APPEAL NO. 991945

Following a contested case hearing held on August 9, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the sole disputed issue by determining that the respondent's (claimant) on-the-job injury of _____, extends to and includes his low back. The appellant (carrier) requests our review of this determination, asserting the insufficiency of the evidence. Claimant's response urges the sufficiency of the evidence to support the challenged finding and conclusion.

DECISION

Affirmed.

The carrier does not challenge the hearing officer's finding that on _____, claimant sustained an injury while engaged in the exercise of his job duties with (employer). The hearing officer's Decision and Order contains a detailed statement of the evidence with which neither party takes issue. Accordingly, we will mention only so much of the evidence as is necessary to support our decision.

Claimant testified that on _____, while erecting a scaffold, a 10-foot metal scaffold board fell from above, struck the left side of his body, including the back of his head, neck, shoulders, and back, and "crushed [him] down"; that he was initially dazed and sat for a while; that he then arose and went to an office to report the accident; and that he finished his shift. He said that the next day his back hurt so bad he could hardly get out of bed; that he went to (medical center) where he was given a shot of Demerol so he could be x-rayed; that on February 23, 1998, he commenced treatment with Dr. H; and that he eventually changed doctors to Dr. S, who performed his cervical fusion surgery, because Dr. H was just keeping him medicated. Claimant said he is now having problems with his legs in addition to low back pain; that he just stays at home doing very little; that his life has been "shattered"; and that all Dr. S can do is monitor his low back injury because of the carrier's dispute.

Mr. F, the employer's safety director, testified that he did not witness the accident but investigated it; that the scaffold board that struck claimant weighed 41 pounds; and that he interviewed the two coworkers who were working above claimant and learned that one of them let go of one end of the board which then swung down like a "pendulum," striking claimant. Mr. F also said that when he prepared the Employer's First Report of Injury or Illness (TWCC-1) and wrote the word "back" in box 19 to describe the body part injured, he was referring to the back of claimant's shoulders. He also said he accompanied claimant on his visits to the medical center and that on the second or third visit, claimant complained of hip pain and also mentioned his low back.

Dr. H wrote on July 19, 1999, that when he initially saw claimant on February 23, 1998, claimant complained not only of pain in his neck but also of low back pain radiating into both legs and that he continued to complain of low back pain.

Dr. S wrote on June 29, 1999, that when claimant was hit from behind on the neck, shoulders, and middle back on _____, he sustained an injury to his cervical spine resulting in fusion surgery at C4-5, C5-6, and C7 with a plate in April 1999; and that he also had a low back injury associated with the discs at L4-5 and L5-S1, which is well documented by Dr. H. Dr. H's letter of September 3, 1998, to the carrier stated that claimant's lumbar spine MRI on April 13, 1998, revealed degenerative discs at L4 and L5. The carrier's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) dated April 30, 1998, denies the low back injury for the reason that it was not initially reported and was not documented in medical records for about three weeks.

Claimant had the burden to prove by a preponderance of the evidence that his injury at work on _____, extended to his low back. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb a challenged factual finding of a hearing officer unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find it so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The Appeals Panel long ago stated the well-settled law that the aggravation of a preexisting condition may constitute an injury in the course and scope of employment, and that to defeat such a claim, the burden is on the carrier to show that the preexisting injury is the sole cause of the current incapacity. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991.

The decision and order of the hearing officer are affirmed.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Alan C. Ernst
Appeals Judge