

APPEAL NO. 991053

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 21, 1999. The issues concerned whether the appellant, who is the claimant, sustained an injury in the course and scope of employment and whether he had the inability to obtain and retain employment equivalent to his preinjury average weekly wage as the result of a compensable injury (*i.e.*, disability).

The hearing officer determined that the claimant did not injure his low back in the course and scope of employment and did not sustain a compensable injury. She found as fact that he had the inability to obtain and retain employment for a period beginning February 2, 1999, and continuing through the date of the CCH, but that, as there was no compensable injury, this did not constitute "disability" (as defined by the 1989 Act).

The claimant has appealed, arguing that the decision of the hearing officer is against the great weight and preponderance of the evidence. Facts in support of injury and disability are recited in the appeal. The respondent (carrier) responds that the decision is sufficiently supported by the evidence and the Appeals Panel should not second guess resolutions of conflicting evidence.

DECISION

Affirmed.

The claimant said he had been employed by (employer) since March 1998. The employer was engaged in the business of sandblasting and painting, and he was employed as a foreman. On _____, a Monday, he was working at the site of a customer for the employer, where he was lifting and carrying 100-pound bags of sand for use in the employee's operations at that site. The claimant said that as he lifted the third bag, he felt a muscle pull in his lower back. He kept on working, expecting that it would go away. He told a coworker, Mr. A, about what happened. The claimant continued his work the rest of that week.

The claimant said that he did not report his injury to a supervisor because of a meeting that the company held in December, in which it was expressed that they could not afford another lost-time accident. He was under the impression that the employer, as a new company, did not want to lose business because of accidents.

The claimant said that on Friday evening, _____, at around 6:15 p.m., he took paint out to the work site. This was after his usual working hours, which were 7:00 a.m. to 4:00 p.m. He said that he was usually at the site until 6:30 p.m. but that he was "off the clock" after 4:00 p.m. He maintained that even if he wrote down the extra work hours that he put in, the company would not pay for it. The claimant said the paint buckets he was

loading weighed around 75 pounds and felt a sharp pain in his back going down to his right leg.

The claimant denied that he had back problems immediately prior to _____. However, he also testified that he had a prior back injury seven years before. When he got up on Saturday the 30th, the claimant said, he went in to work to see if he could do it and he could not, so he told a coworker he was unable to work and returned home. The claimant said he called his supervisor, Mr. G, on the 31st, and was told by Mr. G that he already knew about his back. He said he called the safety manager, Mr. H, to report what happened. Mr. H told him to stay home and they would discuss it the next day. The claimant said he did, but was not referred for medical attention so went to his regular family doctor, Dr. C, on February 1st. When Dr. C's office called the employer to get information to file the injury under workers' compensation insurance, it was denied by the employer. The next day, the claimant was referred to the company doctor, but then testified that coverage for this was denied as well. The claimant said he called Mr. H about this, and was told to go to the drugstore and buy some Ibuprofen.

The claimant said he went to see a chiropractor, Dr. V, on February 2nd and was taken off work. On cross-examination, he was questioned about the need to go through a guard gate in order to get from the office where he clocked out at 4:00 p.m. to where the paint was stored that he contended he loaded on January 29th. He noted that at the time of his prior back injury, he had his income benefits stopped because he had been caught fishing while out on injury leave.

The claimant denied he had received a telephone call from the company on January 24th, a Sunday, asking if he could come in to work. He said that one would not necessarily have to sign in and out of different areas of the plant when you had gotten to know the guards. He offered this by way of explanation as to why he was not shown as signing in and out of the area where he contended he had to pick up paint on the evening of January 29th.

Dr. V testified that when he first saw the claimant, he had a visible limp and described the two incidents in which he said he hurt his back. Dr. V said that an MRI done on March 2nd showed a herniation at L4-5. The MRI also indicated a Schmorl's node, which Dr. V described as an interruption in the "end plate" of the vertebrae that allowed disc material to penetrate into and erode away the bone. He said that a Schmorl's node resulted from repetitious activities or compressive forces on the spine. Dr. V opined that surgery was probable.

Mr. H testified that on Monday morning at around 10:00 a.m., a regular foreman's meeting was held, with the claimant in attendance. The Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) filed by the claimant stated that the time of injury was 10:00 a.m., but the claimant testified in rebuttal that the accident actually occurred after the safety meeting. Mr. H said that on January 27th, he and the claimant were lifting five-gallon buckets of wasted paint and pouring them into a larger

drum. He said the claimant neither complained of nor manifested back pain. Mr. H described a safety bonus program of the employer that would result in additional compensation for foremen such as the claimant. Mr. H agreed that the company did not want to have injuries.

Mr. GN, another foreman, testified that the claimant called him after January 29th and asked him to tell the customer's operators that he was hurt, because no one was helping him out. Mr. GN took this as kind of a threat. Mr. GN had no personal knowledge, one way or the other, concerning the injuries or the claimant's activities on those days.

Mr. L, another foreman, testified that he called the claimant on Sunday, January 24th, to work because the company was shorthanded. He said the claimant declined because his back was hurting. The claimant denied that this conversation even occurred. Mr. G testified that he was present when Mr. L called the claimant.

Mr. G, the superintendent, testified that the claimant's crew was painting on _____ and that sandblasting had been done the day before or was done later in the week, according to an activity log that the claimant was required to fill out. Mr. G said he had occasion to see the claimant every morning during employee calisthenics, performed to minimize job-related muscle strains. Mr. G said he would not have seen the claimant during much of the rest of the day, and that although workers might stay after 4:00 p.m. clocking out, it was not mandatory that they do so. Mr. G said that if some such as the claimant needed to stay late to complete paperwork, overtime would likely not be paid because the paperwork should be completed during the workday. Mr. G said that signing in at the client company's plant was mandatory, and that the claimant had not signed in at the paint area on January 29th, but had signed off the premises at 5:50 p.m. He said it would have been a two- to five-minute drive to the paint storage area.

Mr. G said that he first became aware that the claimant's back was hurting on January 30th, when the claimant did not show up for work. He said he was contacted the next day by the claimant and then told he was supposed to know there had been an injury. During cross-examination, Mr. G said that signing in and out of the paint storage area would have been more on the honor system, since there was not a guard on duty. He agreed that the claimant had been reprimanded previously for not signing in. A signed (unsworn) statement from an operator states that he saw the claimant sometime between 6:00 and 6:30 p.m. on January 29th and was told that the claimant was delivering some paint. Various other documents, medical records, and statements were presented that corroborated or supplemented the accounts given by the live witnesses.

Notwithstanding the testimony about two incidents, the claimant was asserting injury attributable to the _____ lifting incident. The dispute involved resolution of conflicting evidence and assessment of the credibility of the various witnesses, rather than legal issues. 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). Although the record here would lend itself to different inferences, the decision should not be set aside

because different inferences and conclusions may be drawn upon review. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, 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). We cannot agree that the resolution of the evidence by the hearing officer in this case, who was asked to consider the occurrence of an injury on _____, is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

When there is no finding of a compensable injury, an essential part of the finding of disability is not present. The hearing officer's finding that the alleged injury did not cause a loss of ability to obtain and retain employment is supported by the evidence. We cannot agree that the decision is against the great weight and preponderance of the evidence, and affirm the decision and order.

For these reasons, we affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge