APPEAL NO. 991705

This appeal is considered in accordance with 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. The issues disputed at the CCH were whether the respondent, who is the claimant, sustained a compensable injury to his back, and whether the injury resulted from the wilful intent to injure himself, discharging the appellant (carrier) from liability. Although inadvertently omitted from the preamble of the decision, there was a third issue involving whether claimant was prevented from obtaining and retaining employment (equivalent to his preinjury average weekly wage) due to his compensable injury--in other words, whether he had "disability."

The hearing officer held that the claimant injured his back, and had disability beginning on May 28, 1999, and continuing to the date of the CCH. She held that the injury did not result from the wilful intent of the claimant to injure himself.

The carrier has appealed, and argues that claimant had a significant preexisting back problem and therefore did not sustain an "injury." The carrier's theory on wilful intent is similar to what it argued at the CCH: that witnesses disputed that the ground where the claimant allegedly slipped was wet and his actual fall was unwitnessed, therefore, he must have staged the accident. The carrier also invokes a review of the related disability issue. The claimant responds that the decision is fully supported by the evidence. The claimant points out once again that there is a dearth of evidence, as opposed to speculation, that the claimant intentionally fell, and he points to the lack of proof of any motivation to stage a fall. The claimant says that factual determinations as to whether the ground was wet were for the hearing officer to believe. Finally, the claimant argues that the assertion that he sustained no injury ignores objective testing showing a herniated disc.

DECISION

We affirm.

The claimant was a journeyman pipefitter who worked on "turnaround" projects. He had worked for (employer), on and off, for over 20 years. The claimant, prior to his injury, had last worked on a project for the employer three to four months before, and then took jobs in the interim with two other contractors. The claimant was injured on _____, which was his first day out on the job site of the client company with whom the employer had contracted for services. However, claimant pointed out that he had already completed a three and one-half day safety training course immediately prior to this day, which was required in order to be authorized to go onto the client company's premises.

The claimant said he checked in around 7:00 a.m. that day, and then headed for a group of men in order to find out where to report; they sent him toward another group, and then he spotted Mr. H, a co-employee, who indicated that claimant should follow him to the area to receive assignments.

The claimant said that the caliche surface was packed hard from vehicles going over it, and that the surface was regularly sprayed to tamp down the dust that would otherwise fly up. He said that the ground, therefore, was wet, but not mushy, which created a slick thin mud over the hard ground. The claimant said that he was walking with Mr. H and had gone with him about five yards when all of a sudden his feet flew out from under him and he went down flat on his back, feeling a snap and immediate sharp pain. An ambulance was called.

Claimant said that at the hospital, he had x-rays and a CT scan and was told he would be held for observation for a couple of days because he had a severe problem. He said his boss then entered the room, and then left; claimant could hear talking in the hallway, and then his doctor came in and told him that he would be discharged and could go home. Claimant had not worked since this date, and said a herniation has been detected. He denied any previous injury, on or off the job, to his back. Claimant said he was looking forward to this job, which he understood would last quite sometime.

A transcribed oral statement given by Mr. H to Ms. G, apparently the adjuster, stated that he had never previously met the claimant and was walking with him when he suddenly "just disappeared from the corner of my eye." He looked back and saw claimant laying on his back. He said he did not see water around, and the surface was just packed dirt.

The record of the emergency room diagnosed back strain and indicated that a lumbar injury should be considered. The report stated that the CT scan was unremarkable except for an old L-1 collapse. Claimant subsequently saw Dr. V, who said that claimant had a compression fracture at L-1. His Initial Medical Report (TWCC-61) indicates that his narrative continues on the reverse side of the form; the record was not, however, favored with this. Dr. V took claimant off work from March 29th through various subsequent two-week intervals. Dr. V requested authorization for a TENS unit to relieve claimant's pain. On July 8, 1999, an MRI was conducted pursuant to authorization finally granted after initial denials. This test showed evidence of remote trauma involving the area around the junction of the thoracic spine and lumbar spine, and a degenerated disc at L5-S1, with bulges at two levels above that.

The carrier argues that this simply shows preexisting and degenerative conditions and not "an injury." However, the Appeals Panel has adopted old law concepts relating to "aggravation" of preexisting conditions and has consistently applied them. Texas Workers' Compensation Commission Appeal No. 960622, decided May 13, 1996; Texas Workers' Compensation Commission Appeal No. 981319, decided July 29, 1998. It is axiomatic, in case law having to do with aggravation, that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). The burden is on the carrier to prove that inability to work has to do solely with the preexisting condition.

The hearing officer is the finder of fact, and it appears that the contention that this was a staged fall was considered by the finder of fact to rise only to the level of speculation. The decision of the hearing officer on the matters appealed is supported by the record, and she could conclude that even if the claimant had a preexisting compression fracture, he fell as he stated and caused a worsening of that condition. There appears to be little doubt in the medical evidence that the claimant was documented with pain to the degree that a TENS unit was prescribed. An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.- El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

In reviewing the record, we cannot agree that the great weight and preponderance of the evidence is against the hearing officer's decision, and we affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge