APPEAL NO. 991617

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 14, 1999, a hearing was held. He (hearing officer) determined that respondent (claimant) sustained a compensable back injury on Injury 4, and had disability from March 26, 1999, to April 17, 1999. Appellant (carrier) asserts that the claimant had three prior back injuries and that claimant told three other people that the injury "was a personal injury and had nothing to do with an on-the-job injury" and that there is no medical evidence of added injury. The appeals file does not indicate that claimant replied.

DECISION

We affirm.

Claimant testified that he worked for (employer) on Injury 4. At that time, he said, he lifted a hitch assembly that weighed 75 pounds and felt a sharp pain and pop in his back. He continued working and said that he reported the accident the next workday. There was no issue in regard to notice. The only issues were compensable injury and disability.

Claimant agreed that he had three previous back injuries. In injury 1, he said, he fell onto his back. In injury 2 he injured his back while working for employer but lost no time at work. On Injury 3, he had a low back spasm which was evidently not related to work. He testified that after the Injury 4, injury, his pain was different, adding that in April he began feeling numbness in his left leg.

The carrier presented statements from three other employees which indicated that claimant said something to them other than that he hurt himself at work on Injury 4. Claimant at one point said he could not remember what he told Mr. C, but later testified that he told Mr. C he had picked up the hitch assembly, not making it clear whether he said that such lifting injured him. He said that he also told Mr. W that he had picked up the hitch "and didn't know what he would do."

Mr. C provided a statement saying that he asked claimant whether he had a "personal injury" when claimant provided a light-duty note from a doctor. Mr. C's statement said that claimant replied that "it was." Mr. C added that claimant said "he hoped he would not have to make it work related." Mr. C said that a nurse called him later that day and said that claimant "made his personal injury work related."

Mr. K also gave a statement in which he said claimant told him he had a sore back on (day after injury date); he then asked claimant if he hurt his back "here," to which he said claimant replied "no."

Mr. W also provided a statement in which he said that claimant had injured his back "about a year ago." He related some information about the Injury 3, injury. Mr. W said he

then approached claimant on (day after injury date) while he was talking to Mr. K and heard him say his back was sore. He added that on March 29th when claimant presented a doctor's note, claimant said that he "did not want to make this a work-related injury." A reading of these three notes from other employees indicates that two said claimant denied a work-related injury while the third does not address the question. Two of these statements indicated that claimant said he did not want to "make" the injury "work related."

The first medical record provided after the Injury 4, injury date was provided by Dr. S; her SOAP note was dated March 26, 1999. It noted "chronic back pain" until Injury 3, when "it flared up" after dancing. Dr. S referred to prescriptions from "last week" but no medical record prior to March 26,1999, was provided. Thereafter, claimant saw Dr. P on April 2, 1999, and that doctor reported that claimant had low back pain for 10 days, stating that he had an "injury on (injury date)," which occurred when he "picked up a piece of metal." Thereafter claimant began seeing Dr. H, D.C., on May 4, 1999. An MRI of May 28, 1999, shows a disc "protrusion/herniation" at L5-S1.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Whether or not another fact finder may have made different inferences based on the same evidence is not a basis for overturning a factual determination. While the carrier stresses that this is not just a choice between the evidence provided by two people, but that three other employees contradict claimant, Charter Oak Fire Insurance Company v. Levine, 736 S.W.2d 931 (Tex. App.-Beaumont 1987, writ ref'd n.r.e.) stated that a question of incapacity was a fact question for the jury even when four doctors returned Levine to full duty while one doctor stated that he should be on light duty for a period of time. The great weight of the evidence is not necessarily counted in numbers. Of just as much concern could be the initial medical report of Dr. S which mentions nothing relative to Injury 4, while mentioning other dates. However, we cannot say that a doctor could not make a mistake in recording; Dr. S's entry was for the hearing officer to weigh, especially since Dr. P, within a week, did refer to an injury on Injury 4. As stated, that another fact finder could have inferred differently from the same evidence is not a basis for overturning the factual determination. Finally, carrier asserts that there is no medical evidence of "additional damage" to claimant, but provides no MRI or similar study prior to Injury 4, showing the disc bulge/herniation that the May 1999 MRI shows; therefore the fact finder did not have to find that no injury occurred.

While claimant stated that he could not, and has not, worked, the hearing officer found disability only through April 17, 1999, after claimant testified that he applied for unemployment insurance on April 18, 1999, representing that he was able to work. The end of disability was not appealed by claimant, and carrier only appealed disability on the basis that there was no compensable injury. The disability determination beginning March 26th and ending April 17, 1999, is sufficiently supported by the medical evidence and claimant's testimony.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Tommy W. Lueders
Appeals Judge