

APPEAL NO. 000419

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 7, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) did not suffer a compensable injury in the course and scope of his employment on _____ (all dates are 1999 unless otherwise noted), and did not have disability from such an injury. The claimant appeals, reciting evidence which he contends shows he had an injury in the course and scope of his employment and had resulting disability. The respondent (carrier) responds, citing alleged discrepancies in the claimant's description of the alleged injury, and urging that the hearing officer's determinations are sufficiently supported by the evidence and should be affirmed.

DECISION

Affirmed.

The evidence is somewhat in conflict. Claimant was employed as an "instrument technician" for (employer). Claimant testified, in some detail, that on _____, he was repairing or replacing a transmitter at the top of an elevated platform; that he had gone up and down the ladder several times; that he had put the transmitter and some tools in a bucket; and that when he raised the bucket to place it on the platform he felt a "stretch" or "abnormal pull" in his right lower back. Claimant testified that he continued work; that he finished his shift; that that evening he experienced some muscle spasms; that the next day, Saturday, _____, he worked a 12-hour shift and experienced some "shooting pain" in his right lower back; that on the evening of _____ his girlfriend gave him a massage and rubbed his muscles down; that he again worked a 12-hour shift on _____; and that his back pain got progressively worse. Claimant testified that on Monday, _____, when he woke up, his back was "totally locked up" and that he "called in sick." Claimant made an appointment to see Dr. B, and saw him on _____. The sequence of events at the doctor's office is somewhat unclear regarding when claimant gave a history to the nurse, when the nurse called the employer to obtain a workers' compensation claim number, or whether claimant was alleging a work-related injury at the time. Claimant testified that he had sustained minor back strains in 1992 and 1996, had sought chiropractic adjustments, and those conditions had resolved. Claimant also testified that he had worked out and lifted weights in the past but had not done any weightlifting in the six months before _____,

Dr. B, in a report dated May 11th, of the _____ office visit, noted that claimant had been bothered with back pain "for two days" and that "he didn't know if his complaint had happened at work or while exercising." That report indicated that claimant would be responsible for payment "himself and his personal health insurance," but that "[a]fter filing out his paperwork [claimant] informed [Dr. B] that he wanted to file his injury as a workers'

compensation case." The report then goes on to document a number of calls between Dr. B's office and the employer. In a report dated April 9th, Dr. B noted complaints of back pain by claimant when he "was squatting down, reached for tools, tearing out a transmitter, twisted, checked under a pipe that was overhead." No mention is made of a bucket. Dr. B checked as diagnoses a number of items including myalgia, lumbar discopathy and lumbosacral segmental dysfunction. The injury recited on the Employer's First Report of Injury or Illness (TWCC-1) dated April 7th recites that claimant sustained his injury squatting "and walking a lot between block houses." Dr. B took claimant off work until April 7th, when claimant was released to light duty with a five-pound lifting, pushing, pulling restriction. The employer apparently did not have light duty which would accommodate claimant's restrictions until May 3rd, when claimant returned to work at light duty for his preinjury wage.

On referral from his attorney, claimant changed treating doctors to Dr. T. Dr. T's history, in a report dated May 21st, describes that claimant twisted his back climbing a ladder. Dr. T diagnosed thoracic/lumbar intervertebral disc syndrome and muscle spasm. An MRI was performed on July 7th and showed "4 mm" herniated discs at L3-4, L4-5 and L5-S1. Claimant was subsequently examined by Dr. F, a Texas Workers' Compensation Commission required medical examination doctor. Dr. F's report of August 9th includes a history of the bucket-lifting incident, claimant working light duty and receiving chiropractic treatments, and a notation that "[h]e does have pain when he is carrying out his activities of weightlifting." Dr. F had an impression of "[l]umbar degenerative disc disease without radiculopathy." Dr. F opined that he does "not believe that [claimant] has a herniated nucleus pulposus [HNP]." Dr. F believes that claimant has "degenerative disc disease at three levels and does not have [HNP]." Dr. F concludes:

In summary then, it is the opinion of this examiner that [claimant] had significant degenerative disc disease prior to the alleged incident of _____. Through successful chiropractic care, he has now made a complete recovery without residual impairment.

Claimant continued working light duty until September 14th, when he was laid off or put on personal sick leave for a reason unrelated to this claim. Claimant testified that he could have continued working in the light-duty position but for the unrelated medical condition.

The hearing officer found that claimant had not sustained a compensable injury on _____, and, because he did not have a compensable injury, he did not have disability. See the definition of disability in Section 401.011(16). Claimant appeals, essentially summarizing the evidence from his perspective, citing Appeals Panel decisions for the proposition that "disability may be established by the testimony of the Appellant alone," that "aggravation of a pre-existing condition occurs when there has been some enhancement, acceleration or worsening of the underlying condition from an injury" and that "aggravation of an ordinary disease of life is compensable." While those propositions

may be correct as general truisms, they depend on the fact finder making a determination that claimant, in this case, did, in fact, sustain an injury on _____. There are conflicting histories and testimony from claimant exactly how the _____ incident happened, whether or not claimant had engaged in weightlifting around the time of the alleged injury and claimant's explanation of the discrepancy in the history given to Dr. B that he was "delirious" from "excruciating pain." There is further conflicting evidence whether claimant has herniated discs as the MRI reading suggests or whether those readings merely show degenerative disc disease as opined by Dr. F. We have frequently noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge