

APPEAL NO. 990413

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 3, 1999. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury; that the date of injury is _____; that the claimant timely reported his injury to his employer; and that he has had disability from September 20, 1998, through the date of the hearing. In its appeal, the appellant (carrier) argues that those determinations are against the great weight of the evidence. In his response, the claimant urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was working as a pipefitter. He stated that he was working 12 hours per day, seven days per week and that he had been a pipefitter for about 20 years. He stated that, as a pipefitter, it is not unusual to experience low back pain from pulled muscles after a day of work because the work is heavy. He testified that on _____, he was lifting a six-inch hose, when he felt a sharp pain and a burning sensation in his low back, through his right hip, and down his leg into his foot. He stated that he had never experienced the burning sensation before; however, he stated that he kept working, thinking that the pain and burning would subside. He stated that he did not report an injury to his employer on _____ because he thought it would get better after he went home and rested, noting that he had not missed work because of back pain prior to _____. He stated that the pain became worse as time passed and he was not able to go to work on Sunday, September 20th. He again explained that he did not report his injury at that time because he thought it would improve with rest and that he would be able to return to work on Monday. He stated that the pain did not improve; thus, he went to the emergency room early in the morning on Monday, September 21st. It is undisputed that the claimant reported his injury to his employer on September 23rd.

The emergency room records state that the claimant complained of shooting pain down his right leg that "began 1 week ago." Those records also state that the claimant "denies fall or injury." On September 22, 1998, the claimant sought treatment with Dr. P, a chiropractor. In a letter of October 14, 1998, Dr. P states that the claimant complained of low back pain of about one month's duration, noting that the claimant "really did not know what caused this but it has gotten worse as time has gone by." The claimant testified that he told Dr. P about the lifting incident at their initial appointment. On October 1, 1998, the claimant began treating with Dr. B, an orthopedic surgeon. Dr. B gives a history of the claimant's having felt a burning and tingling sensation in his back and down his right leg after having lifted a heavy object at work. Dr. B diagnosed "sciatica most likely secondary to a herniated nucleus pulposus," which Dr. B thought was "most likely related to the event that occurred at work." Dr. B referred the claimant to his partner, Dr. M, a spine specialist. In a "To Whom it May Concern" letter of December 15, 1998, Dr. M noted that the claimant has

a "very large transligamentous L4 herniated nucleus pulposus with a large extruded fragment" and a "central subligamentous L2 disc herniation." Dr. M recommended surgery.

In a report of January 12, 1999, Dr. H, the carrier's second opinion doctor, concurred in the claimant's need for surgery.

On October 5, 1998, the claimant gave a recorded statement to an adjuster. In that statement, the claimant stated that he felt a burning sensation in his low back and down his leg on _____, when he lifted the hose at work. He also stated that he had had back pain for about a month prior to that incident and that he had also previously experienced the burning sensation in his back and leg. At the hearing, the claimant maintained that he was mistaken when he said he had felt the burning sensation before, insisting that he first experienced it after the _____ lifting incident.

Mrs. D, testified that she is the claimant's wife. She acknowledged that on _____, while her husband was at work, she picked up Dr. P's card at a health fair at the mall. She stated that she got the card because her husband had complained of back pain and she thought a chiropractic adjustment might help. She further testified that when the claimant came home on _____ he was in a lot of pain and that it was different from the complaints of soreness that he had previously made.

Mr. F testified that he was the foreman on the job where the claimant is alleging that he was injured. Mr. F stated that the claimant did not report an injury to him on _____, noting that the employer had a policy that employees are to immediately report any and all injuries. Mr. F acknowledged that the work the claimant was doing was heavy work, that it is not unusual for a pipefitter to have sore muscles, aches and pains from his work, and that he (Mr. F) does not report every ache and pain as an injury.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness.

Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In this instance, the carrier argues that the hearing officer's injury determination is against the great weight of the evidence, pointing to the evidence suggesting that the claimant had had back pain for a month prior to _____. The claimant acknowledged that he had had pain; however, he maintained that he had not had the intense, burning pain with radiation down his leg prior to the lifting incident of _____. The carrier also emphasizes the fact that the claimant's wife picked up Dr. P's card on the same date as the alleged injury, which it maintains corroborates that the claimant's injury predated _____. The carrier likewise stresses that the claimant did not immediately report his injury to the employer and that he stated in his recorded statement that he had experienced radiating pain prior to _____. The carrier made the same arguments to the hearing officer. As the fact finder, it was solely the hearing officer's responsibility to determine the significance, if any, of those factors in determining whether the claimant had sustained a compensable injury. The hearing officer resolved the conflicts and inconsistencies in the evidence in favor of the claimant and she was acting within her province as the fact finder in so doing. Our review of the record does not demonstrate that the hearing officer's injury determination is so contrary to great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse her determination on appeal.

The carrier's challenge to the date-of-injury and notice determinations is premised upon the success of its argument that the claimant actually sustained his injury in August 1998. The hearing officer rejected that argument, finding that the claimant had sustained a low back injury on _____, in the lifting incident, notwithstanding his prior back pain. We affirmed that determination and, accordingly, we reject the argument that the hearing officer erred in her date-of-injury and notice determinations, given the undisputed evidence that the claimant reported his injury on September 23, 1998, well within the 30-day notice period. The disability argument is premised upon the success of the argument that the claimant did not sustain a compensable injury. Given our affirmance of the injury and notice determinations, we reject the challenge to the determination that the claimant had disability from September 20, 1998, and continuing through the date of the hearing.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge