

APPEAL NO. 991933

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On July 28, 1999, a contested case hearing (CCH) was held with the record closing on August 5, 1999. The issue concerned the whether the appellant, who is the claimant, sustained an injury in the course and scope of employment for (employer) on _____, and whether he had disability as a result of that injury.

The hearing officer determined that the claimant had not sustained an injury when he was involved in a minor traffic mishap, and therefore did not have disability. However, the hearing officer has a finding of fact stating that the claimant was not able to obtain and retain employment equivalent to his preinjury average weekly wage due to a work-related injury.

The claimant has appealed. He argues that the decision is against the great weight and preponderance of the evidence, and that it is ludicrous to suggest that a man his age at the time of this incident would not have been injured and that the hearing officer could have so concluded through the application of "general experience and common knowledge." He argues that his medical evidence supported the existence of spinal region strains, and that there was no controverting evidence, only the testimony of "hired guns" for the respondent (carrier). The carrier asks that the decision be affirmed as based upon sufficient evidence (and incorrectly recited in its response that Finding of Fact No. 2 reads that claimant was not unable to obtain and retain employment). The carrier points out that some of the factual assumptions made by the claimant's treating doctor were not borne out by the facts of the accident.

DECISION

We affirm, although we reform a finding of fact to correct an obvious typographical error.

The claimant was an over-the-road truck driver for the employer. On _____, at around 9:00 p.m., he was involved in an incident in which he ran off the road. He was driving an 18-wheeler that was towing two empty "pups" (the cargo container that is pulled by the cab). As indicated by the various reports, he was attempting to pass a truck on a two-lane highway, and was pulled out in the left lane, approximately 30 feet behind the truck, going at least 55 miles an hour. He said that he felt he might not be able to overtake the truck before a car approached, and swung back in behind the truck at an angle. The claimant said at that moment, the truck in front of claimant hit its brakes, so that claimant had to brake hard. The adjuster's report indicated that it was drizzling, although the police report indicated the surface was dry.

Because of the sudden braking action, the cab of the truck acted like a "pivot," and the "pups" (trailers) that were being towed swung around it and across the highway to the right, as the whole unit also moved down the highway. There were 218 feet of skid marks recorded in the police report. The cab ran onto the shoulder of the road, which, from pictures taken at the scene, was dirt and grass and appeared to be level with, if not actually slightly above, the pavement. The second trailer being towed turned over across the highway. The cab portion of the truck jackknifed with respect to the trailer behind it, although those trailers did not actually jackknife with respect to each other, and remained somewhat spanning the highway, while the cab was pointed back around. According to claimant, the damage caused was that the link between the two trailers was broken, and a flap on the back of his cab was bent where it was compressed against the container behind it. (The entire vehicle did not spin around 180E.)

The claimant said that the seat in which he rode has a track so that it would slide back and forth for greater comfort, and he believed it slid. He said he gripped the steering wheel tightly throughout the incident. Claimant was walking around the truck after the accident. The insurance adjuster for the employer was called to the scene and took pictures which are in evidence. The police gave the claimant a ticket for failure to control his speed. The claimant said he was taken to a hospital emergency room and blood and urine samples were taken. While the claimant indicated that he was not also referred to a doctor, he agreed on cross-examination that he did not ask to see a doctor. The adjuster's affidavit said that there was no evidence of injury to the claimant on that night. The police report indicated no injuries. On _____, claimant reported (in writing) injuries to his employer involving his shoulders and neck.

The claimant contended that he observed some external damage on a braking mechanism, but a report from the employer stated that the brakes were inspected afterwards and were working properly. The claimant was taken off driving, and then said he was notified on the 10th or 11th that he was terminated for the accident. The claimant said he thereafter called the business manager for his union, who stated that they would try to have him reinstated. Claimant testified on direct examination that the business manager asked him if he was receiving workers' compensation to which he replied it had been denied. However, on cross-examination, the claimant said that the business manager did not ask that question during the first conversation and that he raised it himself in a subsequent conversation. The claimant said he felt sore after the accident and he believed he had been banged around in the truck cab. He felt numbness and tingling down his left arm.

Claimant was treated by a chiropractor, Dr. C, who testified at the CCH. Dr. C had been in practice since 1992 and stated that he did not have a college degree, as it was not required, to go to chiropractic college. He stated that claimant had degenerative disc disease (he was 65 years old) but that herniations and bulges he had were in all probability caused by his accident. He said that his only knowledge of the accident came from the

claimant, and that he understood that the claimant had gone off into a "ditch" on the side of the road. Dr. C had not reviewed the MRI itself, but had the report.

The claimant said he actually felt pretty good by the time of the CCH, except for neck stiffness, and felt he could drive a truck once Dr. C released him, which he had not done. The claimant said his wrist pains had resolved. He was reinstated to his job around 20 days after the accident, subject to a two-week suspension when he returned.

The claimant put into evidence the report of an engineer, Mr. S, commenting upon the accident and the forces generated by it. Mr. S stated that the accident as he analyzed it "could" produce the injuries resulting to claimant.

The cervical MRI taken on June 10, 1999, reported cervical stenosis and some cord compression at two levels, with spurring and moderate protrusions at three levels. Two consultants testified for the carrier; neither doctor had examined the claimant. The first doctor, Dr. S, a board certified diagnostic radiologist who had been practicing medicine for nearly 20 years and who taught at a medical school, testified as to his opinion that the claimant had degenerative disc disease as reflected by his MRI, and that he had bony spurring which could not have developed only between the accident and the date of the MRI. Dr. S said there was no evidence of acute trauma in the MRI. Dr. P, who was board certified in physical medicine, had been in practice 11 1/2 years. Dr. P stated that claimant's sliding seat or gripping the steering wheel would have tended to buffer any effect of the accident. He had reviewed reports of the mechanics of the accident and stated that he did not believe that the conditions on the MRI resulted from it, but were preexisting.

First of all, it appears to us, after reading the discussion of the evidence, that the hearing officer's finding that the claimant "has not been able" to obtain and retain employment is a typographical error, and should read "has not been unable" and is hereby corrected. This is clear because the hearing officer found no work-related injury or disability, and further commented that the medical evidence along with claimant's testimony was not compelling to show that claimant had any disability due to the incident in question.

Second, we agree that the hearing officer's decision of finding no injury is supported by the record. We cannot agree that the driving of a tandem 18-wheeler would be within the common experience of the hearing officer such that she could substitute her own knowledge for the evidence, or lack thereof, in this case. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

We will not second guess the hearing officer's evaluation of the facts and therefore affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge