APPEAL NO. 990709

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On March 1, 1999, a contested case hearing (CCH) was held. With respect to the issues before her, the hearing officer determined that appellant (claimant) did not sustain a low back injury on _____ (all dates are 1998 unless otherwise noted), that claimant's compensable injury of that date is limited to his ribs and that claimant did not have disability.

Claimant appeals, contending that the testimony and medical documentation supports his position. Claimant contends that he sustained a low back injury in addition to the accepted rib injury and that, as a result, he had been unable to obtain and retain employment at his preinjury wage. Claimant requests that we reverse the hearing officer's decision and render a decision in his behalf. Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant testified through a translator but, as the hearing officer's discussion indicates, there is some uncertainty about the level of claimant's English language ability. Claimant was employed as a pipe insulator. It is undisputed that on _____ claimant was climbing down a ladder off a scaffold when his foot got tangled in the safety harness, causing him to lose his balance and fall, hitting his right side on a valve handle before falling to the ground. Whether claimant landed on his side or flat on his back is in dispute. A coworker was in the vicinity and saw claimant on the ground. Claimant was given first aid by the employer for a scratch or abrasion on his right side. Carrier has accepted liability for a rib injury.

At claimant's request, he was taken to a nearby clinic where he was apparently seen by a nurse practitioner. The clinic records indicate complaints on "pain to ® side of chest" and notes a "small abrasion [illegible] 1-2 cm φ active bleeding." X-rays of the right ribs, which were read by a radiologist, were "normal." Claimant was prescribed ibuprofen and released to regular work "as tolerated." The employer's safety coordinator testified that claimant was placed on light duty. Claimant finished his shift that day, worked the next day and was off a day. On November 23rd, claimant again complained of right side pain and was seen at the clinic. Clinic notes of November 23rd indicate right side of chest pain and that "ibuprofen doesn't help very much." Claimant was prescribed Darvocet (apparently after a consultation with a doctor) and warm, moist heat. Claimant was released to regular work "as tolerated–no heavy equipment." Claimant, along with several other employees, was laid off in a reduction of force on completion of a project on November 25th.

Claimant was subsequently seen by Dr. C, on December 1st. Dr. C recites the history of the fall, complaints of right lateral rib pain, "lower lumbar pain on the right side" and right mid back pain. Further lumbar x-rays were taken showing "a mildly decreased lordotic curve." Dr. C found evidence of muscle spasms. Dr. C took claimant off work. Claimant was again seen at the clinic on December 2nd where, in addition to the right side contusion, subjective complaints of "pain radiating to low back" were noted and that the Darvocet was causing vomiting. The assessment noted "[l]ow back pain <not associated [with] current injury>." Claimant continued to see Dr. C as noted in progress notes of December 4th, 7th and 10th. Claimant was again seen by Dr. C on December 15th, where Dr. C noted muscle spasms associated with the thoracic back.

Claimant began treatment with Dr. D, apparently on December 16th. In an undated report, Dr. D noted claimant's recent medical history and had a diagnosis of "[c]ontusion of chest wall–[r]ule out rib fracture," a lumbosacral sprain/strain, "[l]umbar [r]adiculitis–[r]ule out lumbar HNP" and myospasms. A series of progress notes shows treatment every few days through February 15, 1999. Dr. D testified at the CCH, stating that in his opinion, claimant had sustained a low back injury in addition to the rib injury as a result of the _____ fall. Dr. D testified that claimant continued to be "totally disabled." Claimant was eventually referred to Dr. G, who, in a report dated January 27, 1999, diagnosed direct trauma to the ribs and recommended an MRI to rule out a herniated disc.

At the CCH, on direct examination, claimant testified that he had had no prior back injuries, but on cross-examination, he testified that he had been in a motor vehicle accident (MVA) in 1995, that he had filed a lawsuit for that accident, that he had received a settlement and that he did not remember the amount of the settlement "because I had to pay the doctors and everything." The hearing officer could consider the conflicting testimony about whether claimant had made any complaints about back pain prior to being laid off and the first notation of back complaints in the medical records was Dr. C's December 1st report. The hearing officer could also consider testimony that claimant was taking an over-the-counter medication for a backache two days before the fall injury. The hearing officer comments in her discussion:

> A review of the totality of the evidence contained in the record of the [CCH] fails to persuade the Hearing Officer that Claimant has met his burden of proof with respect to these issues; in particular, the Hearing Officer notes that Claimant previously denied having sustained any injury as a result of a [MVA], and that [Dr. D] indicated that a history of such an injury might have played a significant role in his opinion regarding Claimant's current medical condition. Claimant's denial of having sustained a prior back injury, which denial apparently was communicated to both Carrier and [Dr. D], does not appear to be fairly attributable to the fact that Claimant is not a native speaker of English, since the record as a whole tends to indicate that Claimant is better able to communicate in the English language then [sic] he would have the Hearing Officer believe, and at any such misinformation was not the result of a simple misunderstanding.

Claimant contends that he has met his burden, that he complained of back pain "as early as 12 days following [his] injury" and that Dr. C and Dr. D support his position.

The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ); Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The hearing officer is not compelled to accept the testimony of the claimant as an interested witness. Lopez v. Associated Employers Insurance Company, 330 S.W.2d 522 (Tex. Civ. App.-San Antonio 1960, writ ref'd). Further, we have many times held that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer in this case obviously did not find claimant's testimony persuasive. She could have considered that the back injury was not documented until after claimant had been laid off. We would further note that the Appeals Panel has held that a fact finder is not bound by the testimony of a medical witness when the credibility of the testimony is manifestly dependent on the credibility of the information imparted to the witness by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). We find the hearing officer's decision that claimant did not sustain a back injury and did not have any disability, as that term is defined in Section 401.011(16), to be supported by sufficient evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I agree with affirming, but for the reason that I believe the hearing officer thought the back pain related to occurrences other than the accident and that claimant's failure to disclose the accident to his doctor undercut the persuasiveness of his medical evidence. I do not agree with the observation that the hearing officer "could consider" that the back injury was not documented until after claimant was laid off because I think this is entitled to almost no weight or significance here. There was no dispute that the accident happened, so whether or not a different region is brought in through a doctor's report after a layoff, within two weeks after the fall, should not tip the balance one way or the other here. If there was no indication of another explanation for the back condition, I would be voting to reverse and render since the back injury documentation "fact" would be insufficient, standing alone, to support a decision against claimant. But there is, and the decision is thus supportable.

_____

Susan M. Kelley
Appeals Judge