APPEAL NO. 990397

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 February 2, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury on _____, and whether he had disability as a result of that injury.

The hearing officer found that the claimant injured his back on _____, and that he had disability from this injury from October 21, 1998, through February 2, 1999.

The appellant (carrier) has appealed, arguing that the claimant is not credible on either the matter of injury or disability. The carrier seems to argue in part that without an outcry at the time of the lifting injury, there is no evidence of an injury. The carrier further argues that the claimant's findings on MRI were "more of a pre-existing nature." There is no response from the claimant.

DECISION

Affirmed.

The claimant said he was employed by (employer) since July 1998. On _____, claimant said he lifted a pulpit from the floor to a table in order to sand it down. Claimant said the way that he would lift was to prop the pulpit against a table and slide it up. He estimated that a pulpit would weigh from 50-75 pounds. He said that he felt a tingling sensation in his lower back when he did this, and slight pain, but he thought nothing of it and was able to work without problems the rest of the day. The claimant said that that night in bed, however, he began to hurt much more. His testimony was essentially consistent with a statement he gave to the adjuster on October 22, 1998.

The next morning, he came into work and asked to see a doctor. Claimant was told that the earliest appointment would be 2:00 p.m., and he then felt that he could not wait so he went to the emergency room (ER).

Claimant said that in 1987 he had an injury that involved his leg, but it was eventually opined that this problem stemmed from his back. He had no back problems before his current injury.

The ER record showed claimant's low back pain to be over his buttock to the right of center. There was some radiation of his pain to the leg. He was diagnosed with an acute myofascial lumbar strain. The history given was that he was lifting furniture at work. He was given pain medication. An MRI was recommended and he was told to stay off work until it was performed.

Claimant went to see an orthopedic doctor, Dr. T, on November 11, 1998. Dr. T diagnosed acute low back strain and recommended physical therapy (PT) along with pain medication. Dr. T stated as an objective that claimant would be returned to light duty with a 10-pound lifting restriction. The claimant said that the employer had no light duty available. At this point, the claim was disputed and claimant said he did not go to PT because he could not afford to pay. He was not aware that he had any regular health insurance.

The carrier had the claimant's medical records reviewed by Dr. C in December 1998. Stating that few substantial conclusions could be drawn by comparing a 1987 CT scan to the current MRI, Dr. C nevertheless concluded that the MRI findings appeared to be chronic or preexisting.

Claimant was subsequently examined by a doctor for the carrier, Dr. W, on January 22, 1999. Dr. W also reviewed the claimant's records and a videotape. Dr. W found mild tenderness in claimant's low back; he found indications of a pain syndrome of unclear etiology. However, Dr. W performed testing which did not indicate any exaggeration or symptom magnification; claimant's responses were "appropriate." Dr. W felt that claimant needed more evaluation of his right hip area. He did not believe that the MRI findings of a herniated disc accounted for the claimant's present problems. He said that there was no way to know if these problems were preexisting and there was no way to prove that the MRI findings were preexisting. He suggested that the claimant could return to light work.

The claimant was asked about the videotape; he said that in December 1998, when returning from having his MRI performed, his car overheated several times and he had to stop to fill the radiator with water. He said that he went to a discount department store to buy some "stop leak" substance to put in the radiator to resolve the problem. The claimant is shown as looking on while another person bends over and fills his radiator; after leaving the discount department store, claimant fills his own radiator and is bent over to do so. However, contrary to what Dr. W stated in his report, the claimant appears, when he walks and bends, to carry himself somewhat stiffly. He is wearing a heavier plaid jacket so his back area cannot itself be seen clearly.

Dr. T responded to the record review performed by Dr. C and said that the difference between the current MRI and a scan taken in 1987 was significant. Dr. T stated that the current herniation at L5-S1 was most likely a new work-related injury.

Mr. B, the employer's vice president, said that claimant had regular health insurance through the employer but that there was a probation period before one could qualify and he was unaware of what that was. He said he was not present at the time of the accident and investigated through coworkers the contended injury. Mr P, director of operations, testified essentially in the same regard.

Mr. Baker (Mr. BR), who worked with the claimant in the same general area about 10 feet away, was working on a piece of furniture himself. Mr. BR had not heard the testimony of the claimant because the "rule" was invoked. He estimated that a veneered pulpit weighed 75-80 pounds. He agreed that workers would generally pick up their own furniture, although they could request help. His recollection of events was that claimant did not cry out or mention a back injury. Mr. BR said he found out about the back injury the next day.

The carrier has cast its argument in its brief as if the evidence at the CCH was so entirely incredible, and the claimant so obviously dishonest, that the error of the hearing officer is blatant. We cannot agree with this assessment of the record. This involved simply conflicting evidence, a lot of it on minor points, that goes to the heart of what the finder of fact is present to judge. The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). His determination that the claimant sustained an injury in the manner he claimed was supported by sufficient evidence. We cannot agree that this determination was against the great weight and preponderance of the evidence. The testimony of Mr. BR and claimant actually were not conflicting; claimant said he felt only minor discomfort at the time of the accident and thought nothing of it. This would be consistent with Mr. BR's statement that claimant did not cry out or mention an injury. No medical evidence was presented that a back injury necessarily results in outcry or immediate manifestation. Likewise, no medical evidence was presented to show that a person with a back injury should not be capable of performing functions that were caught on videotape. While Dr. W's report could have been viewed persuasively on the issue of disability, Dr. W recommended in that same report that claimant could return to light duty (not full duty) work.

For the reasons set forth in this decision, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge