APPEAL NO. 990314

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 25, 1999, a hearing was held. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and has not had disability, but did timely notify her employer of an injury, timely filed a claim, and is not barred from seeking workers' compensation benefits by an election of remedies. Claimant asserts that the hearing officer applied the wrong legal standard in regard to his decision that no injury was sustained. Claimant also stated that the hearing officer gave weight to a medical doctor who "misdiagnosed claimant's condition"; disability was appealed. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, when, she testified, she moved a number of 15-pound bundles, over a period of one and one-half hours, causing her to have pain in her low back and left leg unlike any she had had in the past from her osteoarthritis. *See* Hartford Accident & Indemnity Company v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.).

Claimant testified that when she saw her doctor, Dr. GP, she told him of the lifting while at work, but she added, "[a]nd I told him that I had lifted boxes and that I felt that I was injured, and he said no--after he--you know, he did all of the--he says, no, he says, your osteoarthritis." This conversation took place within a week after _____.

Medical records in evidence do show that claimant saw Dr. GP on February 4, 1997, and he noted "no new trauma" at that time. A form claimant filled out on February 5, 1997, (apparently as she was visiting a chiropractor) said that claimant had no prior back problems and that the current condition was not caused by an accident. In July 1997 claimant and an associate of Dr. GP, signing on Dr. GP's behalf, filled out forms for payment of disability through an insurance program. The form said that the condition did not arise out of employment. The diagnosis was "degenerative joint disease: lumbar spine/hips/cervical spine [and] Lumbar disc disease." Again, in October 1997, Dr. GP filled out another disability form in which the condition was said to be the result of illness, as opposed to injury. Dr. GP listed "degenerative disc disease as '#1' and Thoracic-lumbar discogenic disease/sciatica" as "#2." Listed on that form as a doctor to whom claimant had been referred, was Dr. O.

Dr. O, a neurosurgeon, saw claimant in July 1997. He noted that claimant, "had an episode of severe sciatica three years ago" that took "over four months to clear." He added, "[o]ver the past year, the episodes have returned, particularly with working and standing on her feet all day as well as lifting to some degree." He stated that an MRI

"suggests" a "small disk at the level of L5-S1 on the left." He added that a myelogram should be done. When it was done, Dr. O commented that it showed "tiny disks" that were not surgical. He predicted a prolonged clinical course.

Chiropractic records showed that claimant was initially seen on February 4, 1997, by Dr. M, D.C. At that appointment, claimant's history was noted as, "patient states pain started _____ while working & pain not similar to any previous."

The hearing officer determined that claimant did not make an election of remedies that would keep her from pursuing a workers' compensation case; that was not appealed. Similarly, determinations in claimant's favor as to timely notice given and timely filing of a claim were not appealed.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. While statements on forms that claimant either signed or accepted, such as whether the condition occurred from an accident, may be interpreted differently, the hearing officer was not remiss in interpreting such statements as indicative of no compensable injury. Just because the hearing officer found no election of remedies does not negate his ability to consider what may be reasonably interpreted as prior statements inconsistent with claimant's testimony that she sustained a compensable injury. These questions are for the hearing officer to determine.

Similarly, the hearing officer may give weight to a medical statement of "no new trauma." While claimant appears to equate that reference in the hearing officer's Statement of Evidence to not "understanding that a claimant need not prove that lifting a specific item caused injury," we do not agree that the latter proscribes consideration of the former. *See* Contreras, *supra*, which affirmed a determination of injury on a specific day from lifting numerous 50-pound sacks, in which no individual lift could be identified. That case placed emphasis on medical testimony that "from the tests and examinations that he made . . . he determined that plaintiff's injuries were caused by trauma." We conclude in the case under review that just because the theory of the case states injury was caused by repeated lifting in one day at work does not compel a fact finder to disregard any reference to the presence or absence of trauma. Since this is the reference that is said to have resulted in use of the "wrong legal standard," that assertion is without merit. Cases cited by claimant included Texas Workers' Compensation Commission Appeal No. 960117, decided February 26, 1996, which affirmed a hearing officer's factual determination that injury occurred, cited Contreras, and did not accept carrier's argument that a specific lift, as injurious, needed to be shown. Texas Workers' Compensation Commission Appeal No. 94278, decided April 12, 1994, reversed and remanded a decision of no compensable injury saying that a failure to identify a precise event was not determinative. Neither case indicated that a hearing officer should not consider whether trauma was shown or not. In fact, a position could be taken that in Contreras, where no specific lifting of a particular sack was required, the court gave significant weight to medical evidence showing trauma had occurred. Claimant somehow then concludes that "the absence of any documented accident or trauma in the medical records in [sic] not evidence that an injury did not occur" (emphasis added), after which a "see also" citation to Texas Workers' Compensation Commission Appeal No.

971260, decided August 18, 1997, was provided. We reject the assertion that the absence of trauma in a medical record cannot be considered by a hearing officer as evidence that an injury did not occur. The hearing officer should consider all medical evidence in the record in reaching a decision; in considering all medical evidence, a fact finder is not precluded from considering that certain observations were not made or that certain testing was not done. Appeal No. 971260 only says that an injury may generally be proved by the testimony of claimant alone, in rejecting an assertion that a particular incident in a day at work must be pinpointed. *See* Texas Workers' Compensation Commission Appeal No. 92300, decided August 13, 1992, which said that objective medical evidence is not a prerequisite to determine whether injury occurred but that the Appeals Panel has never held that the fact finder could not consider whether diagnostic or objective findings were made, how extensive the examination was, or whether a treatment plan was devised. *Also see* Texas Workers' Compensation Commission Appeal No. 92543, decided November 23, 1992, which specifically said that the fact finder could give little weight to a claimant's testimony that he could not work for a year when no medical evidence and no detail as to limitations was provided. The hearing officer in the case under review did not use the wrong legal standard. The record contains no indication that the determination of no compensable injury was based on an erroneous belief that a specific lift, of many, must have been shown to be injurious.

Claimant also states that the evidence "clearly indicates that [Dr. GP] misdiagnosed claimant's condition." The hearing officer, to our knowledge, is not a physician; claimant points to no medical evidence that says Dr. GP misdiagnosed anything. Indeed, our lay reading of Dr. GP's records indicates that he diagnosed both degenerative joint disease and thoracic-lumbar discogenic disease/sciatica. While statements from other workers indicate claimant was in pain on certain days at work, that does not mean that Dr. GP misdiagnosed anything, especially when he names the disc problem within his diagnosis. The assertion that Dr. GP misdiagnosed claimant's condition is without merit.

The evidence from medical doctors and chiropractors was somewhat in conflict, but it is the responsibility of the hearing officer to resolve any such conflicts. The findings of fact and conclusions of law, including that claimant did not sustain a compensable injury and did not have disability, were not against the great weight and preponderance of the evidence.

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:

_____
Thomas A. Knapp
Appeals Judge

_____
Alan C. Ernst
Appeals Judge