

APPEAL NO. 991275

On May 26, 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 \_\_\_\_\_; and (2) whether claimant has had disability. Claimant appeals the hearing officer's decision that he did not sustain a compensable injury on \_\_\_\_\_, and that he has not had disability. Respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant testified that in 1977 he sustained a work-related lower back injury for which he underwent lumbar spine surgery in the form of a laminectomy for a ruptured disc, that in 1980 he sustained a work-related lower back injury for which he underwent lumbar spine surgery in the form of a fusion, that in 1983 he pulled a muscle in his side while working, and that in 1997 he pulled a muscle on the side of his back while working. Claimant said that he has worked as a bricklayer, construction worker, painter, and deckhand.

Claimant began working for (employer), a custom molding company, on (2 days before date of injury), on the 9:30 p.m. to 8:00 a.m. shift. Claimant said that before beginning work for employer, he had no severe pain in his lower back and no neck pain and was able to work. On his first shift he cut plugs using a bandsaw. On his second shift, which began at 9:30 p.m. on (day before date of injury), he was trained to use an injection gun to inject chemicals into a press, which required him to push against the gun with his hip or thigh while pulling on the press or gun with one hand and using his other hand to push a button to release the chemicals into the gun, and he performed that job on that shift. The weight of the gun, which another witness said is 15 pounds, is supported by two steel cables. Claimant said each injection procedure lasted 10 to 30 seconds. Claimant said that he was able to perform that job for several hours but then about 4:00 a.m. on \_\_\_\_\_ he had pain in his neck and right arm and after that felt weak and was unable to do the pushing and pulling required to keep the gun in the press which resulted in the chemicals being sprayed everywhere. Claimant said that later on during his shift he was told by a supervisor that he was not properly performing his job because there were complaints about his "bad shots" with the injection gun and was terminated from employment before his shift ended.

Claimant said that at the time he was terminated he was hurting but thought that he just had sore muscles that he would get over and that he did not report any physical problems or injury when he was terminated. Claimant said that on his walk home after being terminated, he began to feel worse and had to stop and rest on several occasions. Claimant said that on December 11th he was in severe pain and that he telephoned the employer on that day and reported that he had been injured at work. Claimant said that since his work with the injection gun on \_\_\_\_\_ he has had back, neck, arm, and leg pain. Claimant said he again called employer on December 14th and reported that he injured his back at work and needed his paycheck to see a doctor or that the employer could send him to a doctor. He said he was told that he would have to wait until Thursday for his paycheck.

Claimant's father stated in a written statement that claimant stayed with him from (2 days before date of injury) to December 15th and that during that time claimant worked for employer for a few days and hurt his back and was not able to do anything. Claimant's friend or cousin gave a written statement that claimant had no problems with his back or neck until he went to work for employer the night of (day before date of injury), and that after that claimant was complaining about his back and neck.

Claimant's supervisor stated in a written statement that claimant was dismissed before his shift was over because he had more chemicals on himself, the floor, and the press than he did in the press, and that claimant did not mention to him or to the back-up supervisor that he had injured himself. LN, employer's personnel manager, testified that he was at the meeting with claimant and claimant's supervisor on \_\_\_\_\_ when claimant was terminated, that claimant was terminated because he failed to properly operate the injection gun, that claimant did not complain about having any physical problems and did not appear to be having any physical problems when he was terminated, that neither claimant nor claimant's supervisor reported that claimant had any work-related injury during the two shifts claimant worked for employer, that he saw claimant walk outside without any physical problems after he was terminated, and that he first learned that claimant was claiming a work-related injury on December 14th, when he was told by MW, employer's bookkeeper, that claimant told her on December 14th that he injured his back at work after she had told claimant he could not get his paycheck until Thursday. MW stated in a written statement that after claimant asked for his paycheck on Monday, December 14th, and she told him that payday was not until Thursday, claimant told her that he had hurt his back at work.

According to medical records in evidence, claimant went to a hospital emergency room on December 29, 1998, complaining of back, neck, arm, and leg pain, and reported that he was hurt about two weeks before when pulling on a machine at work. Claimant was diagnosed as having an apparent muscle strain of the neck and back. Claimant said he went to Dr. D, in January 1999. Dr. D referred claimant to Dr. G, an orthopedic surgeon, who wrote on February 4, 1999, that claimant reported that he was injured at work on \_\_\_\_\_, and that he had prior back surgeries in 1977 and 1980. Dr. G diagnosed claimant as having a recurrent herniated nucleus pulposus (HNP), mechanical instability of the lumbar spine, a cervical HNP, and cervical radiculopathy. Dr. G recommended diagnostic testing and physical therapy and saw claimant at least on two more occasions. Dr. D wrote on March 22, 1999, that claimant told him that his job with the injection gun required repetitive pushing, pulling, and twisting, and that while performing that job he injured his neck and back. Dr. D had x-rays of claimant's lumbar, thoracic, and cervical spine taken and diagnosed claimant as having a lumbar HNP, a lumbar sprain/strain, a cervical sprain/strain, and cervical radiculitis. Dr. D wrote that claimant is unable to perform any work. According to chart notes, Dr. D continued to treat claimant in March and April 1999. Dr. D wrote in March 1999 that claimant would be off work for three to six months.

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). The trier of fact may believe that a claimant has an injury, but disbelieve that the injury occurred at work. Johnson. The hearing officer found that claimant did not sustain an injury while he was engaged in the exercise of his job duties with employer on \_\_\_\_\_, and concluded that claimant did not sustain a compensable injury on \_\_\_\_\_. The 1989 Act makes the hearing officer the sole

judge of the weight and credibility of 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. 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 \_\_\_\_\_, 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).

Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Thus, the hearing officer did not err in deciding that claimant has not sustained disability because, without a compensable injury, claimant would not have disability as defined by the 1989 Act.

The hearing officer's decision and order are affirmed.

Robert W. Potts  
Appeals Judge

CONCUR:

Tommy W. Lueders  
Appeals Judge

Elaine M. Chaney  
Appeals Judge