

APPEAL NO. 991229

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 7, 1999. She (hearing officer) determined that appellant (claimant) did not sustain a compensable injury and that he did not have disability. Claimant appeals, contending that he did sustain either an occupational disease or specific back injury on _____. Respondent self insured (referred to as "carrier" or "employer" herein) responds that claimant's herniated disc was preexisting and that the hearing officer correctly determined that he did not sustain a work related injury.

DECISION

We affirm.

Claimant contends the hearing officer erred in determining that he did not sustain a compensable back injury. He contends that he worked on _____, doing many lifting activities that could have caused his herniated disc. He asserts that he has not done anything else that could have caused the herniated disc.

Claimant testified that he began working for employer as a substitute custodian on Thursday, _____. He described his job duties on that first day and said he did not remember any particular thing that caused an injury. Claimant said he felt some knee or leg pain when he took out the trash at work. He said he felt pain in his leg lifting the bags of trash but that he did not have any back pain. Claimant said he did not feel any back pain the next day, either. He said he began having very severe back pain on the following Sunday morning and he went to the emergency room that day. Claimant said he was told that he should see his personal doctor regarding what the doctor thought was knee pain. In his transcribed statement, claimant said he was later told by another doctor that his pain in his leg was actually due to a pinched nerve in his back. In a November 5, 1998, report, Dr. W stated that claimant had a herniated disc at L3-4.

Mr. G, a custodian for employer, testified that claimant told him he was also working doing landscaping work with his son. Claimant denied that he was working doing anything else at the time he was working for employer. Claimant said he worked for employer for eight days and that his last day was September 26, 1998.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as damage or harm to the physical structure of the body and a disease naturally resulting from the damage or harm. Section 401.011(26). The definition of "injury" includes occupational diseases. An occupational disease is defined as "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body," but does not include "an ordinary disease of life to which the general public is exposed outside of

employment, unless that disease is an incident to a compensable injury or occupational disease." Section 401.011(34).

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence, Section 410.165(a), including the medical evidence. Where there is conflict in the evidence, the hearing officer resolves the conflicts and determines what facts have been established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, 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 great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, the hearing officer determined that claimant did not sustain a specific injury or a repetitive trauma lumbar injury. The hearing officer also determined that it is most likely that claimant already had the herniated disc when he started working for employer on _____, the date he claims he sustained his injury. The hearing officer was the judge of the credibility of the witnesses and medical evidence. As the fact finder, she considered the issue of whether claimant sustained an injury on _____, and resolved this issue against claimant. We will not substitute our judgment for hers in that regard because the hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra. Given our standard of review we will not overturn the hearing officer's decision. *Id.*

Claimant contends the hearing officer erred in determining that he did not have disability. 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). Because there was no compensable injury, there can be no disability.

Judy Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge