

APPEAL NO. 991852

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 28, 1999. He (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant testified that on _____, he hurt his lower back while lifting gas cylinders. There were no witnesses to the incident. He said he initially thought it was only a muscle pull but over the succeeding days the pain worsened. He first received medical care on February 9, 1999, from Dr. S. The office notes from this visit reflect a "date of initial injury last of Nov or Dec. Didn't say anything because he had perfect safety record." The claimant agreed that he was eligible for a safety award and for this reason did not want to report an injury until he was sure, but he denied telling Dr. S that he injured himself the previous November or December. Dr. S's records of March 3, 1999, reflect that the claimant sought to correct this history in favor of a date of injury of _____. At the first visit, Dr. S gave the claimant a duty excuse for one week. According to the claimant, he took this excuse to his supervisor, (Mr. W), that same day, but Mr. W crumpled it up and threw it against a wall. He said he reported the injury on February 9, 1999, because his doctor told him of the potential seriousness of his condition. The claimant further testified that on February 11, 1999, he reported the injury to (Mr. B), the safety manager, and was asked to undertake a urinalysis. He left work that day to pick up his children and never returned to provide the urine specimen for drug analysis. The claimant also admitted to a prior felony conviction.

Mr. B testified that he made daily rounds of the work site and on February 5, 1999, advised the claimant to wear ear plugs. According to Mr. B, the claimant did not appear injured when he saw him. He first found out about the injury on February 11, 1999, when he was given the duty excuse by Mr. W, who told him he obtained it that morning. Mr. B also said that he spoke with the claimant on February 8, 1999, and the claimant said nothing about an injury.

The claimant had the burden of proving 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 for the hearing officer to decide and could be proved by his testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer did not find the claimant credible or persuasive in his assertion of a work-related injury on _____. In doing so, he commented in his decision and order that the claimant

violated the employer's policy by not reporting the injury to Mr. B until February 11, 1999. The claimant appeals the finding that he did not sustain a compensable injury and argues that the only reason the hearing officer found against him was that he did not report the injury to Mr. B immediately. Timely reporting was not an issue in this case. The hearing officer, however, considered the claimant's report of the injury as part of the sequence of events bearing on the credibility of the claimant, not as dispositive of the compensability issue. There was other evidence which could raise a question in the hearing officer's mind about the claimant's credibility, including not only his prior criminal history, but Dr. S's initial recording of a November or December date of injury. It was the claimant who had the burden of proof in this case. The carrier was not required to produce evidence that the injury did not occur as claimed. This case became essentially a question of the credibility of the respective witnesses, including the claimant. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer observed the demeanor of the witnesses, reviewed the documentary evidence, and concluded that the claimant did not meet his burden of proving a compensable injury. 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 decline to revisit the credibility determination of the hearing officer, but find the evidence sufficient to support his decision that the claimant did not sustain a compensable injury.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge