

APPEAL NO. 991664

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 1, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that he did not have disability within the meaning of the 1989 Act. In his appeal, the claimant essentially argues that the injury and disability determinations are against the great weight of the evidence. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was in training for the position of a drain technician. The claimant stated that he was working with Mr. L on _____ and that they were at a naval base cleaning out a clogged drain with a machine. He testified that he was pulling the cable out of the drain and he felt pain in his low back; that the pain got worse by next day; that he went to work on day after injury date, but did not work because Mr. L had left without him; and that he quit his job on Monday. The claimant acknowledged that he did not report his injury when he quit, explaining that he thought the pain in his back would go away. However, at another point in the hearing, the claimant testified that his back pain became progressively worse each day after the injury. The claimant stated that on Saturday, December 19, 1998, he went to the employer's office to pick up his last paycheck and he reported his injury to Mr. J.

The claimant first sought medical treatment on December 22, 1998, from Dr. H, a chiropractor. Dr. H diagnosed lumbar disc displacement, lumbar sprain/strain, low back pain, and myofascial pain syndrome. In a patient history/consultation form, Dr. H notes that the claimant stated that his pain on the Saturday following his alleged injury on Friday, was so severe the claimant could barely get out of bed. Dr. H referred the claimant to Dr. E, who diagnosed lumbar and thoracic sprains/strains. Dr. E advised the claimant to continue with conservative care and prescribed Naprosyn for pain.

Mr. L testified that he worked with the claimant on _____, and that the claimant had been reprimanded that morning for performance problems. Mr. L stated that he worked all day with the claimant on _____ and that he neither reported an injury to him, nor exhibited any signs of having sustained an injury. Mr. L testified that he was scheduled to work with the claimant on day after injury date, that he waited for him for two hours, and that the claimant did not report to work. On cross-examination, Mr. L acknowledged that the claimant pulled the cable out of the drain by hand and did not have the machine pulling it out.

Mr. J testified that he is a branch manager for the employer. Mr. J stated that the claimant was reprimanded on the morning of _____ because several of the technicians

with whom he had been training during his probationary period had told Mr. J that the claimant spent a lot of time talking on his mobile phone and that he was not learning to properly operate the machinery. Mr. J testified that the claimant reported to work late on day after injury date and turned in his hard hat and safety equipment; that the claimant called in on Monday, and quit his job; that the claimant told him that he did not want to do the job anymore when he quit; that the claimant did not report his injury when he quit; that he did not give any indication of having sustained an injury or being in pain during the telephone call on Monday; that the claimant came to the office on December 19, 1998, to pick up his last paycheck; and that at that time, the claimant told him that he had injured his back pulling cable from a drain on _____.

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That issue presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury on _____. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant's evidence established that he injured his back pulling the cable from the drain. The hearing officer was acting within his province as the fact finder in deciding to reject the claimant's testimony and evidence that he had injured his back performing that activity at work. In his decision, the hearing officer noted that the claimant explained at the hearing that he did not report his injury to the employer sooner because he thought it would go away; however, he told Dr. H that the pain was so severe on the day after his alleged injury that he could barely get out of bed. In addition, the hearing officer noted the claimant's performance problems and the fact that he did not report his injury at the time that he quit his job with the employer. The hearing officer was free to consider each of those factors in assessing the weight and credibility to be given to the testimony and evidence. Our review of the record does not reveal that the hearing officer's determinations that the claimant did not sustain a compensable injury are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 15 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge