APPEAL NO. 990801

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 22, 1999, a hearing was held. She determined that the date of injury was _____; that respondent (claimant) sustained a compensable back and left leg injury on that date; that claimant had good cause for giving notice of injury to his employer on June 3, 1998; and that claimant had disability from June 3, 1998, to September 10, 1998. Appellant (carrier) asserts that the evidence conflicts as to whether the alleged injury was from a fall or repetitive trauma and questions whether claimant showed either; carrier also states that claimant did not present evidence in support of the good cause for late notice determination; because there was no compensable injury, there was no disability. Claimant replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked as a truck driver. Claimant testified, without providing a date, that he left City 1 in a truck with another driver to go to State 1. (Claimant's statement of June 3, 1998, shows that he left City 1 on (prior date of injury).) He testified that the other driver, JA was first to drive; claimant began the trip by trying to sleep in the sleeping part of the sleeper cab. After a truck stop, apparently in State 2, to let claimant get to sleep, he switched with JA in State 3. He said that on the trip back to Texas from State 1 he drove the truck through State 2. While claimant did not testify as to the quality of the road in State 2, he did say in his statement of June 3, 1998, that State 2 highways are three to four times as rough as any other roads; he said he was hurt by being bounced around the sleeper compartment while the truck traveled through State 2. On cross-examination, he said he was "thrown around the sleeper several places." In comparison to the road condition in State 2, claimant, in his statement, said that roads in State 3 and State 1 are good. Claimant did say that he told the dispatcher upon returning to City 1 on April 18, 1998, that "the truck liked to beat us to death" and also said, "my back is hurting."

Claimant did testify that he filled out a form after an MRI was done and a doctor took him off work. This testimony was consistent with his more detailed statement of June 3, 1998, in which he said that he had not missed work up to the time of the statement. He also said in that statement that he just felt a "tinge" in his back, but his doctor had put him on medication. In this statement, claimant also said, "I didn't think anything was wrong you know?" when he got back to City 1 on April 18, 1998. He said he then worked two or three weeks and then went to Dr. G. He saw a doctor again after an MRI was provided (apparently Dr. G). In his testimony, claimant said that he gave the statement of June 3, 1998, the day after he got the report of the MRI, which he said showed he had a herniated disc.

There are no medical records in evidence from Dr. G to confirm when claimant saw him or when Dr. G told claimant of the MRI. For some reason, the only report of Dr. G's is

a referral to Dr. P, D.C. in October 1998. Dr. P then provides the only evidence that ties the bouncing in the sleeper cab to an injury to the back by saying that claimant "somehow twisted his back" by being bounced around in the sleeper and this was "directly related" to the disc condition. Dr. P also stated that claimant had smoked for 50 years which contributed to his discs being poorly hydrated and susceptible to herniation. He compared claimant's discs to an "old dry twig" that breaks instead of bending freely. Another report by Dr. J is of little assistance in this review since he gives no opinion as to cause and states erroneously that claimant was injured when he fell after being "thrown out" of the bunk. The evidence provided by claimant of being "thrown around" the sleeper several times over an eight-hour period is stronger than a mere reference to continued "bouncing" and could be compared to Hartford Accident & Indemnity Company v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-City 1 [1st Dist.] 1973, writ ref'd n.r.e.), in which injury was found when Contreras had been lifting 50-pound sacks during the work day, but he could not say which lift injured him. While the evidence could have been viewed differently by another fact finder, it is sufficient to support the determination that claimant was injured while in the sleeper cab, probably on (prior date of injury), rather than on April 17th, as found by the hearing officer.

Carrier correctly states that claimant did not testify that he "trivialized" the injury. He did not testify at any length about notice except to state that he told a dispatcher on April 18, 1998, that "the truck liked to beat us to death" and added that his back was hurting (or in his statement, that his leg was hurting). Claimant's statement of June 3, 1998, though, does provide the essential points for the hearing officer to find that claimant trivialized the event until after receiving the MRI results. (Those MRI results speak of a protrusion, not a herniation.) Claimant's statement said that he kept working and did not think anything was wrong, adding that he did not have significant pain. He added that after getting the results of the MRI on June 2, 1998, he then filled out a form with employer; this form is not in evidence, but claimant gave the statement of June 3, 1998, to employer, which is the date the hearing officer found that notice was given. While there are no medical records to show claimant saw Dr. G on or about June 2, 1998, the MRI is in evidence, and its report is shown to have been typed on May 28, 1998.

The hearing officer as sole judge of the weight and credibility of the evidence (*see* Section 410.165) could believe claimant's statement indicating that he received word of the MRI the day before the statement and that he reported in writing to employer that day.

Claimant testified that he returned to work on September 9 or 10, 1998. The determinations of the hearing officer that claimant sustained a compensable injury while resting in the sleeper compartment while the truck was traveling across State 2, that claimant had good cause for trivializing the injury until he obtained the MRI and was told he would miss work, and that he had disability from June 3, 1998, to September 10, 1998, are sufficiently supported by the evidence. The date of injury was said to be (prior date of injury); since that determination was not appealed, it will not be changed.

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:

_____
Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

As the author of a reversal decision in a similar case, Texas Workers' Compensation Commission Appeal No. 990591, decided April 30, 1999, I cautioned against basing a claim, or for that matter, a decision, on sincerely felt arguments, unsubstantiated by evidence of facts to support broad assertions. It seems to me that where a claimant is thrown around over a road, leading to injury, this recollection would be powerful, detailed (*i.e.*, the stretch of road could be clearly identified), unequivocal and direct, and corroborated in like detail by the person driving the truck. It need not be pulled out through indirection, the testimony of other drivers or officials about "general knowledge" of road conditions, or conclusory statements about mechanical conditions of trucks from nonmechanics. In this case, contrasted to the one cited above, there is more evidence from the injured worker which fleshes out the particulars about this trip. The design of this truck appears to be different (at least as far as the evidence was developed before this tribunal) with respect to cushioning ability. This is more than a mere scintilla, and therefore supports the decision, although different inferences could be drawn. Because of our standard of review, I will concur in this affirmance.

_____
Susan M. Kelley
Appeals Judge