

## APPEAL NO. 991202

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 May 6, 1999. The issues at the CCH were whether the appellant (claimant) suffered a compensable injury in the course and scope of employment on \_\_\_\_\_; whether the claimed injury occurred while the claimant was in a state of intoxication, thereby relieving the respondent/cross-appellant (carrier) of liability for the claim; and whether the claimant had disability. The hearing officer determined that the claimant suffered a compensable injury in the course and scope of employment on \_\_\_\_\_; that the claimed injury did not occur while the claimant was in a state of intoxication; and that the claimant did not have disability as a result of the \_\_\_\_\_, work-related low back injury from January 13, 1999, through to the date of the CCH. The claimant appeals only the finding of fact and conclusion of law that found that the claimant did not have disability, urging that it is against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The carrier responds that sufficient evidence supports the determination that the claimant did not have disability and the hearing officer's decision should be affirmed. In its cross-appeal, the carrier appeals only the finding of fact and conclusions of law that found that the claimant sustained a compensable injury to her low back, urging that the evidence is insufficient to support the hearing officer's determinations. There is no response to the carrier's cross-appeal.

### DECISION

Affirmed.

The claimant testified that she sustained an injury to her low back on \_\_\_\_\_, when she lifted a full tank of propane weighing approximately 70 to 75 pounds, while performing her job duties as an issue clerk in a parts warehouse. According to the claimant, as she was lifting a propane tank with a coworker, Ms. C, to place it on a rack, Ms. C lost her grip, and the entire weight of the tank shifted to her. The claimant testified that she placed the tank on the rack by herself and felt a pull in her lower back. According to the claimant, she told Ms. C that her back hurt before leaving work that day. The claimant testified that her back pain increased that night and she did not report to work the next day, but called in and reported the injury to the security guard, who told her to wait until Monday, (4 days after date of injury). The claimant testified that on (4 days after date of injury), she told her boss, Mr. G, that she was injured, an accident report was completed, and she was instructed to see the company doctor, Dr. S. The claimant testified that Dr. S took her off work, prescribed medication, and diagnosed a lumbar strain. The claimant testified that she sought medical treatment with Dr. B on January 13, 1999; he took her off work and has not released her to return to work.

The carrier presented the testimony of Mr. G to support its position that the claimant did not sustain an injury on \_\_\_\_\_. Mr. G testified that on the afternoon of \_\_\_\_\_, the claimant complained to him about having to fill the propane tanks. Mr. G testified that on

(day after date of injury), he was informed by Mr. T, a foreman, that the claimant had called that morning stating that she would not be at work. After Mr. T called the claimant to find out why she was not at work, Mr. T told Mr. G that the claimant said it was because she hurt her back filling propane tanks. Mr. G testified that he saw the claimant on January 11, 1999, filling propane bottles and he asked her how she was hurt. According to Mr. G, the claimant stated that she did not know, and then later indicated that she was hurt lifting paper. The claimant admitted on cross-examination that she did not like her job of filling propane tanks. The carrier asserted that the claimant's testimony was inconsistent and that her version of the events has continually changed: she initially claimed in her recorded statement and her report of injury to Mr. G that she injured her back lifting paper boxes, she told Ms. C that her back was hurting on the day before the alleged injury, and it was not until the claimant was asked by Mr. T that she stated that she was injured lifting propane tanks.

The hearing officer made the following Findings of Fact and Conclusions of Law which are appealed:

### **FINDINGS OF FACT**

2. Claimant established through a MRI report dated January 27, 1999 that showed a prominent posterior L5-A1 [sic] bulge on the right, encroaching on the neural foramina and a L4-5 mild posterior bulge and through [Dr. B's] medical records that she sustained damage or harm to her low back on \_\_\_\_\_ while working as an Issue Clerk for Employer.

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7. Claimant failed to establish through credible medical evidence or testimony that she was unable to obtain and retain employment equivalent to pre-injury wage from January 11, 1999 through to the date of this hearing.

### **CONCLUSIONS OF LAW**

3. Claimant did sustain a compensable injury on \_\_\_\_\_.
4. Claimant did suffer a compensable injury in the course and scope of employment on \_\_\_\_\_.

\* \* \* \*

6. Claimant did not have disability as a result of the \_\_\_\_\_ work-related low back injury, from January 13, 1999 through to the date of this hearing.

The claimant had the burden to prove by a preponderance of the evidence that she sustained an injury in the course and scope of employment and that she had disability as defined in Section 401.011(16). Injury is defined in Section 401.011(26) as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." While a claimant's testimony alone may generally be sufficient to prove both an injury in the course and scope of employment and disability, a hearing officer is not bound by such testimony in that a claimant is an interested party whose testimony only raises questions of fact to be resolved by the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The hearing officer considered the conflicting evidence and determined that the claimant sustained a low back injury on \_\_\_\_\_. While a positive finding on a diagnostic test does by itself establish that an injury occurred in the course and scope of employment, the MRI was a factor for the hearing officer to consider in determining whether the claimant sustained a compensable injury. We cannot say that the hearing officer was incorrect as a matter of law in finding that the claimant met her burden to prove a compensable injury. This is so even though another fact finder might have drawn other inferences and reached other conclusions. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

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). The existence of disability is a question of fact for the hearing officer. While Dr. B's medical records indicate that the claimant has been unable to work since January 11, 1999, and the claimant testified that Dr. S took her off work on (4 days after date of injury), the hearing officer was not bound by their opinions, or the claimant's testimony. The claimant, upon being asked by the hearing officer to describe a normal day since last working on January 11, 1999, testified that she sleeps until 1:00 or 2:00 p.m.; takes pain reliever approximately once a week; sits on the couch and watches television; is able to dress, bathe and drive; and drives with her mother to get groceries. After considering all of the evidence, the hearing officer resolved that the claimant failed to establish that she had disability. That determination is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, we will not disturb it. Cain, supra.

The decision and order of the hearing officer are affirmed.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Elaine M. Chaney  
Appeals Judge