

APPEAL NO. 000270

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 January 19, 2000. The issues at the CCH were whether the respondent's (claimant) injury was caused by his wilful intent and attempt to injure himself, thereby relieving the appellant (carrier) of liability for compensation; whether the claimant sustained a compensable injury on _____; and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury on _____; that he had disability beginning on June 24, 1999, and "continuing"; and that the issue of whether the claimed injury was caused by the claimant's wilful intention and attempt to injure himself was improvidently certified and not at issue. The carrier appealed, requesting that the Appeals Panel reverse the hearing officer's decision and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

We affirm.

Carrier contends the hearing officer's determination that claimant sustained a compensable injury on _____, is not supported by sufficient evidence. Carrier asserts that claimant is merely experiencing problems from a prior _____ injury that was not pursued as a compensable injury; that the evidence showed that claimant already had a herniated disc in _____ and that doctors suspected a recurrent herniated disc before June 1999; that claimant was not a credible witness; that he was in pain the day before the alleged injury; that he is not credible because he allegedly substituted the urine of another employee for a drug screen; that claimant worked overtime and endured the pain from his herniated disc in order to increase his average weekly wage before staging an injury; and that there was evidence that claimant was going to stage an injury so that he could receive benefits. Carrier complains that the hearing officer stated that claimant was not credible, but still found that he sustained a compensable injury. It was also carrier's contention that claimant's injury was caused by his wilful intent to injure himself.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act 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." Section 401.011(26). A claimant may meet his burden to establish an injury through his own testimony, if the hearing officer finds the testimony credible. See Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

Claimant testified that on _____, he felt a pop in his back while working doing "one man" feeding or lifting of boxes into a hopper. He said he went to tell his supervisor, Mr. M, about his injury. He said he felt pain radiating down his leg; that he went for a drug screen, which he thought was "clear"; and then he went to the doctor. Claimant said he was taken off work and that he has not been able to do his job since that time. Mr. C, claimant's coworker, stated that performing work on a machine with a one-man feed is "very rough" and will cause a normal person to be tired and their back to be sore. He said each time a worker doing this work lifts up to the machine, he would be lifting about 25 pounds and also twisting while working.

There was evidence that claimant had sustained a prior compensable back injury at work in 1997, that he underwent spinal surgery, and that he returned to work after ten months. There was also evidence that claimant injured his back again at work in _____ and that he was off work for about three months, but claimant apparently did not file a claim for that injury.

There was evidence, as noted by the hearing officer, that claimant was not popular with some of his coworkers. There was also evidence that there were rumors about: (1) whether claimant was going to stage an injury; (2) whether he had actually injured himself doing recreational activities; (3) whether he had behaved as though he had already been injured the day before the alleged injury; and (4) whether he had asked coworkers for urine so that he could use it to pass his drug screen. A coworker, Mr. E, testified that he did not get along with claimant. Mr. E said he thought claimant was "working the system" because claimant needed another surgery for his back, he wanted to be "off work and get paid," and he had mentioned the need for further surgery to coworkers. Mr. E said claimant had never complained about his back hurting, but that he saw claimant the day before the injury and claimant acted as though he was already in pain, but said he would be "all right." Mr. E said he felt the injury was "staged." In a written statement, Mr. K, a coworker, stated that there was "bad blood" between claimant and Mr. K; that he overheard claimant saying that employer would have to pay him for a month because it turned down his vacation request; and claimant was "too crazy"; that claimant was addicted to cocaine in the past; and that claimant used marijuana. Mr. K testified at the CCH that claimant told Mr. K that claimant should have filed an accident report regarding his _____ injury at work and that he could not collect benefits without having done that. Mr. K said that, during the period before claimant's injury, it was a period when significant overtime was involved and that Mr. K worked overtime. He said workers may volunteer for overtime, but that "our machines had to be there." There was evidence that the workers on Mr. K's machine and the

workers on claimant's machine did not get along sometimes. Mr. K testified that he and claimant did not get along because claimant had been telling "management" that Mr. K was sabotaging claimant's machine. He said the two were competitors. Mr. K said he had heard a lot of rumors about claimant and that he could not name the people who passed on the rumors because "it would be everybody in the plant." Mr. B, a coworker, said that several employees thought claimant claimed an injury at the same time each year in order to get out of working. He said he saw claimant feeding the machine by himself and he felt claimant was making his "own liability" by "putting himself in that position" and doing heavy work that long by himself.

An October 1998 MRI report states that claimant had postoperative changes and scar tissue and that a "small residual or recurrent central disc herniation" was noted. In a July 1999 MRI report, Dr. B stated that there is a moderate to large disc herniation with deformity of the thecal sac and that "this is new" when compared to the October 1998 MRI. In a July 1999 medical note, Dr. W noted that claimant's recent MRI scan "revealed a large herniated disc at L5-S1 on the right" and that "this is a definite change from the MRI scan" from October 1998.

The hearing officer determined that claimant sustained a compensable injury on _____. The hearing officer stated that claimant was not very credible, that "much of" carrier's evidence was credible, and that claimant was not well-liked among his coworkers. She noted that a comparison of the October 1998 and July 1999 MRI scan reports shows "the presence of a new injury after _____." The hearing officer noted that she found it difficult to believe that claimant could have worked for four or five months with his back in the condition that it was after _____. She also said that she found it difficult to believe that a person would have failed to stop his drug usage before planning a staged injury, in order to have a clear drug screen result, rather than searching for urine donated by coworkers who did not use drugs. The hearing officer stated that claimant met his burden to prove that he sustained a compensable injury and that carrier did not come forward with enough evidence to rebut claimant's prima facie case. The hearing officer stated that carrier did not establish: (1) claimant's alleged dishonesty in providing a borrowed urine sample; (2) the alleged planning of a "staged" injury; or (3) the alleged fact that claimant injured himself during recreational activities.

In this case, the evidence conflicted regarding whether claimant sustained an injury on _____. Claimant testified that he did sustain an injury, his coworkers stated that claimant was required to do lifting at work, and the MRI reports established that claimant had a large herniated disc that was not present in October 1998. The hearing officer resolved the conflicts in the evidence. The matters emphasized by carrier were for the hearing officer to consider in making her fact determinations in this case. We would note that the hearing officer may choose to believe all, part, or none of the testimony from any witness. See Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). We will not substitute our judgment for the hearing officer's because her

determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

Carrier contends that the hearing officer erred in placing the burden of proof on carrier to prove that the injury was not compensable. However, from reading the hearing officer's decision, we conclude that the hearing officer determined that claimant met his initial burden to prove he sustained a compensable injury. The hearing officer noted the lack of evidence to overcome the fact that claimant met his burden to prove a "prima facie case." The hearing officer was entitled to consider evidence from carrier to rebut claimant's evidence in deciding whether claimant met his burden of proof. We have reviewed the record and we conclude that the hearing officer did not place the burden of proof on carrier to prove that claimant did not sustain a compensable injury.

Carrier next challenges the sufficiency of the evidence to support the hearing officer's disability determination. We apply the Cain standard of review to this challenge. The applicable standard of review and the law regarding disability is set forth in Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995. The hearing officer determined that claimant had disability from June 24, 1999, and "continuing." Claimant's testimony supports the hearing officer's disability determination. We will not substitute our judgment for the hearing officer's because her disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain.

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Dorian E. Ramirez
Appeals Judge