APPEAL NO. 990911

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On March 2, 1999, a contested case hearing was held. The issues concerned whether the appellant who is the claimant, sustained a compensable injury on _____, and had disability as a result.

The hearing officer held that the claimant did not sustain a compensable injury, and any inability to work resulted from something other than a compensable injury. She concluded that there was no compensable injury and therefore no disability, and carrier was not liable for benefits.

The claimant appeals, arguing that he proved his case, and pointing to the evidence that he believes show this. He asks that the decision be reversed. The carrier responds that the decision is supported by sufficient evidence.

DECISION

Affirmed.

The claimant was employed by (employer) and delivered soft drink products to area retailers and grocery stores. On _____, as he was on the premises of a grocery store, he said that he was pulling a pallet and it came apart, and he slipped and fell in some water. The claimant said he had complained before about the equipment at this grocery store. The claimant agreed that the accident was unwitnessed but a store employee, Mr. J.D., helped him clean up the water. The claimant said his back hurt but didn't get severe until that night. When he called supervisor Mr. B right after the accident, he was told there was no one else who could cover his route. The accident happened around 11:00 a.m.

The claimant also contended he reported the accident to another supervisor, Mr. A, later that day. The next day, he called in and spoke to Mr. A and Mr. B and was told generally to see a doctor, without a specific referral being made. He saw Dr. W, his wife's doctor, on (day after date of injury), and was told he needed therapy. He was taken off work and treated with medication and massage.

The claimant said that he found out on June 6th that no accident report had been filed by the employer. He was terminated on June 10th. The claimant applied for and received unemployment benefits.

The claimant denied that he had excessive sickness and lateness during the four months prior to his claimed injury. He agreed that he was upset when the predecessor supervisor to Mr. B had undertaken the first stage of disciplinary action. The claimant returned to work for another employer on February 9, 1999, making more money than he did for the employer.

Evidence was presented that the claimant's family was involved in an automobile accident on April 6, 1998; he denied that he was in the car at the time. He said that an off-work slip that Dr. W wrote for him back at that time, due to lumbar syndrome, was for the purpose of allowing him to stay home with his wife and children after their accident. Although the off-work slip cautioned about drowsiness from medication, the claimant said Dr. W did not give him medication at this time. The claimant said that he had back trouble around this time due to his work but denied that he was treated or examined by Dr. W for this. He had no explanation as to why Dr. W would generate an off-work slip in April that would appear to indicate he had treated and diagnosed the claimant for a lumbar injury he sustained at that time.

On October 16, 1998, the claimant agreed he was involved in another automobile accident, in which he hurt his upper back, while sitting in the back seat. He denied his lower back was reinjured at that time.

Mr. B testified that he was the bulk district sales manager for the employer on the day of the claimed accident. When he became the claimant's supervisor, he changed the claimant's delivery route, which he said the claimant contended was too much for him to handle. Mr. B said he continued to have problems with the claimant calling in sick, and that on (day after date of injury), the claimant called to say he could not come in because he had a headache and vomiting. No work-related accident was reported.

Mr. B did not hear from the claimant again until June 4, although he tried at least six times to contact the claimant at home, leaving voice mail messages. There was no mention of a work-related accident during this phone conversation. The claimant was asked to bring in his work-issued equipment. When the two met face to face on June 10, Mr. B said that the claimant contended for the first time that he had been off due to a work-related accident. Mr. B said that the claimant did not appear to be in any pain or distress. Mr. B said he was contacted by the claimant that afternoon and threatened physically, which Mr. B said seemed inconsistent with a claim of work-related injury. The claimant denied this. Between January 1 and May 12, 1998, Mr. B said that the claimant had 22 instances of being late, and 11 absences for calling in sick.

A transcribed statement given to the adjuster by Mr. A indicated that Mr. A could not recall being told by the claimant that he hurt his back. Mr. A said he was the claimant's coworker.

In evidence is a statement dated April 5, 1998, from an emergency room saying that the claimant was not able to report to work due to medical evaluation of the "family" after an automobile accident. Dr. W's April 6th three-day off work certificate states that the nature of the claimant's illness or injury is lumbar syndrome and lower extremity pain, and that the claimant should avoid prolonged use of medication due to drowsiness. Records from Dr. W for the treatment of the claimed injury state that the claimant sustained a lumbar syndrome for which he was first seen on (day after date of injury).

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The hearing officer, who had a chance to observe the demeanor of the claimant during testimony, evidently found the evidence against him more credible, as is indicated in her decision.

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Without a finding of compensable injury, there can be no disability. In any case, the hearing officer also factually found that, if there was an inability to work, it was due to reasons other than a compensable injury as asserted. All of her findings find sufficient support in this record.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge