

APPEAL NO. 991968

On August 12, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The issues at the CCH were whether respondent (claimant) sustained a compensable injury on _____, and whether he has had disability. Appellant (carrier) requests that the hearing officer's decision that claimant sustained a compensable injury on _____, and that he had disability from May 15, 1999, through August 12, 1999, be reversed and that a decision be rendered in its favor. No response was received from claimant.

DECISION

Affirmed.

Section 401.011(26) defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. The term includes an occupational disease." Section 401.011(10) defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Claimant has the burden to prove he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Claimant also has the burden to prove that he sustained disability. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. In workers' compensation cases, the issues of injury and disability may generally be established by the testimony of the claimant alone, if found credible by the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

According to claimant, in _____ he sustained a work-related neck injury for which he had surgery around January 1994, he was released to return to work and did return to work about six months after his surgery, and he has worked until his claimed injury of Friday, _____. Claimant began working for employer in November 1995. Claimant said he has had problems in the past with kidney stones and that on May 11 or 12, 1999, he told DP, who operates a forklift for employer, that he has kidney stones. Claimant delivers pallets to customers on a flatbed truck. The pallets are secured on the truck by a strap that is tightened down with a ratchet on one side of the truck. Claimant said that the morning of _____, he delivered a load of pallets to a customer and that to unlock the ratchet to loosen the strap, he put a four-foot ratchet bar into the hole of the ratchet and pushed down on the bar. He said that as he was pushing down on the bar it slipped out of the hole and he fell forward to the ground and felt a pop and sharp pain in his lower back.

Claimant said that the customer unloaded the pallets and that he returned to the employer's plant and told DP that he had been hurt. Claimant said that he then left work to go to a previously scheduled appointment with an attorney about personal business.

Claimant said that on _____, and again on _____, he went to a hospital because of his kidney stones. He said he passed his kidney stones on _____. Claimant said that he did not complain at the hospital about his work-related back injury because he was there to get rid of his kidney stones. Claimant said that on May 18th, he went to work and filled out an injury report and that he also went to Dr. H, D.C., that day. Dr. H referred claimant to Dr. S, a neurosurgeon, who claimant had been seeing for his _____ neck injury. Claimant said that he has been unable to work since _____, because of the lower back injury he sustained while working that day. Apparently, on some unspecified day in May 1999, claimant underwent a cervical discogram and he said he was scheduled for cervical surgery the day after the CCH. Claimant said that it was his back injury, and not his neck injury, that prevented him from working after _____.

MS, claimant's supervisor, testified that he was at employer's plant on _____; that claimant did not report a work-related injury to him on that day; that DP told him that claimant was going to have something done about his kidney stones; that claimant reported to employer's office on May 18, 1999, that he injured his back; and that DP is not a supervisor and was later terminated for drug abuse. MS also testified that he was aware that claimant was having neck problems and that claimant had told him, apparently sometime before _____, that he had back problems and that he had hurt his back while working for another employer. MS also said that claimant had told him that he was going to have a cervical MRI and would be off work.

In an undated written statement, DP wrote that on May 11, 1999, claimant told him that he was having trouble with kidney stones and that he was going to try and wait until the weekend to get rid of them and that on _____, when claimant returned after making his first delivery, claimant told him he had injured his lower back while untying the load, but that claimant said that he had to take care of the kidney stones first.

A hospital record dated May 15, 1999, notes that claimant was seen that day for lower back pain that began five days earlier, that claimant had a history of kidney stones, and that claimant denied an injury. A hospital record dated May 16, 1999, notes that claimant was seen that day for complaints of lower back pain and flank pain and that he denied an injury. The doctor at the hospital noted that claimant was not to return to work until May 19, 1999. Dr. H noted on May 18, 1999, that he saw claimant that day and that claimant would be taken off work for seven to 10 days or until further evaluation determines that he can do light duty. Claimant's May 18, 1999, written report of injury to employer states that on _____, as he was pushing down on the ratchet, the bar slipped out of the hole and he lost his balance; that he fell down, catching himself with his hand; and that he hurt his lower back.

Dr. H wrote in a June 2, 1999, report that he saw claimant on May 18, 1999, for complaints of lower back pain resulting from an on-the-job injury that occurred on _____, when claimant was loosening a ratchet on the truck, the ratchet slipped, and claimant felt something slip in his back. Dr. H noted that claimant had had kidney stones. He diagnosed claimant as having a lumbosacral sprain, sacroiliac subluxation, muscular spasm, and possible disc involvement, and wrote that, in his opinion, claimant's low back injury and complaints were the result of the incident which occurred on _____, while adjusting the ratchet on the truck. A radiologist reported that an MRI of claimant's lumbar spine done on May 28, 1999, showed "L5-S1 DDD, subligamentous disc protrusion, central and left paracentral."

Dr. S wrote on July 1, 1999, that claimant has problems with cervical discs that cause cervical radiculopathy; that claimant's low back injury while working for employer on _____, is a new injury and is a different injury than his neck injury; that the lumbar MRI shows a ruptured disc at L5-S1; that claimant's neck is worse than his low back; that he anticipated going forward with cervical surgery; and that, while claimant is symptomatic from his lumbar disc, it is too soon for lumbar surgery and other management should be tried first.

Dr. SC, D.C., reviewed claimant's medical records at carrier's request and he wrote on June 10, 1999, that, in his opinion, claimant did not sustain an on-the-job injury on _____; that there is evidence that claimant is probably having kidney stones, which would cause flank pain; and that the MRI showed degenerative disc problems.

Carrier appeals the hearing officer's findings that on _____, claimant sustained an injury while engaged in the exercise of his job duties with employer and that from May 15, 1999, through August 12, 1999, claimant's compensable injury of _____, has prevented claimant from obtaining and retaining employment at wages equivalent to the wage claimant earned prior to _____. Carrier also appeals the hearing officer's conclusions that claimant sustained a compensable injury on _____, and that claimant had disability from May 15, 1999, through August 12, 1999. Carrier contends that the appealed findings and conclusions are not supported by any evidence or are not supported by sufficient evidence.

While there is much conflicting evidence in this case, we cannot agree that the appealed findings and conclusions are supported by no evidence or insufficient evidence. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a

different result. Appeal No. 950084. When reviewing a hearing officer's decision to determine the factual sufficiency of the evidence, we should set aside the decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Appeal No. 950084. We conclude that the appealed findings, conclusions, and decision are supported by sufficient evidence and are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1985).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Dorian E. Ramirez
Appeals Judge