APPEAL NO. 991230

On May 5, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained a compensable injury on Injury 4; and (2) whether claimant has had disability. Claimant requests that the hearing officer's decision that he did not sustain a compensable injury on Injury 4, and that he has not had disability be reversed and that a decision be rendered in his favor on both issues. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant testified that he injured his back in injury 1, injury 2, and injury 3; that although his doctor in injury 1 recommended that he have back surgery, he decided not to have surgery; that since his injury 1 injury his back hurts whenever he does constant lifting; that his back was not hurting in July 1998 when he started working for employer as a packer of blinds and shades; that his job with employer required him to pack blinds and shades in boxes and lift the boxes on to a cart; that that job required constant bending and lifting; that about August 28, 1998, his back was hurting at work, he reported that to his supervisor, and he went home that day; that on Injury 4, he was lifting boxes at work and bent one time and felt sharp pain in his back; that that pain was the same as the sharp pain he had felt when he was injured in injury 1 and injury 2; and that he reported to his supervisor that he had reinjured his back. Claimant's supervisor testified that one day in August 1998 claimant told her that his back was bothering him and he went home that day and that after Injury 4, claimant left her a message that he had reinjured his back and that he would not be coming to work because he did not think he could do that job.

Claimant was sent by employer to Dr. B, who wrote on October 7, 1998, that claimant could return to work with restrictions and that claimant needs to be able to change positions. Claimant went to Dr. C on October 5, 1998, and Dr. C wrote that claimant told him that he experienced lower back pain at work when lifting boxes and that he had a prior back injury in injury 3. Dr. C diagnosed claimant as having a lumbosacral strain and wrote that claimant was to remain off work. Dr. F reported that lumbar x-rays done on October 14, 1998, showed early degenerative changes in the lower thoracic and upper lumbar spine. Dr. C noted in December 1998 and February 1999 that claimant continued to have lower back pain and that he was to remain off work. Dr. C wrote in March 1999 that based on the history provided by claimant, claimant has a new injury unrelated to his previous injuries. Dr. O examined claimant at carrier's request in November 1998 and he wrote that claimant had marked evidence of symptom magnification, that claimant had had a reoccurrence of a problem that he had had on and off for a number of years, and that he did not think claimant had a new injury, although he tended to believe claimant had re-strained his back. In a recorded statement, claimant indicated that he had been having problems with the right side of his back for a long time.

Claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). An "injury" means "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(26). In Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist.] 1988, no writ), the court stated that an injury that aggravates a preexisting condition is compensable, provided that an accident arising out of employment contributed to the incapacity. In Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, the Appeals Panel stated that an aggravation of a preexisting condition is an injury in its own right, citing INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). Whether there has been an aggravation is generally a question of fact for the fact finder to determine. Appeal No. 94428. And whether a claimant sustained a new injury or merely suffered a continuation of an original injury is a question of fact to be determined by the fact finder. Texas Workers' Compensation Commission Appeal No. 950600, decided May 31, 1995. Strains and sprains sustained in the course and scope of employment are compensable. Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.).

The hearing officer found that on Injury 4, claimant's work duties caused no new harm or damage to the physical structure of his body and that on Injury 4, claimant did not injure any part of his body as a result of any work-related activity. The hearing officer concluded that claimant did not sustain a compensable injury on Injury 4. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the hearing officer's decision that claimant did not sustain a compensable injury on Injury 4, is supported by sufficient evidence and that it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer did not err in determining that claimant has not had disability because, without a compensable injury, claimant would not have disability as defined by Section 401.011(16).

The hearing officer's decision and order are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Gary L. Kilgore
Appeals Judge