APPEAL NO. 992006

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 September 1, 1999. The issues involved whether the appellant, who is the claimant, sustained an injury on the job on _____. During the CCH, this date was amended by the claimant to _____.

This was a case brought by the respondent (employer) under the employer's bill of rights, after acceptance of liability for the claim by the insurance carrier. The employer's evidence was stricken for failure to exchange. However, the hearing officer found that the claimant was not injured in the course and scope of employment on either _____ or _____. He did not regard the claimant's testimony as credible.

The claimant has appealed, arguing that he was hurt on the job and there was no evidence to prove otherwise. He states that he was not lying, but the employer was. The employer responds by pointing out that there was no evidence of a specific incident that would have caused the injury to the claimant's back and that the claimant's credibility was a matter for the hearing officer to review as the trier of fact.

DECISION

Affirmed.

All dates are 1999 unless otherwise specified. The claimant had been employed by employer to do carpentry work, since November 1998. He said that he was working for a client company, a mobile home company, and was "popping" chalk lines when he felt pain in his lower back that radiated down his leg. The date was a matter of some controversy; claimant originally had claimed a date of injury of _____, but apparently amended this when he realized that his job at the client company where he said he was injured did not start until _____. It was not described exactly what he was doing or how his body was positioned when this happened, although medical reports in evidence indicate that he had been bent over, then raised up and felt pain. Claimant said the "accident" was witnessed by his supervisor, Mr. D. Mr. D was called as a witness by the employer but not permitted to testify because the employer had not complied with the exchange requirements with regard to its documents and witnesses, and therefore its case, except for cross-examination, was effectively stricken.

The claimant agreed that he continued to work because he thought he would get better, but he got worse. The claimant was emphatic that he first saw a doctor, Dr. L, on January 11th. There are no records from Dr. L in evidence.

The initial medical report of Dr. J, D.C., lists the date of the first visit with him as February 12th. Dr. J stated that claimant reported a sudden onset of symptoms when bending forward to work on a chalk line, with a listed date of injury of _____. Claimant was treated conservatively, then referred to Dr. B. Claimant was found to have a herniation at L4-5 which compressed the L5 nerve root. Claimant had surgery on March 25th. Lumbar bone and tissue was sampled and a laboratory report noted the existence of fibrocartilaginous, granular, and myxoid degeneration, with focal calcification.

The legislature, as part of the 1989 Act, added provisions that for the first time would allow an employer to assert a dispute or present additional evidence when it felt that there had been a failure of the carrier to do so. The resulting statute, Section 409.011, is referred to as the Employer's Bill of Rights. The employer may dispute the claim only when the carrier has accepted liability. Section 409.011(b)(4).

The hearing officer indicated that he found claimant's testimony not credible and lacking in specifics as opposed to generalities. However, in our opinion, what is also of importance in affirming the hearing officer's decision is the lack of evidence to establish that there was an accident that occurred at a specific date and time that arose out of the course and scope of employment. To the extent that any incident was testified to by the claimant, he merely said that on _____, as he was working with chalk lines, he experienced back pain and radiating pain down his leg on one occasion when he got up. Although he contended that his supervisor "witnessed" the incident, there is no evidence to indicate what was witnessed, in some part due to the sustained objection by claimant to the testimony of his supervisor.

The fact that pain from an underlying condition may be first appreciated at work does not mean that any later diagnosed injury was one which arose out of the course and scope of employment. A claimant contending an accidental injury (as opposed to an occupational disease) must prove a specific time, place and event leading to injury. Olson v. Hartford Accident & Indemnity Co., 477 S.W.2d 859 (Tex. 1972). However, the requirement of a "definite event" may be met by showing that claimant was injured after being engaged in an unusual or stressful activity on the job. *See* Texas Employers' Insurance Ass'n v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.-Houston [1st Dist.] 1974, no writ). The evidence in this case did not compel the hearing officer to conclude that merely bending over would be enough to herniate a lumbar disc so badly that surgery was warranted. The burden to prove an injury arising from the course and scope of employment belonged to the claimant, Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977), and he was not absolved of that burden because the carrier had accepted the claim or because the employer's exhibits and witnesses were not admitted.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here, and affirm his decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge