APPEAL NO. 991630

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). In Texas Workers' Compensation Commission Appeal No. 990836, decided June 4, 1999, the Appeals Panel reversed the decision of the hearing officer, which found disability based on an "alleged" injury, and remanded for further express findings of whether the respondent (claimant) sustained a compensable injury on _____, and if so, whether he had disability. In a decision and order on remand, the hearing officer, found that the claimant sustained a compensable injury on _____, and had resulting disability from January 19, 1999, until March 22, 1999. The appellant (carrier) appeals these determinations, contending that they are against the great weight and preponderance of the evidence and that the hearing officer's judgment "may well have been clouded" by his disagreement with the Appeals Panel's decision. The claimant replies that the decision is correct and should be affirmed.

DECISION

Affirmed.

The claimant, who was 22 years old at the time of the original contested case hearing (CCH), worked as a helper for a scrap metal processing operation. He admitted to being involved in a motor vehicle accident in 1989, but said he only injured his knee and suffered facial abrasions. Later he admitted in his testimony that he also wore a back brace for a period of time. On September 26, 1996, he passed the employer's physical with no restrictions. According to the claimant, between 8:00 and 8:30 p.m. on _____, he was picking up scrap metal to take to a dumpster. He estimated the piece he picked up weighed between 200 and 300 pounds. He said that as he walked to the dumpster, he stepped on some tracks and felt what he thought was a muscle pull. He finished his shift at 11:00 p.m. He did not work the next day because of his father's scheduled surgery or the next couple of days because, he said, the surgery had been postponed and he was helping his father bathe and perform other personal tasks. The pain increased until he "couldn't stand it any more" and went to an emergency room (ER) on May 4, 1997. Through his wife, he said, he first reported the injury to Mr. B, his supervisor, on May 5, 1997. Dr. S became his treating doctor. The claimant underwent surgery in September 1997, which he described as a laminectomy and fusion, and again on February 2, 1999, for adjustment of the hardware implanted in his spine. He insisted at the CCH that he did not feel pain picking up the scrap metal, but only upon misstepping on the tracks. The weight of the scrap metal was based on his own estimates, but he stated he was able to lift it and that he took care of his father despite his back problems. Other statements of relatives supporting his position were admitted into evidence, including a written statement of his wife that when the claimant woke up the morning after the injury "he was so stiff, he couldn't move."

Medical records of Dr. S and Dr. B, a carrier doctor, reflect a history of the injury from picking up the scrap metal, not from stepping on a track while carrying it. Mr. K, the employer's chief financial officer, testified that at a prior benefit review conference the

claimant said he was injured while lifting the scrap metal because the overhead crane was not working. Mr. K felt it was impossible to lift an item as heavy as that described by the claimant. Mr. M, a coworker, testified that he could not remember if the claimant told him he pulled a muscle and would have remembered if he was told. He also said that an item this heavy would have been picked up by a crane and that the crane and forklifts were operating that day. He also said that the claimant looked normal that day. Mr. B, the supervisor, also testified that the crane was working that day; that it would not have been possible for one person to lift this scrap metal, and that on May 1, 1997, the claimant's mother called to say the claimant would be with his father that day but no mention was made of a work-related injury.

Transcribed interviews of a relative of the claimant, Ms. W, and a "friend of the family," Ms. P, were in evidence. These individuals accompanied the claimant to the ER, the purpose of which visit was to provide care to an injured niece. Both Ms. W and Ms. P essentially stated that the claimant was lazy and once at the ER fabricated an injury in order to obtain workers' compensation benefits because he knew he would probably be terminated for unexcused absences. They also said he expressly told them he did not injure himself at work.

The claimant had the burden of proving that he sustained a compensable back injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide and could be proved by his testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. This case clearly involved the claimant's credibility. The hearing officer found him credible and determined that he sustained a compensable injury at work as claimed. In its appeal of this determination, the carrier points to numerous conflicts in the evidence and to inferences it deems most likely to be made from that evidence. For example, it questions how the claimant or anyone could lift an object of this weight and bulk; it points to the claimant's alternative descriptions of the injury as caused by lifting or by walking; it notes that at the same time the claimant said he was helping his father, his wife wrote that he was too stiff to even move; and that the claimant had many opportunities to report an injury, but only said he needed to be off work to help his father; and, perhaps most importantly, it stresses the statements of Ms. W and Ms. P that the claimant fabricated an injury. The claimant countered that he was telling the truth and that Ms. W and Ms. P were troublemakers out to harass him and make things difficult for him. The claimant's father-in-law, in a written statement, expressed the view that Ms. W has a history of making trouble for the claimant and his wife. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In finding the claimant credible on the mechanism of injury, he still could conclude that the claimant's estimate of the weight of the scrap metal was grossly inaccurate and that the version of the injury given at the CCH was correct. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case,

we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer, but find sufficient evidentiary support for the factual determination that the claimant sustained a compensable injury as alleged.

The claimant has not appealed the finding of disability. The carrier's appeal of this finding is premised on the lack of a compensable injury. Having affirmed the determination of a compensable injury, we also affirm the finding of disability.

Finally, the carrier correctly notes in its appeal that the hearing officer devoted much of his discussion in the decision on remand to a rejoinder to and critique of the reasoning of the Appeals Panel in Appeal No. 990836, *supra*, particularly regarding what he perceived to be an issue of the carrier's waiver of the right to dispute compensability in this case. As we noted in our previous decision, this was not an issue. The carrier suggests that, given these comments by the hearing officer, he was not deciding this case on the issue and evidence before him, but on the non-issue of carrier waiver. Although we do not subscribe to the hearing officer's analysis of the remand and its effects, we are unwilling to conclude that these comments by the hearing officer reflect a disregard of our prior decision or that the decision and order on remand proceeded from improper motives.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge