APPEAL NO. 991771

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 16, 1999. He (hearing officer) determined that the respondent/cross-appellant (claimant) sustained a compensable low back injury and had resulting disability from March 29 through March 31, 1999, and not thereafter. Given his finding of disability, the hearing officer determined that the remaining issue of an offer of bona fide employment was "moot." The appellant/cross-respondent (carrier) appeals the compensable injury finding, contending that this determination is contrary to the great weight and preponderance of the evidence. The claimant appeals the disability determination, expressing his disagreement with it and asserting that he also had disability from April 1, 1999, through May 2, 1999, when he returned to his preinjury job at his preinjury wage. The carrier responds that, if the compensability finding is upheld on appeal, the disability determination was supported by sufficient evidence. The appeals file contains no response from the claimant. Neither party appeals the hearing officer's disposition of the issue of an offer of bona fide employment.

DECISION

Affirmed.

The claimant handled freight for a trucking company. He testified that on _____, as he and a coworker were trying to remove a piece of freight from a truck, the wrapping bands on the freight broke and he fell backwards onto a steel buggy, thereby injuring his lower back. The incident was witnessed and there appears to be no dispute that it occurred. The claimant was referred by the employer to Dr. K, who in an Initial Medical Report (TWCC-61) of _____, diagnosed a lumbar sprain. Claimant was taken off work until March 31, 1999, when Dr. K released him to regular duties. The claimant said that Dr. K wanted to see him again before he went back to work, but the claimant declined to do so. Instead, the claimant saw Dr. B, D.C., on March 31, 1999. Dr. B's diagnoses were lumbar facet syndrome and muscle spasm. He placed the claimant on "total disability" beginning March 31, 1999, and returned him to light duty effective April 12, 1999, through May 3, 1999. On April 20, 1999, Dr. B wrote that his previous return to work notices were "void." On April 29, 1999, Dr. B confirmed that the claimant was released to regular duty effective May 3, 1999. The claimant testified that he has been working regular duties as of this date.

The carrier appeals the hearing officer's determination that the claimant sustained a compensable low back injury as alleged, arguing that the claimant failed to prove he sustained an injury as defined by the 1989 Act. Section 401.011(26) defines injury for purposes of this case as "damage or harm to the physical structure of the body " Specifically, the carrier argues that the claimant only established pain, which in itself is not an injury; that there was no objective evidence of an injury; and that the claimant, in effect, "set up" an injury because of a series of performance warning letters, including one for insubordination a day before the claimed injury.

We agree that mere pain in itself is not a compensable injury except insofar as it reflects damage or harm to the physical structure of the body. *See* Texas Workers' Compensation Commission Appeal No. 93812, decided October 22, 1993. In this case, two doctors diagnosed a lumbar strain. We have held that strains can be a compensable injury. Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993. It has also been observed that while an impairment rating must be based on objective medical evidence, the 1989 Act does not impose a requirement that an injury must be proved by such evidence. The existence or nonexistence of such evidence may, however, be considered by the hearing officer in resolving a compensable injury issue. Texas Workers' Compensation Commission Appeal No. 92300, decided August 13, 1992. Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1992.

The claimant had the burden of proof that he sustained a compensable injury as claimed. 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 which in this case could be established by his testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The question of whether a compensable injury was sustained was essentially a matter of the claimant's credibility. The carrier introduced evidence of a number of warning letters preceding the claimed injury and evidence that the claimant spoke with another employee about workers' compensation benefits shortly before the claimed injury. It argued that the claimant manufactured an injury in retaliation against the employer. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). He found the claimant credible on the question of whether he injured himself as claimed. 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 find that the testimony of the claimant, deemed credible by the hearing officer, and medical evidence of a lumbar strain constituted sufficient evidence to support the finding of a compensable low back injury.

Whether disability existed was also a question of fact which could be proved by the claimant's testimony alone if deemed credible by the hearing officer. Appeal No. 93560, *supra.* The claimant argues that he had disability for another month beyond that found by the hearing officer. The hearing officer stated in his decision and order that he gave little weight to Dr. B's opinion of disability and did not believe the strain injury was serious enough to warrant a finding of additional disability. There was evidence from Dr. K returning the claimant to regular duty on March 31, 1999. Under our standard of review, we decline to reweigh this evidence, but find it sufficient to support the disability determination.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge