacral strain and a herniated nucleus pulposus with severe pain radiating down his left leg. It is unknown at this time when the patient will return to work. Evaluation of the case has been delayed since the insurance company has been denying diagnostic tests.

Dr. C wanted an MRI; however, carrier has refused to authorize a new MRI until the previous MRIs are made available for comparison purposes. Dr. C testified at the CCH and diagnosed a lumbosacral strain and possible herniated disc. Dr. C said that he has taken claimant off work because of the possible harm that might come to claimant if he attempted to work without an adequate diagnosis.

Carrier attacked claimant's credibility by disputing claimant's version of the television lifting incident, claimant's reporting of the injury to Mr. BB (carrier alleges that claimant did not report his injury until after his position had been eliminated), claimant's failure to seek

medical attention for almost six weeks after the alleged injury, and by the presentation of a surveillance videotape. The videotape shows claimant walking, getting in and out of cars, carrying a small container, carrying a plastic bag with some merchandise of unspecified weight and making three trips from an office to claimant's car, carrying what was identified as a computer component which claimant said weighed about five pounds. Carrier contends that claimant's credibility is the key to this case and that the testimony of the witnesses and the videotape show claimant "was not a credible witness."

The hearing officer found Dr. C's testimony persuasive, noted that carrier had not presented any evidence contrary to Dr. C's testimony and commented that he saw nothing in the video "that was inconsistent with the claimed lumbar sacral sprain and possible herniated nucleus pulposus" and that carrier's medical evidence was "conspicuously absent." The Appeals Panel has many times stated that the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Further, Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company 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 Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In this case, the hearing officer obviously found claimant's and Dr. C's testimony more persuasive than carrier's witnesses and resolved the inconsistencies and contradictions in claimant's favor. The hearing officer saw the videotape and found it not inconsistent with claimant's testimony. Although another fact finder may have drawn different inferences from the evidence, which could have supported a different result, that does not provide a basis for us to reverse the hearing officer's decision on appeal, Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.), and we decline to substitute our judgment for that of the hearing officer.

As previously indicated, carrier attaches a November 12th (same date as the benefit review conference) medical report to its appeal stating that it "was inadvertently omitted from carrier's exhibits" although it had been exchanged and the doctor had been listed as a possible witness. As carrier notes, reports submitted for the first time on appeal generally are not considered. We would further note that this report does not meet the requirements of newly discovered evidence necessary to warrant a remand. See Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). It appears that the report was not offered at the CCH due to carrier's oversight, which is not a reason to reverse and remand the decision.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge