APPEAL NO. 991679

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 15, 1999, a contested case hearing (CCH) was held. With respect to the only disputed issue before him, the hearing officer determined that respondent (claimant) had disability from March 1, 1999 (all dates are 1999), through the date of the CCH.

Appellant (carrier) appealed, citing certain evidence and (disputed) testimony which might lead to a different conclusion. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from claimant.

DECISION

Affirmed.

Claimant was employed by (employer) in the wash room picking up bundles of clothes and putting them in washers, sometimes using a hoist. The parties agree that it is a fairly heavy job involving "some lifting." Claimant testified that he sustained a back injury lifting bundles and putting them in the washers on _____. Claimant reported the injury to his immediate supervisor, Mr. C, and later that day the employer took claimant to the doctor at the (clinic) where he saw Dr. BR. Dr. BR diagnosed a lumbar strain and released claimant back to work with lifting restrictions for two days. Carrier has accepted liability for a lumbar strain injury. Dr. BR's Initial Medical Report (TWCC-61) of _____ describes the injury as "picking up big load and hurt back." Claimant apparently had a follow-up appointment with Dr. BR on January 12th. Although the parties agree claimant did not go to that appointment, the reasons differ, with claimant testifying that the employer did not take him or tell him over the public address system where to report. The employer denies that occurred.

It is fairly undisputed that claimant returned to light-duty work for two days and then resumed his regular duties in January and February. Exactly what happened next is subject to different inferences. Claimant testified that he worked for two months and then "I couldn't bear the pain, couldn't stand the pain," and went to see another doctor. Mr. G, employer's production manager, testified that during January and February claimant had no complaints of back pain and that in late February the employer received notice that some employees had "bad" social security numbers (SSN). Mr. G testified that on March 1st the employer called in a group of employees to tell them they needed to have their SSNs checked. It is undisputed that claimant was not in this group; however, claimant did work with other employees that were in the group called in. Claimant testified that at about 1:00 p.m. on March 1st his back was hurting so bad that he had to go home. Claimant testified that he told Mr. C that he had to leave because of back pain. Mr. C, in an undated signed statement, said that claimant said "he had to leave" and that he had "something to do at home." Mr. G speculated that claimant had found out about the inquiry into "invalid" SSNs

and that is why he left work on March 1st. Claimant admitted that he "had a false [SSN]." Claimant was subsequently terminated because of the SSN problem.

Claimant went to see Dr. CR, D.C., on March 1st. In a report of that date, Dr. CR diagnosed claimant with a grade II lumbar strain/sprain and took claimant off work. A number of other notes from Dr. CR keep claimant in an off-work status at least through April 12th.

At the CCH, claimant was assisted by an ombudsman, carrier was present through its attorney and the employer was represented by Mr. G. Also in attendance was Mr. S, who identified himself as the attorney for the "subclaimant," Dr. CR. After some discussion, Mr. S was allowed to remain in the CCH, over carrier's objection, but was not allowed to cross-examine or present evidence. Although the file does not reflect that Dr. CR was a subclaimant, Mr. S was asked for his agreement on the issues and stipulations. Carrier, in its appeal, raises as "a procedural matter" Mr. S's attendance as a representative of Dr. CR. Section 409.009 provides that certain categories of persons, specifically including doctors, "may file a written claim with the commission [Texas Workers' Compensation Commission] as a subclaimant" under certain conditions. There is no evidence that Dr. CR had filed a claim to be a subclaimant, although he may have been eligible to do so. The hearing officer ruled that Mr. S could not cross-examine or present evidence, but he did allow Mr. S to attend the CCH and asked for Mr. S's agreement on the stipulations and the wording of the issue. Mr. S's participation as the representative of Dr. CR, who was not a subclaimant, was improper. However, the error, if any, of allowing Mr. S to remain in the hearing room, was harmless error. Further, carrier does not state what remedy it seeks other than asking us to hold that Mr. S's attendance was error. In any event, error or not, Mr. S's presence in a nonparticipatory role (except for agreeing on the issue and stipulations) did not affect the carrier's substantive rights and does not constitute reversible error.

On the merits of whether claimant had disability, carrier points to Dr. BR's treatment of a minor back ailment; claimant's return to work, initially on light duty for two days, for almost two months; and claimant's failure to follow up with Dr. BR, purportedly saying "[m]y back is fine" as showing claimant did not have disability. Carrier speculates that claimant found out about the SSN problem from other employees and left before he was confronted with the problematic SSN inquiry.

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). The existence of disability is a question of fact to be determined by the hearing officer from all the available evidence including medical evidence and the claimant's testimony. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992; Texas Workers' Compensation Commission Appeal No. 91024, decided October 23, 1991. The burden of proof can be met by the injured employee's testimony alone. Texas Workers' Compensation Commission Appeal No. 93858, decided November 9, 1993. In this case, claimant's claim for disability is supported by the reports of Dr. CR.

While we might agree that the seven-week period or so from _____ to March 1st during which claimant worked his regular job presents something of a contradiction to a finding of subsequent disability, those facts were before the hearing officer and he obviously believed the claimant's testimony. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Carrier also contends that claimant "knew he was about to lose his job because of the problem with his [SSN]" and cites Texas Workers' Compensation Commission Appeal No. 971910, decided November 3, 1997, and Texas Workers' Compensation Commission Appeal No. 970775, decided June 12, 1997, for the proposition that claimant's right to legally work in the United States "is a proper consideration . . . in determining whether a compensable injury was the producing cause of the disability." Carrier alleges that the hearing officer "gave no weight whatsoever" to claimant's not legally being able to work in the United States. First, we note that what claimant may have known is entirely speculation unsupported by evidence. While the cases carrier cites do hold that "alien status or the legal right to work . . . is a proper consideration for a hearing officer in determining whether the compensable injury was a producing cause of the claimed disability," Appeal No. 971910, *supra*, went on to state "we decline to hold that as a matter of law the claimant's status as an undocumented worker precludes her from establishing disability as defined by the 1989 Act." This evidence was certainly presented to the hearing officer and there is no evidence that the hearing officer failed to give it the weight that the hearing officer, as the sole judge of the weight and credibility of the evidence, felt it merited.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge