

APPEAL NO. 990800

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 12, 1999, a hearing was held. She determined that respondent's (claimant) compensable injury of \_\_\_\_\_, is a producing cause of his current back condition; she also found that claimant is not barred from seeking workers' compensation based on an election of remedies; finally, she found that claimant had disability from May 29, 1998, to August 3, 1998, and from November 10, 1998, to the date of the hearing. Appellant (carrier) asserts that the sole cause of claimant's current condition is the "intervening injury" of Alleged injury, that claimant aggravated his original injury on Alleged injury, that the claimant elected to use his group health insurance which bars him from workers' compensation benefits, and that claimant did not show that he sustained disability, adding that findings of fact and conclusions of law in support of these issues were against the great weight of the evidence. Claimant replied that the decision should not be disturbed.

DECISION

We affirm.

Claimant worked for (employer 1) on \_\_\_\_\_. While the evidence provided little indication that a traumatic event occurred on \_\_\_\_\_, the parties stipulated that claimant sustained a compensable back injury on \_\_\_\_\_, which sufficiently addresses the \_\_\_\_\_, compensable injury.

Claimant testified that after \_\_\_\_\_, he was off work for an initial period to April 13, 1998; he then worked although his back continued to be painful. To make extra money he began working several hours a day for another employer, a (employer 2), in late April 1998. After obtaining initial medical care from an emergency room on \_\_\_\_\_, he has been treated by Dr. J, who he first saw on April 3, 1998. Dr. J's records confirm that claimant still had lower back pain on April 29, 1998, and May 22, 1998, when claimant visited Dr. J for treatment.

Claimant testified that he felt pain down his leg on Alleged injury, while working for employer 2 (his prior statement said that he felt pain down his leg after beginning work on Alleged injury, for employer 1, although he had worked for employer 2 that day prior to reporting to employer 1). While claimant's statement and testimony conflicted as to when the Alleged injury, pain originated, claimant's statement that his back felt tight and got tighter during the day, did not conflict with his testimony as to how the pain down his leg arose. Dr. J's initial report indicated that claimant had also had pain radiating down his right leg at the time of his injury in March but that claimant said it had resolved, after two days. There was no testimony or statement that indicated that claimant had any type of lifting or twisting incident on Alleged injury, or even any testimony that what he did at employer 2 could cause a back injury (laying thin sheets of fiberglass) although Dr. J indicated that there may have been an aggravation on that day. Dr. J, in an October 27,

1998, letter, mentioned an MRI showing a herniated disc and said, "while working for [employer 2] may have aggravated this injury, it was not the cause of the injury. The need for surgery is a direct result of the injury he sustained on \_\_\_\_\_."  
."

Prior to Alleged injury, claimant had an MRI on May 6, 1998, which showed a "large broad-based central disc herniation" at L4-5.

While claimant received temporary income benefits from carrier for the initial period of disability in March and April, carrier then refused to pay any benefits after June 22, 1998, and thereafter claimant paid for his medical care through his group medical plan that he had with employer, upon application through his employer to use his medical insurance.

After Alleged injury, when claimant felt pain down his leg and left work early that day, he saw Dr. J on May 29, 1998. Dr. J noted low back pain just as he noted in prior visits by claimant. He added, "leg pain began yesterday - had to leave work." The May 29, 1998, note says nothing of any injury, lifting, twisting, falling or any other event that may have acted upon claimant to affect his March 1998 injury. Dr. J then took claimant off work.

Claimant was able to return to work on August 3, 1998, but did not return to work with employer 2. Dr. J again took him off work at the time of his spinal surgery on November 10, 1998, and claimant stated that he has not returned to work since that surgery.

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. The evidence sufficiently supported the absence of any finding of fact that any injury occurred in May 1998. The testimony and statement of claimant, Dr. J's medical records, the MRI of May 6, 1998, and other evidence concerning claimant's work for employer 2 provided sufficient evidence to support the determinations that claimant's compensable injury of \_\_\_\_\_, was a producing cause of his current back condition and that claimant's current condition "was caused by" his \_\_\_\_\_, injury.

The periods of disability found are supported by Dr. J's admonitions to do no work and are sufficiently supported by the evidence. The hearing officer pinpointed the issue of election of remedies by finding that carrier "left the claimant with no choice except to seek medical care . . . through . . . group health insurance . . ." From that finding of fact and others, she then determined that claimant did "not make an informed election," and that determination is sufficiently supported by the evidence. Carrier argued that while claimant may have had no choice in June/July to use his medical, he continued that practice too long and obtained spinal surgery without going through the workers' compensation spinal surgery process. As stated by the hearing officer, the carrier's denial of benefits "left the claimant with no choice."

The decision and order are sufficiently supported by the evidence and are affirmed.  
See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

---

Joe Sebesta  
Appeals Judge

CONCUR:

---

Robert W. Potts  
Appeals Judge

---

Judy L. Stephens  
Appeals Judge