

APPEAL NO. 990564

On February 11, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury in the course and scope of his employment on _____; and (2) whether claimant had disability from October 10 to November 15, 1998. The claimant requests reversal of the hearing officer's decision that: (1) on _____, claimant did not sustain a compensable injury in the course and scope of his employment; and (2) claimant did not have disability. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Medical reports reflect that in April 1993 claimant, who was 45 years of age at the time of the CCH, complained of lower back pain after being involved in a motor vehicle accident (MVA) and complained of lower back pain and bloatedness in March 1997. Claimant said that Dr. G told him that his back pain in 1997 was from a polyp in his intestines that caused his intestines to swell. Claimant said that his back pain went away when the polyp was removed. Claimant said that he believes he was involved in an MVA in September 1995 and had lower back pain because of the seat belt, but that he had an x-ray and nothing was found to be wrong. Claimant said he may have been involved in an MVA in January 1997 and that his lower back and shoulder were hurt. A July 7, 1997, medical report notes that claimant complained of abdominal pain and low back pain. Claimant said that he had a workers' compensation injury in (prior date of injury) when he scraped his lower back and shoulder. Claimant said that he did not have an MRI for his prior injuries.

Claimant began working for the employer in July 1998 as a wrecker driver and he was assigned to drive one of the employer's flatbed trucks, which will be referred to as the truck. The bed of the truck slides back and tilts down, claimant hooks up the front end of the vehicle to be transported, a winch pulls the vehicle onto the bed of the truck, and claimant secures the vehicle to the truck. Claimant said that the truck motor needs to be running to load a vehicle on the truck and that the parking brake is set while loading a vehicle. Claimant testified that the handle of the truck's parking brake, which was also referred to as the emergency brake, is on the floor on the right side of the driver's seat and that he must bend over to pull the handle up to set the brake. He said that more force must be used to pull up on the handle of the truck's parking brake than is required to set the parking brake of a car and that written complaints had been made about the parking brake of the truck because the handle was too hard to pull up.

Claimant testified that on Friday, _____, in the afternoon, he transported a car to the employer's yard for unloading; that when he pulled up on the truck's parking

brake, he felt a twinge and sharp pain in his back; that the pain went away; that he got out and unloaded the car; that he then parked the truck and again felt back pain when he pulled up on the parking brake; that the pain went away; that he felt back pain when he stepped down out of the truck; and that the pain went away when he walked. He said his shift was over and that he told the dispatcher, DV, that he had felt something in his back. DV testified that he, DV, did not work on (day after the date of injury) and that claimant did not tell him that he hurt his back on the job on (day after the date of injury). Claimant stated that he is claiming that he injured the disc between L4 and L5 when he pulled up on the truck's parking break on (day after the date of injury).

Claimant said that he had back pain the night of (day after the date of injury) and on Saturday, (2 days after the date of injury), when he was scheduled to be off work. He said that about noon on (2 days after the date of injury) he had numbness in his legs. Claimant said that about 3:00 p.m. on (2 days after the date of injury), a friend called and said he had bought a car for claimant's daughter at an auction held that day at the employer's yard and that the friend then drove him to the employer's yard to pick up the car. Claimant said he loaded the car onto the truck and drove the truck to his house, where he unloaded the car. He said that he had back pain and leg numbness before he loaded the car onto the truck on (2 days after the date of injury).

DV testified that he talked to claimant at the auction site on (2 days after the date of injury) and claimant did not tell him that he had hurt his back and that claimant did not appear to be hurt. DV said that sometime after (2 days after the date of injury) claimant called in to work and said his back was hurting and that claimant was not sure where it happened. There is no dispute that claimant reported his claimed injury to the employer within 30 days as required by Section 409.001. Claimant said that at about 5:00 p.m. on (2 days after the date of injury), his wife took him to a hospital emergency room (ER) where he obtained medication. ER records reflect that claimant was seen at the ER about 5:00 p.m. on (2 days after the date of injury), that he reported that his pain started "last PM" and was "getting worse," that he was diagnosed as having back pain/spasm, and that he was discharged to go home at about 8:30 p.m. on (2 days after the date of injury).

IE, who holds a management position with employer, testified that he talked to claimant at the hospital. IE was not certain if the conversation was on (2 days after the date of injury) or Sunday, (3 days after the date of injury), but believed it was on Sunday. IE said that he was at the hospital to see a relative, that claimant was in a wheelchair, and that he asked claimant what happened. IE said that claimant said that his legs were numb, that he could not stand up, that he did not know what happened, and that he did not know if it had happened at work or not. IE said claimant's wife was at the hospital and that she said that it had happened before. Claimant said he talked to IE at the hospital on (2 days after the date of injury) and IE told him that he might want to put it under workers' compensation.

Claimant saw Dr. Z on October 12, 1998, for complaints of lower back pain and Dr. Z noted that claimant told him that he had had back pain since _____. Dr. Z noted that claimant would not be able to return to work until October 19th and prescribed medications.

Claimant said that he returned to work on October 21st and had no problems on that day. He said that on October 22nd he again felt sharp back pain when he reached down and pulled up on the parking brake of the truck while loading a vehicle and that when he stepped down out of the truck he felt back pain. He said that the pain he felt on October 22nd was the same as the pain he had felt on (day after the date of injury). He said he reported to the dispatcher that he thought he had hurt his back again and also reported it to the field supervisor. The field supervisor stated that claimant told him on (day after the date of injury) that he thought he had hurt his back again. Claimant went to Dr. R on October 22nd complaining of lower back pain and Dr. R noted that claimant told him that he had started to get better and then stepped off a truck that day and his back popped and hurt. Dr. R took claimant off work. An MRI assessment sheet dated October 23, 1998, states that claimant has low back pain and that there was no trauma and no known injury. Dr. L wrote that claimant's lumbar MRI of October 23, 1998, showed a large central protruding disc at the L4-5 level with severe spinal canal stenosis that is accentuated by hypertrophic facet disease and bony osteophytes.

In a report dated October 26, 1998, Dr. R wrote that claimant reported that his low back pain started on _____, and that he had a previous low back injury secondary to an MVA in 1997. Dr. R noted on October 29th that claimant's work status was light duty. Claimant undertook physical therapy prescribed by Dr. R. A doctor noted on November 2, 1998, that claimant was unable to work. Claimant saw Dr. S on November 2, 1998, for an orthopedic evaluation, and Dr. S wrote in the history section of his report that on (day after the date of injury) claimant was reaching down to pull on the parking brake when he had pain in his back, that the next day he was towing a friend's car while off work and had some increased pain, that he went to the hospital, that he went to Dr. R, that he had an MRI, and that he denied any pain or problems with his back prior to _____. Dr. S noted that the MRI showed a very large extruded disc at the L4-5 level and approximately 50% to 60% canal stenosis.

Dr. R wrote on November 19, 1998, that claimant told him that his lower back injury occurred at work, stepping off a tow truck. On December 4, 1998, Dr. S wrote that claimant injured his back in a work-related accident on _____, when he reached down to pull an emergency brake, twisted his lumbar spine, and sustained an injury to his lumbar spine. Dr. S stated that the MRI showed a herniated disc at L4-5 and that the MRI finding is consistent with the mechanism (of injury) described by claimant. Claimant said that Dr. S released him to return to work about November 15th.

Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ.

App.-Texarkana 1961, no writ). The trier of fact may believe that a claimant has an injury but disbelieve that the injury occurred at work as claimed. Johnson. The hearing officer found that on _____, claimant did not sustain an injury in the course and scope of his employment and concluded that claimant did not sustain a compensable injury on that date. The hearing officer's decision reflects that he did not find claimant's testimony to be persuasive. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. While Dr. S's opinion on causation tends to support the claimant's claim, it has been held that the finder of fact is not bound by the testimony of a medical witness where the credibility of that testimony is manifestly dependent upon the credibility of the information imparted to the medical witness by the claimant. Rowland v. Standard Fire Ins. Co., 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.).

We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer did not err in deciding that claimant has not had disability, because, without a compensable injury, claimant would not have disability as defined by Section 401.011(16).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge