

APPEAL NO. 991730

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 20, 1999. With respect to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on (Injury 1), and that he has not had disability as a result of the Injury 1, compensable injury. In its appeal, the appellant (carrier) argues that the hearing officer's injury determination is against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant. In addition, the claimant did not appeal the determination that he has not had disability as a result of his compensable injury.

DECISION

Affirmed.

The claimant testified that on Injury 1, he was filling and delivering bottles of propane for the employer. He stated that he took five empty bottles of propane to a hardware store to fill them; that after they were filled, he lifted them into the bed of the pick-up truck he was driving; and that he again had to lift the full propane bottles out of the truck when he delivered them to the customers. He stated that as he was lifting the full propane bottles, which he estimated weighed between 100 and 125 pounds, he felt a "pinch" and a "snap" in his low back. The claimant testified that he completed his work and returned the truck to the shop between 7:00 p.m. and 7:30 p.m., noting that no one was around the shop that evening. On Friday, February 26, 1999, the claimant underwent a previously scheduled cervical myelogram. The claimant acknowledged that the cervical myelogram had been ordered to assess the condition of his neck, which had been injured in a (Injury 3) noncompensable motor vehicle accident (MVA). In addition, the claimant acknowledged that he had a prior compensable lumbar injury in 1989 that resulted in lumbar surgery. The claimant testified that he could not work on Monday, March 1, 1999, because he was still suffering the effects of the myelogram. He stated that he went to work on Tuesday, March 2, 1999, even though he could not put on his shoes and had difficulty getting into the car because of his low back pain. The claimant testified that he reported the Injury 1, low back injury to Mr. CS, the employer's president, on March 2nd; that Mr. CS asked him if he wanted to go to the doctor; and that he responded that he did not because he wanted to see if he could "work out the kinks" without going to the doctor. The claimant stated that he was able to work Tuesday, Wednesday, and Thursday, but by Friday, he was no longer able to handle the pain, so he again told Mr. CS about his injury and asked Mr. CS to complete the necessary paperwork to pursue a workers' compensation claim. He stated that Mr. CS became angry with him that he wanted to pursue a claim rather than just go to the doctor at Mr. CS's expense and that a "heated discussion" ensued in which Mr. CS told the claimant he Mr. CS was going to have to get another welder, a statement that the claimant interpreted as a termination.

The claimant sought treatment for his low back from Dr. B on March 5, 1999. In progress notes of that visit, Dr. B diagnosed a lumbosacral strain and placed the claimant on restricted duty with no lifting over 30 pounds. The claimant had a follow-up appointment with Dr. B on March 29, 1999, at which time Dr. B referred him for a lumbar MRI. The claimant's March 29, 1999, MRI revealed a small to moderate central and left paramedian disc herniation at L4-5, narrowing of the L5-S1 interspace but no herniation at that level, and a mild annular bulge at L3-4. In progress notes of April 20, 1999, Dr. B diagnosed a herniated lumbar disc and referred the claimant to Dr. G, with whom the claimant had treated for his injuries from the Injury 3 MVA. Dr. G was asked to compare the claimant's September 1998 MRI findings with the February 1999 MRI findings. In a report of June 9, 1999, Dr. G stated:

[T]he MRI of the LS spine from 1998 in my opinion shows an L5-S1 right sided herniated disc or osteophyte that clearly is producing nerve compression on that side. At L4-5 on the left he has definitely a disc herniation. It is large. Clearly it obscures the view of the nerve roots in that area. The bulges are a bit more prominent I believe in this study compared to the study of 3-29-99. The study again shows the same defects L4-5 on the left and L5-S1 on the right. The bulges look perhaps a little less prominent on that study than they did previously, but it is essentially the same looking study. It really indicates that these are postoperative changes as well as changes that were present evidently prior to or after injury of 7-28-98.

Please note, this is based simply on the review of studies that are available. I have not examined [claimant] since at least February 11, 1999 which predates the accident in question. So the examination certainly may not fit what the MRI shows or you can have aggravation of a condition that existed prior to Injury 1. The only way to determine that of course is by examination and that is why examination and then review of test results is the usual way that things are done. In this case, I have not examined the patient.

In a progress report of February 11, 1999, Dr. G noted that the claimant had complaints of low back pain and a history of lumbar surgery and L3-4 stenosis; however, he also noted that the claimant "obviously has many abnormalities, but the main symptomatology that is bothering him at present is neck and left shoulder pain."

Mr. R testified that he worked with the claimant; that he saw the claimant at the shop at the end of the day on Injury 1; that he exchanged greetings with the claimant; and that the claimant did not mention that he had injured his back at that time or give any indication of having been injured. Mr. R also testified that when the claimant returned to work after Injury 1, he did not complain of back pain and from what Mr. R saw, the claimant was able to perform his job duties.

Mr. CS testified that he is the president of the employer. He stated that he first learned that the claimant was alleging a work-related back injury on Injury 2. Mr. CS specifically denied that the claimant had reported a back injury to him on Tuesday, March 2, 1999, after he returned to work following the myelogram. Mr. CS stated that the claimant worked eight hours on Tuesday and Wednesday and did not give the appearance of having been injured. He stated that on Thursday, March 4th, the claimant came up to him wearing a back brace and reported that he had injured his back lifting propane tanks on Injury 1. Mr. CS testified that on March 5th the claimant again approached him and told him that he needed to go to the doctor for his back. Mr. CS acknowledged that he and the claimant had an argument about the injury and that the claimant left work; however, Mr. CS insisted that the claimant quit and that he was not fired. Finally, Mr. CS testified that he saw the claimant later in the evening at an auto repair business; that the claimant appeared to be very happy; that he did not look like he was hurt or in pain; and that he saw the claimant "skip" out to his car when he left.

The claimant in a workers' compensation case 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). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier contends that the hearing officer's injury determination is against the great weight of the evidence. In so arguing, the carrier argues the claimant's testimony was not credible. The carrier emphasizes the evidence which it believes demonstrates that the claimant did not sustain a lumbar injury in the lifting incident but instead had a recurrence of symptoms from his prior compensable injury and the 1998 MVA. The carrier relies on Dr. G's statement that the herniations were more prominent on the 1998 MRI; however, Dr. G also noted in that report that he would need to examine the claimant in order to determine whether he had sustained an injury in the Injury 1, incident. In addition, the carrier emphasizes the evidence which it believes demonstrates that the claimant's claim was motivated by spite and dissatisfaction with his job. The carrier emphasized the same factors it emphasizes on appeal to the hearing officer at the hearing. As the fact finder, it was solely his responsibility to assess the significance of those factors in determining whether the claimant had satisfied his burden of proving injury. The hearing officer was acting within his province as the fact finder in deciding to credit the evidence tending to

demonstrate that the claimant sustained a compensable injury and to reject the contrary evidence. The hearing officer's injury determination is sufficiently supported by the claimant's testimony. Our review of the record does not demonstrate that that determination is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse the hearing officer's decision on appeal. Cain; Pool. The fact that another fact finder may well have drawn different inferences from the evidence in the record, which would have supported a different result, does not provide a basis for us to disturb the hearing officer's decision on appeal. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Alan C. Ernst
Appeals Judge