APPEAL NO. 990814

On March 17, 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 whether appellant (claimant) sustained a compensable injury on _____, and whether claimant had disability. The claimant requests reversal of the hearing officer's decision that he did not sustain an injury in the course and scope of his employment on _____, and that he has not had disability. Claimant requests that a decision be rendered in his favor. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Prior to his claimed injury of _____, claimant had worked as a mechanic/lane conditioner in employer's bowling alley for two and one-half years. He said he has never received an oral or written reprimand from employer. Claimant worked from 4:00 p.m. to 2:00 a.m. from Thursday through Sunday. He said that the evening of Saturday, _____, he was at work using an oiling machine that weighed over 150 pounds to oil the bowling lanes and that when he lifted the machine to move it to the next lane, he heard a pop in his back that made him straighten up and he felt throbbing in his back. Claimant said the injury occurred about an hour after he got to work. He said that he put the machine down and went to the back of the building to sit down and that within 15 or 20 minutes he reported to the assistant manager, MR, that he had hurt his back. He said that he did not do any more work after he was injured; that MR telephoned the general manager, KG; that MR was upset; that MR told him that KG said he was to go to the hospital emergency room (ER); that he told MR that it would be better for him to just go home; that he told MR that he was concerned about losing his job; that he could not reach an understanding with MR about going to a doctor; that he has his own doctor; that he did not know if his injury was serious; that he did not go to the ER or see a doctor that evening; that he went home and soaked in hot water; and that he was hoping that when he went home his injury would improve so that he could go to work.

Claimant said that the next day, July 26th, he was stiff and could barely move; that his lower back pain got worse; and that he went to Dr. P, D.C., on July 28, 1998. Claimant has not worked since his injury. Claimant said that Dr. P took him off work, that he sees Dr. P about once a month, that Dr. P initially gave him several weeks of therapy, and that Dr. P cannot now do anything for him because carrier denied his claim. Claimant said that he continues to have stiffness and pain in his lower back and that he did not have any back problems before his injury of _____.

MR testified that the evening of _____, claimant told her that he hurt his back while using the oiling machine to oil the lanes; that she told claimant that if he was hurt he needed to go to the nearest health care facility, which was the hospital ER across the

highway from the bowling alley, and be seen by the ER doctors; that claimant told her he would go to the doctor and that he was really hurting; that she called KG to report the injury to him; that she filled out an injury report and gave it to claimant; that she told claimant he would have to have a drug test; that claimant left work; and that it was her understanding when he left that he was going to the doctor.

In an injury report dated _____, MR wrote that claimant told her that he had hurt his back changing the oiling machine from one lane to another, that she instructed claimant to go to the ER, and that claimant refused to go to the ER. MR said that she does not know why she wrote on the report that claimant refused to go to the ER, when she had testified that he said he would go to the doctor, but explained that when claimant left work that evening he told her that he wanted to go home and that claimant wanted to go to his own doctor. MR said that claimant had a friend at work, later identified as his immediate supervisor, LL, who could take him to the ER. MR said that she is claimant's supervisor when she works the same shifts as claimant, that she has never given claimant a written reprimand, but that she did give him an oral reprimand one time when he did not answer her call over the microphone.

KG testified that when MR called him at home the evening of July 25th and reported claimant's injury, he told her to fill out an injury report and have claimant go to the ER; that later that evening MR told him that claimant said he was not going to the ER; that LL had offered to take claimant to the ER; that two days prior to July 25th, the shift supervisor had orally reprimanded claimant for not responding to calls; that when claimant arrived at work on July 25th he, KG, told claimant he needed to do his job and claimant became offensive; that on July 5th claimant was taken off the work schedule without pay for about two weeks because of his failure to report for work on several days; and that a letter was given to claimant's supervisor to give to claimant about being taken off the work schedule but that he does not know if claimant received that letter. No letter reprimanding claimant was in evidence.

Dr. P reported that he saw claimant on July 28, 1998, for complaints of back and hip pain and that claimant told him that he heard a loud pop in his back on July 25th when he was using the oiling machine at work, that his condition had worsened since then, and that he had not been seen by any other doctor. Dr. P checked that claimant may not return to work and has continued to note that claimant may not return to work. On August 20th Dr. P diagnosed claimant as having lumbar and thoracic intervertebral disc syndrome, myositis/myalgia of the lumbar and thoracic spine, paresthesia of the left hip, and right hip pain. Dr. P wrote in September 1998 that he could not render further treatment because carrier was denying the claim. Claimant has continued to go to Dr. P and Dr. P has written that they are waiting for claimant's workers' compensation hearing.

There is no appeal of the hearing officer's findings that claimant's job duties included preparing bowling lanes for use, including operating machinery to oil the lanes; that on _____, claimant was oiling the bowling lanes; and that oiling the lanes on July 25th was an activity that furthered the business affairs of employer. Claimant appeals, as being

against the great weight and preponderance of the evidence, the hearing officer's finding that claimant did not suffer damage to the physical structure of his back on _____, while working for employer. Claimant also appeals, as being against the great weight and preponderance of the evidence, the hearing officer's conclusions that claimant did not show that he had an injury in the course and scope of his employment with employer and that, because claimant does not have a compensable injury, he does not have disability.

The 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). "Injury" means "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). It is apparent that the hearing officer believed that claimant used the oiling machine in the course and scope of his employment on July 25th but disbelieved that claimant was injured while using the oiling machine as claimed by claimant. 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. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. 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.). An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084. We conclude that the hearing officer's decision that claimant did not sustain a compensable injury 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.

"Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the hearing officer did not err in determining that claimant does not have disability, because, without a compensable injury, claimant would not have disability as defined by the 1989 Act.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Thomas A. Knapp
Appeals Judge