APPEAL NO. 000936

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 March 29, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury; that there is therefore no date of injury; that the respondent (carrier) timely contested compensability of the claimed injury; that the claimant did not timely report the claimed injury of _____, to the employer; and that claimant did not have disability or show an inability to work due to the alleged injury. It was stipulated at the beginning of the CCH that the carrier had timely disputed the compensability of the injury and no evidence was therefore developed on this previously disputed issue.

The claimant has appealed and argues that the decision is against the great weight and preponderance of the evidence and that he sustained an injury at work as stated. The claimant also contends that the carrier did not timely dispute the claimed injury. The carrier responded that the matter of timely contest by the carrier was stipulated and that the evidence is sufficient to support the hearing officer on all other appealed issues.

DECISION

We affirm the hearing officer's decision.

The claimant became employed by (employer) and was stationed at the business of (client company) as a computer technician. His supervisor for the client company was Mr. H. The claimant testified that he was lifting a heavy computer monitor and moving it on July 20, 1999, when he felt a "pinch" in the back of his neck. (All dates are 1999 unless otherwise noted.)

The claimant went to the doctor on July 22nd and was treated by nurse-practitioner Ms. M. He said that he went for chest pains, stress, and radiating arm pain, but said he did not associate any of his discomfort with the lifting incident. Both he and Ms. M (who testified by telephone) agreed that claimant made no mention of the monitor incident either on this date or at his follow-up visit of August 4th.

The claimant said that he had been diagnosed with bipolar disease in the spring of 1999, and that his wife was diagnosed with a stage five cancer at the end of July. All of these were stressors, he said, and caused him to miss a lot of work after her diagnosis.

Ms. M said that she did not view it as unusual that a patient would not immediately understand the source of pain. Ms. M said that she was told by claimant that he had no prior history of neck or shoulder injury. She referred him after the August 4th appointment for further evaluation of left arm numbness and weakness. The claimant said that it was the referral doctor, Dr. J, who made him realize that the source of his pain was the lifting incident. He said that Dr. J told him the neck problem had been due to something recent and Dr. J asked him to think of anything he might have done.

The claimant said that he might have had neck problems in 1996 but was not told that he had any injury. He denied any previous injury to his neck and said that he did not know that any stiffness in his neck before was the result of an "injury."

The claimant said that he told Mr. H, sometime after his August 12th appointment with Dr. J but before a counseling session on August 16th, that he needed emergency surgery due to an injury at work. Mr. H denied this; he said that the prospect of a work-related injury was brought up at the end of a meeting on August 16th, when claimant was being counseled a second time for excessive absenteeism. Mr. H said that claimant had initially been counseled for absenteeism on July 12th. Mr. H said that claimant maintained he was hurt on June 20th. When Mr. H subsequently looked at the calendar, he realized that June 20th was a Sunday and not a workday.

Ms. R, another administrator for the client company, said that she saw claimant by the break room on either August 12th or 13th and said she was sorry to hear that he had neck and back problems. She said she asked claimant if he knew what the cause was and he responded, "I have no idea." She was then surprised when, during the August 16th meeting at which she was also in attendance, he claimed a June 20th injury. The claimant said that the discrepancy in the months of the injury that he related was due to the fact that he had difficulty remembering dates.

The claimant had been off work since September 7th when he was granted a two-week medical leave. He was terminated on September 21st due to a business need to fill his position. He had had surgery on February 3, 2000, on his cervical spine and had not yet been released. There was no testimony developed as to claimant's ability to work between November 5th (the date from which he sought temporary income benefits, an earlier period having been paid by the carrier pending receipt of medical evidence) and the date of his surgery.

An MRI of claimant's cervical spine conducted on August 5th was reported as showing degenerative disc disease, with a moderate herniation at C5-6 with moderate compression on the spinal cord. There was significant left lateral recess stenosis. Dr. J's August 12th report says that claimant had neck and left arm pain beginning about a week and one-half before and had no injury or overt trauma, but attributed his symptoms to repetitive motion. Records of a neurosurgical consultation with Dr. C on September 1st show a more detailed history of injury from lifting the monitor on July 20th, with persistent and growing pain thereafter.

A doctor for the carrier, Dr. CB, examined the claimant and stated his opinion that there was no causal relationship between the contended incident and his condition. Dr. CB said that claimant's condition was preexisting and due to degenerative disease.

Beginning three days after the claimant was hired, he began missing frequent whole or partial days at work. The July 12th counseling record stated that he had at that time worked seven and one-half days out of 19 since he was hired. On August 23rd claimant

gave a statement to the adjuster; he said this caught him by surprise. The claimant said he was not represented by counsel at that time and agreed to tell the adjuster "exactly what happened." He told the adjuster he had been injured moving the monitor on July 22nd.

Finally, the carrier included in its exhibits some notes of previous medical treatment given to the claimant. In August 1991 he was involved in a motor vehicle accident which left him with feelings of tightness into the shoulder and mid back. He was treated in 1996 for "reactivation of disc irritation." In August 1998 he slipped in the shower and was treated for a hurt neck and back. When Ms. M testified, she said that she was not made aware of this prior history. She agreed that the history of an accident was important in determining how a patient should be treated.

W e note that the point of error raised concerning timely contest by the carrier was not before the hearing officer and was disposed of by stipulation at the beginning of the CCH. We therefore cannot assign error to the hearing officer for making a finding consistent with the agreement of the parties. This point of appeal is not well-taken.

Regarding the remaining findings and conclusions, we would note that the hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). In order for disability to be found, there must be a threshold finding that there has been a compensable injury. Section 401.011(16).

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 situation in this case. The hearing officer evidently did not believe the testimony of the claimant and he specifically noted inconsistencies reflected in the records as to the intensity of the claimant's reported initial pain or the dates of the contended injurious incident. This was within his responsibility as the finder of fact, who has the opportunity to personally observe or hear the testimony of witnesses.

We cannot agree that the amount of evidence against his findings of fact constitutes a "great weight" and therefore affirm the decision and order on all appealed points.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge