APPEAL NO. 991403

Following a contested case hearing held on May 3, 1999, with the record closing on June 1, 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 back injury on _____, while in the course and scope of his employment with (employer); that since claimant did not sustain a compensable injury, no period of disability, as defined in Section 401.011(16), could be established; and that claimant is barred from recovery under the 1989 Act since he exercised an election of remedies. Claimant has appealed and asserts, generally, that these conclusions and two findings of fact are against the great weight of the evidence. The respondent (carrier) filed a response asserting that the evidence is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

Claimant testified that during the morning on _____, while employed as a design engineer by the employer and working at a customer's plant in (City 1), he was lifted by a "cherry picker" to identify and tie tags on some pipes and that when the "cherry picker" brought him down, it descended rapidly for the final 10 to 15 feet and stopped suddenly and he grabbed the basket rail to maintain his balance and felt immediate burning pain in his low back. Claimant said he returned to an office and sat for a while but did not think he was seriously hurt. He further stated that on that same day, he called his brother, Dr. P, a medical doctor in (City 2), about his pain and called the employer's City 2 office, where he was assigned, and told both Ms. DM, the office manager, and Ms. E, who also worked in the office, about the incident. A typewritten but undated "Injury Report" claimant introduced describes in precise detail his tagging pipes in a "cherry picker" and the manner in which it rapidly descended and his back was injured. Claimant said he prepared this report on _____, and gave it to Ms. DM and to his surgeon, Dr. M. A December 10, 1998, statement from Mr. P, whom claimant said was not a relative, states that he was on the chemical plant job site with claimant in _____ and that after returning from the plant on or about _____, claimant complained of pain in the low back and legs.

Ms. E testified that neither she nor Ms. DM still work for the employer and that she learned of the injury claim from Ms. DM whom claimant called to report the injury. She also said that Ms. DM had her look over the Employer's First Report of Injury or Illness (TWCC-1) after she prepared it, indicating that neither she nor Ms. DM had much experience with workers' compensation claims. The TWCC-1, dated December 29, 1997, and bearing Ms. DM's name, states the date of injury as "(alleged date of injury)" and that claimant hurt his lower back while working at a job site doing regular work duties. In a telephone conversation with claimant's attorney on February 23, 1999, Ms. NM stated that she, too, no longer works for the employer and that she thought she had taken claimant's call when he called about his injury on the afternoon of the incident, asking for Ms. E or Ms. DM in _____. Ms. NM said that "they said that he fell well he didn't actually fall, he was in a

cherry picker thangy" and that "it was brought down quickly" and "jarred" and his back was hurt.

Claimant further testified that he "did not know" that the employer had workers' compensation insurance and that he "thought health insurance would cover me . . . that the insurance I had would cover me for whatever happened to me."

In a recorded telephone interview on January 8, 1998, claimant told Ms. S, an adjuster, that he first felt severe back pain on _____, and when asked what caused the back pain responded that he really did not know; that he could not say that "this is what [he] did and that happened"; that he had been doing various things in the field and it could have been anything; that he believes he sustained some type of injury on the job but cannot relate it to any specific incident; and that he had been in the field and when he came into the office, he really felt some pain. Claimant also stated that he did not remember doing anything else that day besides climbing ladders and tagging pipes. Claimant further stated that Dr. A, Dr. C, and Dr. M were "HMO" doctors; that he did not tell them he had a work-related injury but nobody asked him if it was; that he did not think they were treating him for a work-related injury; and that he told them he worked in City 1 and that is when he felt pain.

In her affidavit, Ms. S stated that claimant informed her that his group insurance carrier was (group carrier); that she informed him that his physicians apparently did not consider him as having a work-related injury because no preauthorization was sought from the carrier for his treatments and testing; and that she explained to him that under the workers' compensation system, he cannot have back surgery until the proper form is filed with the Texas Workers' Compensation Commission and the carrier is given the opportunity to obtain a second opinion. Ms. S further stated that claimant told her he did not want the surgery, which was scheduled for Monday, delayed and that it was clear that claimant understood that he had both group health insurance with the group carrier and workers' compensation insurance with the carrier.

Dr. P's report of December 28, 1997, states that claimant reported low back pain for three weeks, starting while working at a plant site in City 1 on _____, and reflects that various medications were prescribed. Claimant, who said he had no previous workers' compensation claims, indicated that after returning to City 2, he sought medical treatment at a McGregor Medical Association facility (clinic) through his HMO where he was first seen by Dr. A, then by Dr. C, and finally by Dr. M who performed surgery on his lumbar spine on January 10, 1998, and again in January 1999. The carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), dated "01/12/98," reflects that the carrier denied that an injury occurred in the course and scope of employment. The form stated that there was no specific incident, that no medical evidence substantiated an on-the-job injury; and that claimant's filing with his group carrier and having surgery approved by that carrier indicated that he did not relate his medical condition to an on-the-job injury.

Dr. A's December 16, 1997, note states that claimant's back pain started on (alleged date of injury) as he tried to get out of his car after driving for three hours, and that as soon as he got out, he felt a popping sensation in his back with severe, intense pain radiating

down his left leg. Dr. A's assessment was lumbar strain and she doubted disc herniation. Dr. C's December 22, 1997, record states that claimant returned to the clinic on follow-up; that he states "he had no injury and didn't do any heavy lifting when his back started bothering him." Dr. C's assessment was back pain with radiculopathy and an MRI was scheduled. Claimant stated that he really could not explain these histories but declined to say the doctors were mistaken. The December 31, 1997, MRI report found mild disc bulges at L3-4 and L4-5 and, at L5-S1, found spondylosis, degenerative disc desiccation, and a protrusion effacing the thecal sac and displacing the right S1 nerve root. The January 5, 1998, record of Mr. B of the clinic states that claimant "has had no trauma and no specific injury to his back" but on _____, began experiencing low back pain radiating down his right leg. Clinic records reflect that on January 10, 1998, claimant underwent a right L5-S1 laminectomy for decompression by Dr. M.

Dr. M reported on February 9, 1998, that claimant was recovering rapidly and is discharged from the clinic, that he was given clearance to return to work as a mechanical engineer, and that claimant is in the process of looking for work. Dr. M wrote on March 12, 1999, that it was his usual practice to recommend against heavy lifting, excessive physical activity, and prolonged driving. Claimant testified that after being released by Dr. M he obtained employment with three different employers between his release date and sometime in October 1998 but that he could not work in the field and had to work fewer hours than requested because of increasing back pain. He also indicated that he changed employment in one instance to keep his group health coverage with the group carrier. Dr. M reported on October 16, 1998, that claimant was having residual symptoms in his right leg which is "probably residual from his old injury which occurred at work in (alleged date of injury)." Dr. M's note of December 2, 1998, takes claimant off work from October 10, 1998, until further notice. Dr. A wrote on December 16, 1998, that claimant relates that his pain started while at work on _____. Dr. M's record of January 15, 1999, states that claimant was "one week status post redo for possible recurrent disc." Dr. M wrote on February 19, 1999, that claimant's large ruptured disc compressing his thecal sac was "consistent with an injury that he had on the job on _____, at which time a boom lift of a cherry picker descended rapidly to the ground and he suffered an injury."

Claimant also introduced a written statement from his brother, Dr. P, dated December 10, 1998, stating that claimant consulted with him by telephone on _____, regarding acute low back pain "that started suddenly after strain suffered on back while working for his employers" at a plant in City 1. Dr. P's February 1, 1999, statement stated that the _____, consultation was regarding acute low back strain "that had suddenly started after strain sustained on lower back when apparently he was in the boom lift of a cherry picker which descended rapidly to the ground."

As the hearing officer noted at the outset of the hearing, claimant had the burden to prove by a preponderance of the evidence that he sustained the claimed injury and had disability while the carrier had the burden to prove that claimant elected the remedy of his group health insurance. These issues presented the hearing officer with questions of fact to resolve.

Not challenged are findings that on or after _____, claimant felt his back condition was due to performing his work activities for the employer and that he has been unable to obtain and retain wages equivalent to his wage before _____, from January 10, 1998, to the present due to his back condition and surgeries. In addition to the three dispositive legal conclusions, claimant has disputed the following findings:

FINDINGS OF FACT

2. The Claimant did not sustain harm to his back on _____ while engaged in an activity that originated in and had to do with [employer's] business and that was performed by the Claimant in furtherance of the business or affairs of [employer].

* * * *

5. In a conversation between the Claimant and [Ms. S] on January 8, 1998, [Ms. S] informed the Claimant that she was an adjuster for the Carrier and the Claimant gave her permission to record his statement. The Claimant informed [Ms. S] that [Dr. M] was going to schedule him for surgery on January 9, 1998 under his group health insurance. [Ms. S] informed the Claimant that if he intended to pursue workers' compensation insurance benefits for the back surgery, certain procedures had to be followed and certain approvals had to be obtained. The Claimant did not want the surgery delayed so he opted to let [group carrier], his group health insurance Carrier, pay for it. The Claimant understood, through [Ms. S's] explanation, that workers' compensation insurance is for work-related injuries and that [employer] had workers' compensation insurance, and that his group health insurance was for non-work-related conditions.

In her discussion of the evidence, the hearing officer stated that credibility "played a pivotal role in sorting the facts of this case" and she went on to detail some of the inconsistencies in the evidence which caused her to find claimant's testimony unpersuasive.

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)). The Appeals Panel, as an appellate reviewing tribunal, 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge