

## APPEAL NO. 991646

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 14, 1999. He (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury on \_\_\_\_\_, and did not have disability. The claimant appeals these determinations, asserting prejudicial error in the admission of evidence and that the decision is against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

### DECISION

Affirmed.

We address the evidentiary issue first. The medical history of the claimant played a large role in the resolution of the compensability issue. Over the objection of the claimant on the basis of relevancy and remoteness in time, the hearing officer admitted records of treatment primarily of the neck and cervical regions by four doctors going back to 1980. The claimant appeals the decision of the hearing officer to admit this evidence, arguing that "a good summary of previous treatment of the cervical spine" appears in a report that he offered into evidence. A review of the other admitted evidence also discloses frequent references to the prior condition of the claimant's cervical spine. Given this emphasis by both parties on prior treatment and the references to the earlier treatment in evidence offered by both parties, we can only conclude that the evidence complained of was to some degree relevant and we find no error in its admission.

The claimant testified that on \_\_\_\_\_, in order to retrieve papers from a file on the floor, he had to bend down and pull one file container around another. In the process, he said, he felt a burning pain on the right side of his neck that radiated into his right arm. He described the pain as "new symptoms" for him. He said he filled out an accident report that day and placed a copy in the office mailboxes of Mr. S, Mr. B, and Ms. L, his immediate supervisor. He stated that he was still hurting the day after the accident, so he called in to say he would not be at work. The next day, a Friday, February 12, 1999, he said he was called to the office for a morning meeting with Mr. K to discuss charges of insubordination against him involving Ms. L. He was ultimately called back and terminated that afternoon. He admitted that he did not mention a neck injury to Mr. K at the morning meeting or to Mr. S, Mr. B or Ms. L at the termination meeting that afternoon.

The claimant underwent cervical laminectomies in 1985 and 1991 related to pain radiating on the left. A series of epidural steroid injections was begun in November 1998 by Dr. C after a cervical MRI on November 7, 1998, which, among other things, showed bulging at C5-6 and C6-7 and spondylosis at C6-7 more pronounced on the right. A second injection was given in December 1998, but the third one was canceled according to Dr. C, because of lack of satisfactory results from the former. On June 1, 1999, Dr. C wrote

that the cervical injections "caused complete resolution of his symptoms including pain" and that the claimant did "very well" until the incident on \_\_\_\_\_. Dr. C also believed that the MRI in November 1998, showed "some changes which were not exactly in any way similar to the present changes" reflected on an MRI of February 23, 1999.

Dr. E first saw the claimant on February 18, 1999. He read the later MRI as showing a "large right posterolateral disc herniation at the C5/6 level." On April 16, 1999, Dr. C wrote that the incident on \_\_\_\_\_, caused the sudden onset of neck pain which "was as the result of a disc injury at the C5/6 and C6/7 level." He believed there was "no pre-existing injury."

Mr. S testified that he saw the claimant on the morning of \_\_\_\_\_, about an hour after the alleged injury occurred. He said that the claimant was aware of the insubordination charges against him and was told they were serious. According to Mr. S, the claimant seemed "very agitated" and was released to go home. Mr. S said the claimant never mentioned a neck injury then or on February 12, 1999, when he was terminated. He also said that he checked his office mailbox every day and did not receive a copy of an accident report on February 10 or 11, 1999, but first received a copy a week later from Mr. B. Mr. B, the safety manager, testified that he found three copies of the accident report in his office mailbox on February 17, 1999.

The claimant had the burden of proving he sustained a right side cervical spine injury on \_\_\_\_\_, as alleged. 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. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The claimant's position was that he injured himself while retrieving a file from a file box on the floor and that his resulting condition was right-sided and different from his prior cervical condition. The carrier does not dispute that an incident took place on \_\_\_\_\_, essentially as described by the claimant, but asserts that he sustained no injury, and was presenting this claim in retaliation for the firing. The hearing officer commented in his decision and order that he found the carrier's witnesses credible in the assertion that they received a copy of the claimant's accident report only after the termination, which was contrary to the claimant's testimony and which, in the hearing officer's opinion, "tends to undermine the Claimant's credibility generally." Also significant to the hearing officer in resolving the credibility of the claimant was his failure to mention an injury at the two meetings on February 12, 1999, when he was terminated, and varying descriptions of how exactly the claimant was injured. With regard to the medical evidence, the hearing officer noted what he perceived were discrepancies in Dr. C's statement about why the steroid injections were discontinued because they were not effective and the claimant's and Dr. E's comments that the symptoms had completely resolved by December 1998, when the third injection was scheduled. The hearing officer also considered the pre- and post-injury MRIs "very similar" and "as suggestive of degenerative conditions as of a traumatic incident." At best, he did not consider the medical evidence "such as to shore up and overcome the inconsistencies of the Claimant's assertions in the face of more credible conflicting evidence...." In his appeal, the claimant essentially disagrees with the hearing

officer's analysis of the evidence and what that evidence does or does not establish. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. He did not consider the claimant's evidence sufficient to carry his burden of proving a compensable injury on \_\_\_\_\_. 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 and persuasiveness of the respective witnesses and medical opinions for that of the hearing officer, but find the evidence relied on by the hearing officer sufficient to support his determination that the claimant did not sustain a compensable injury on \_\_\_\_\_.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

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

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge