

APPEAL NO. 991074

Following a contested case hearing held on February 23, 1999, with the record closing on April 16, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by concluding that the appellant (claimant) did not sustain a compensable occupational disease in the form of a repetitive low back injury; that the date of injury is (alleged date of injury), the day claimant knew he had an injury; and that the respondent (carrier) is not relieved from liability because claimant timely notified his employer of a work-related injury. Claimant has appealed for evidentiary insufficiency the adverse conclusion on the compensable injury issue as well as a finding that there is no probative evidence of a causal connection between his work and a repetitive low back injury and a finding that he did not establish with a degree of reasonable medical probability that his work caused a repetitive low back injury. The file does not contain a response from the carrier. The hearing officer's determinations of the date of injury and timely notice of injury issues have not been appealed and have become final. Section 410.169.

DECISION

Affirmed.

We note at the outset that in the case style of the Decision and Order, the hearing officer identified ESIS/OR as "self insured" and the other party to the case, and in the findings of fact stated that the parties stipulated that "[o]n _____, the Claimant worked for [employer]" and that on that date "the Employer was a self insured entity." However, the record reflects that the parties' third stipulated fact was that "[o]n _____, employer carried workers' compensation insurance with ESIS." Since no error has been assigned concerning these matters, we will take no reformatory or other action but will merely note these matters for the clarity of the record.

Claimant testified that he has worked for the employer for over 16 years as a print shop operator printing labels and that his duties included lifting boxes of labels weighing between 30 and 40 pounds off a dolly at the print shop three or four times a week and stacking them up to a height of four or five feet. He stated that on _____, he felt back pain while lifting boxes but thought it was his kidneys and that it would pass as he had been having some pain for approximately two weeks; that on _____ he went to the employer's nurse's office and stated that his back was hurting and was told to see his primary care doctor; that he saw Dr. J on _____; and that Dr. J obtained x-rays and later told him he had something congenital in his spine. Dr. J's note of claimant's _____ visit states that claimant has had pain in the right hip area and left gluteal area off and on which has become more severe in the past week. Dr. J's September 3, 1998, note states that lumbosacral spine x-rays showed congenital abnormality of the lumbosacral joint. The report of an October 16, 1998, MRI states the impression as a small central protrusion of a degenerative disc at the L4-5 level.

Claimant indicated that he continued to work and did nothing until seeing Dr. V, a neurosurgeon, on (alleged date of injury), having been referred by Dr. J. Claimant said that Dr. V asked him what he did at work and that when he mentioned lifting boxes, Dr. V said, "it could be your job," and that claimant feels his date of injury is (alleged date of injury), because of that conversation with Dr. V. In his recorded statement of November 10, 1998, claimant stated that it was he who broached with Dr. V the subject of his back pain being job related. According to the nurse's record of claimant's visit on November 4, 1998, claimant stated that Dr. V told him on (alleged date of injury), that he had a herniated disc which was possibly work related because he told Dr. V he lifts boxes; that claimant said he did not lift boxes every day because the employees take turns; and that when he does lift boxes, it is three boxes per day. Dr. V's (alleged date of injury), record states that claimant recalled having the gradual onset of back pain with radicular pain down the left lower extremity about three or four months earlier and that he denied any history of falls, accidents, or injuries. Dr. V's diagnosis is stated in a November 4, 1998, note as herniated nucleus pulposus at L4-5 and a Schnorl's node. Dr. V wrote on November 25, 1998, that "[i]t is felt that this condition could be related to the type of work and heavy lifting that [claimant] has to do on the job."

Not appealed are findings that on _____, claimant was lifting boxes at work and when he lifted the second box he felt pain to his lower back; that claimant believed it was his kidneys but reported lower back pain to the nurse; and that claimant's position is that he sustained a compensable occupational disease as a result of the repetitive-type work he performed. Claimant does appeal findings that there is no probative evidence of a causal connection between his work and a repetitive low back injury; and that claimant did not establish with a degree of reasonable medical probability that his work caused a repetitive low back injury.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Claimant had the burden to prove by a preponderance of the evidence that he sustained a repetitive trauma injury to his low back, as he contended. However, the hearing officer could consider the evidence as indicating that claimant only lifted a few boxes of label rolls a couple of times a week, that claimant initially thought his pain was attributable to his kidneys and had been having low back pain before _____, that Dr. J thought the pain was attributable to the congenital spinal deformity, and that even Dr. V's statement indicates only the possibility that claimant's low back condition was caused by his repetitive lifting at work.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge