

APPEAL NO. 990617

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 5, 1999, a hearing was held. The hearing officer determined that the appellant's (claimant) compensable injury of _____, did not include an injury to his back; he also determined that claimant had disability on (a day after date of injury), and from September 15 through September 21, 1998. Claimant asserts that he did injure his back; he restates his testimony and minimizes his prior back condition; claimant then quotes from Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, in some detail, stating the facts to be "on point," indicating that the determination of no back injury should be reversed; claimant also points to the MRI results as showing injury to the back. Claimant also asserts that his testimony supports disability for a longer period of time. Respondent (school) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (school) on _____, when he was operating a Bobcat. He testified that there was an auger on the front of the Bobcat which was hydraulically operated. He said that he raised the auger up in the air and (something) came loose. The auger "while spinning" swung around and "came in" where claimant was sitting in the Bobcat; claimant said he "felt the massive weight on me" and felt pain in his back and legs, that in fending the auger away from his torso it "slid down" his leg. He repeated that the auger was spinning. He said he had abrasions on his right leg.

He was taken to a hospital emergency room (ER).

The record of the ER shows that on _____, the attending physician said that claimant could return to work on September 10, 1998, with no limitations. Otherwise the ER records of that date showed that claimant had an abrasion on his right leg and a contusion on his left leg. It was noted that "no other injury" was seen. The history included that a piece of metal fell on the Bobcat causing "small open wounds to legs." There was no reference to claimant's back, although he testified, as set forth above, that he felt pain in his back even before the abrasions to his leg occurred.

Claimant did see Dr. J the next day, (a day after date of injury), who noted a history of "framing to an auger" fell onto claimant's shins while he was sitting in a Bobcat. Dr. J's next sentence was, "when he rose to get up he strained his right lumbar area." Dr. J's impression was "lumbar sacral strain on the right with skin contusions and abrasions to his shins." Dr. J said claimant should not miss work but should not lift over 30 pounds. On September 14, 1998, claimant saw Dr. B and complained of "severe pain" in his right lumbar area down his right leg. An MRI was ordered. On September 16, 1998, claimant was seen by Dr. R; he obtained a history of a piece of iron falling on claimant's thighs while

he was "on the truck"; claimant pushed it away and sustained abrasions and "developed back pain the day after that." His impression was radiculopathy with muscle strain, and he said claimant should stay off work until September 20, 1998. On September 21, 1998, claimant saw Dr. N, who noted that claimant wanted to go back to work. A history of a heavy piece of machinery falling on claimant's legs two weeks before was noted, along with claimant's pain being "much improved . . . he denies any other problems." The physical examination was normal and claimant was cleared for work.

Then on October 10, 1998, claimant saw Dr. P, who noted a "one day history of right sided low back pain." Dr. P also noted that claimant said his back injury of "about one month ago" was one of "three back injuries in the past." This doctor's impression was lumbar sprain, strain. An MRI on October 13, 1998, reported disc degeneration from L2 to S1 and a "suggestion of slight asymmetric disc protrusion . . . at the L5-S1 level" and the report also said it was thought that in addition there was an annular disc tear at L5-S1 with minimal disc protrusion and "no significant effacement of the thecal sac."

Claimant testified that he had never had medical attention for his back prior to this injury. He said that he had minor aches and pains in his back in the past. He also said that he told the doctor, who he saw the day of the accident (at the ER), that he had back pain. In response to Dr. J's note of (a day after date of injury), in which Dr. J said that claimant had chronic back pain back to when claimant was 18 years old and had been asked to get an MRI in the past "but has been too busy," claimant stated that Dr. J "misunderstood." Claimant's statement of September 18, 1998, said that he did not say anything about his back to the doctor he saw the day of the accident. He also said in that statement, in response to a question that asked, "Have you had any prior injuries to your back?". "Uh, no." However, on the next page of that statement, claimant was asked "did you report an injury to your back earlier this year at [school]?", to which he answered, "Uh, yes." He was then asked what were the circumstances that caused the injury, and he replied, "Uh, lifting a heavy obj"

School provided records from (hospital) and (clinic) for visits made by claimant in May, July, August, November, and December 1997 for back pain. Several mention spasms. In May 1997, claimant reported a two-week history of low back pain; spasms are noted as is motor and sensory deficit in the legs. The July 1997 note says that claimant reported trauma two months before. In August 1997, claimant's history was noted as:

[P]atient is 40 year old male with complaints of intermittent lumbar back pain and spasm for 20 years. He has acute exacerbations for several x's/year. States flexion/lifting is bad for back.

In November 1997 claimant stated he had his second episode of back pain "this year." This one occurred when he bent to pick up a shovel. In December 1997, claimant reported back pain while working on his car.

School also provided a report from Dr. M who examined claimant on school's behalf. He said that the current injury of _____, in his opinion, did not aggravate claimant's

preexisting back injury, noting his examination and review of records. He commented also that the MRI, done since the _____, incident, showed disc degeneration.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. The hearing officer listed several reasons for not finding claimant credible, including that claimant had no cuts or bruises on his hands but testified he fended the spinning auger away from him, and that he was "evasive and conflicting" in testifying about medical evidence. He concluded that claimant was "not credible enough" to include the back pain as part of the compensable injury.

While claimant cited Appeal No. 92503, *supra*, that case dealt with a serious compensable injury and thereafter another injury was sought to be included as compensable. The hearing officer in the case under review did not have to find that abrasions and contusions on the legs were a serious injury. Appeal No. 92503 also involved a cast to the compensable ankle injury, which added weight and affected the gait of the claimant which was said to have confused that claimant as to whether his back was injured or was sore because of the way he had to walk. There was nothing similar in the case under review. Also, Appeal No. 92503 included a point made by the hearing officer in that case which was not made in this case. The hearing officer in that case indicated that the claimant therein "made a generally credible witness." Compare to the hearing officer's comments in this case about credibility and to the facts recited herein. Appeal No. 92503 also noted, in discussing the herniated disc which that claimant had, "nothing indicates any other cause" other than the incident which caused the compensable ankle injury. Compare to the case under review where claimant has a "20 year" history of intermittent back pain arising for a variety of reasons, some of which appear to be innocuous; claimant also appears to have had a subsequent exacerbation, according to the October 10, 1998, record of Dr. P. Finally, Appeal No. 92503 referred to medical statements consistent with injury to that claimant's back relative to the original compensable injury to his ankle. Compare to this case in which Dr. M states that claimant did not aggravate his back injury. Appeal No. 92503 does not control the determination of whether claimant's low back was injured on _____. The determination that claimant's compensable injury does not include a back injury is sufficiently supported by the evidence.

With an affirmed determination that the compensable injury did not include a low back injury, the hearing officer was correct in only finding disability relative to the abrasions and contusions sustained on claimant's legs. The determination that disability was incurred on (a day after date of injury) and from September 15 through 21, 1998, was not appealed by the carrier, so both periods in which claimant did not work may be affirmed as attributable to claimant's leg injuries.

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:

Gary L. Kilgore
Appeals Judge

Elaine M. Chaney
Appeals Judge