

APPEAL NO. 000565

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 February 10, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury to his low back in addition to the compensable left shoulder injury on _____ (all dates are 1999 unless otherwise noted), and that claimant did not have disability from the compensable left shoulder injury.

Claimant appealed, reciting testimony and evidence supporting his position and asserting that the hearing officer=s decision is against the great weight and preponderance of the evidence. Claimant requests that we reverse the hearing officer=s decision and render a decision in his favor. The appeals file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

Claimant was employed in the employer=s warehouse filling orders. Claimant testified that on _____ he was working in the warehouse when a coworker threw a cardboard box containing some plastic parts, hitting claimant. An identical box was examined by the hearing officer at the CCH and the parties appear to agree that the box weighed about eight pounds. The crux of the case is where did the box hit claimant. Carrier has accepted liability for a compensable left shoulder injury.

Claimant, at the CCH, testified that the box hit him in his low back. In a transcribed statement, claimant said the box hit him ~~on~~ the back, below the shoulder, right between his shoulder and his hip.@ The coworker who threw the box (to get it out of his way) in a handwritten statement said, ~~A~~The box hit him in the back on his right upper shoulder.@ Claimant reported the injury to his immediate supervisor, Mr. JG, who referred claimant to the shipping department supervisor, Mr. RC. Mr. JG testified that when claimant reported the incident, he pointed to his left shoulder as being where he was hit. Mr. RC testified that claimant had told him that he had been hit in the left shoulder and neck with the box. Claimant was asked if he wanted to see a doctor but claimant said that he thought he would be all right. Claimant finished working on _____, and worked on _____. Claimant testified that initially his shoulder hurt but subsequently his low back began to hurt and got progressively worse over the weekend. Claimant testified that on Monday (which would have been August 23rd), claimant told his supervisor that he was unable to work because of his injury and asked to see a doctor. Claimant was sent to (clinic). The first clinic report is dated August 30th with a date of injury of _____. (The one week discrepancy was not developed or explained.)

The clinic reports are in long hand and difficult to decipher. The August 30th clinic note recites a history of A . . hit (L) part shoulder on rhomboid. Did not have pain till next day in [illegible]. . . . c/o radiation of pain down to (L) leg and into foot.@ (It should be noted that the attorneys and the hearing officer were attempting to decipher the note at the same time as a translator was translating what was being said to claimant; consequently, two to four people were speaking, in two languages, at the same time, making their translation almost as unintelligible as the written version.) A clinic note of August 31st notes complaints of left Ashoulder blade pain.@ Another clinic note dated September 3rd indicated the left shoulder was A[i]mproved@and that A[h]is (L) shoulder and neck are not bothering him. Feels fine. He is c/o (L) leg pain that comes from the (L) [illegible] low back.@ The employer had refused to authorize treatment of the back and the September 3rd note states AI have told him we only have permission to do (L) shoulder.@ Claimant testified that because the clinic refused to treat his back, he went to his own family doctor, Dr. A. Dr. A's records note a date of injury of _____ and in a report dated September 7th, Dr. A recited the box Ahit him on back (mid to lower). . . .@ Dr. A diagnosed an acute lumbosacral strain with radiculopathy and ordered an MRI. The MRI was performed on September 13th and showed aAlarge left paracentral L4/5 disc herniation with moderate to severe central canal stenosis@and a small left paracentral AL1/2 disc herniation.@ Claimant was subsequently seen by Dr. P, for evaluation. In a report dated January 8, 2000, Dr. P recited that claimant was struck in the back by a 10-pound box and opined that claimants A1. Severe L4-5 disc herniation 2. Mild L1-2 disc herniation@were the direct result Aof the injury sustained on _____.@ That opinion was repeated in a report dated January 13, 2000.

Dr. L performed a record review for carrier on January 20, 2000. In a report of that date, Dr. L recites that the box Ahit the left part shoulder on the rhomboid.@ Dr. L considered the MRI showing disc herniations but in response to a question whether the Aincident of _____" could cause the current condition, responded:

There is no indication that based on the mechanism of injury that the alleged injured worker's current complaints of radicular pain to the left leg and into the foot would be consistent with the mechanism of injury. There is no indication that this individual would have sustained a lumbar sacral strain as he has documentation as of _____ that he has full ROM [range of motion] of the lumbar spine. Therefore, the incident of _____ did not cause the injured workers= alleged current back condition including radicular type symptoms.

Claimant testified that he received physical therapy and treatment and that he was released to return to full duty on January 17, 2000, but because of some difficulty in getting

some records, he did not actually return to work until January 19, 2000. Claimant is alleging disability from August 30 to January 17, 2000.

The hearing officer commented that there is no doubt that claimant was hit by the box but went on to state:

However, judging from all the attendant circumstances, as well as listening to the testimony of all the witnesses and reviewing all the medical documents, I find that the claimant has not sustained his burden in showing that his injury extends to [the] low back, as well [as] the accepted left shoulder injury.

There is no doubt from the radiology test that the Claimant has disc herniations in his lumbar spine. However, the incident on or about _____, was not a producing cause of these herniations.

Regarding disability, there is insufficient evidence that the shoulder injury resulted in any disability.

Claimant appeals the hearing officer's decision, reciting his version of the box incident, clinic records which note back complaints for which the employer refused to authorize treatment, Dr. A's records and reports, Dr. P's opinion, and the MRI. Claimant stresses the box was not gently tossed and several doctors were of the opinion that the box incident caused claimant's disc herniations and that claimant had had no prior back injuries or complaints.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he 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 hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight 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). The evidence here was certainly conflicting, particularly on where claimant was hit by the box. While another fact finder could have reached a different result from the evidence in the record, that does not provide a basis

for us to disturb the decision on appeal. Salazar, et al. v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id.*

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge