

APPEAL NO. 001482  
FILED AUGUST 8, 2000

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 April 3, April 26, and May 16, 2000, in \_\_\_\_\_, Texas, with \_\_\_\_\_ presiding as hearing officer. She determined that the respondent (claimant) sustained a compensable injury on \_\_\_\_\_, and had disability from \_\_\_\_\_, through the date of the CCH. The appellant (self-insured) appeals, contending error in an evidentiary ruling and that these determinations are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant's job involved removing "shores" from tanks. Shores are placed in tanks under construction to prevent sagging during the heat-treating process. They are made of steel, weight approximately 323 pounds, and are slightly over nine feet high. Shores are placed vertically in the tank and are tack welded in place. When they are to be removed, an employee goes into the tank, grinds the welds, and rocks the shore in place to completely break the welds. Once this is done, the shore is maneuvered into position where a chain is attached and a crane lifts it out of the tank. The process was estimated to take about 10 minutes.

The claimant testified that on the morning of \_\_\_\_\_, he struggled to break loose a shore, including hitting it with a hammer. During the process, he said, he did not feel back pain. After lunch, he said, his back began to feel tight. About 3:00 p.m., according to the claimant, he went to the office of (Mr. M), his supervisor, and reported that he felt like he had pulled a muscle sometime during the day but could not pinpoint a specific incident. Mr. M speculated it might be caused by the weather or a case of pleurisy. Later, at home, the claimant took a pain reliever to no avail. The next morning at work, he said he again discussed his pain with Mr. M who urged him to keep working. Later that day, he saw the company nurse, who, in a written statement, said the claimant could not identify a specific incident. He also saw Mr. W (Mr. W) that day and, according to the claimant, specifically told Mr. W that he hurt himself moving the shore. He then went to an orthopedic doctor and eventually changed treating doctors to Dr. R (Dr. R), on November 12, 1999. An MRI showed bulging at L4-5 and L5-S1.

The claimant has not worked since September 23, 1999. A limited work release, largely undecipherable, was issued on \_\_\_\_\_, by Dr. S (Dr. S). Dr. R placed the claimant in a continuing off-work status since his first visit on November 12, 1999.

Much other evidence was introduced at the CCH by supervisors and coworkers, none of whom were present in the tank when the claimed injury occurred and who did or did not see the claimant limping or appearing to be in pain. Mr. W and Mr. M both testified that the claimant could not identify any particular incident that caused his back pain. On \_\_\_\_\_, the claimant completed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) in which he attributed a "muscle strain" to "pulling a shore from a tank case." By this time, he was represented by an attorney.

The claimant had the burden of proving he sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide and could be proved by his testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer considered the evidence and found the claimant credible in his assertion of a back injury caused by releasing the shore. She also found his testimony bolstered by medical evidence and an injury. The self-insured stressed, both at the CCH and again on appeal, that the claimant could not initially identify a cause of his back pain and only did so after meeting with his attorney. It further argues, correctly, that the mere fact that pain appears at work does not necessarily establish that the work caused the pain. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In her role as fact finder, the hearing officer was required to evaluate the evidence and determine what facts had been established. She was not persuaded by the evidence or the self-insured's arguments that the claimant really does not know what caused his back condition. Rather, as mentioned above, the hearing officer found the claimant credible in his account of an injury while removing shores. 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 of the credibility of the respective witnesses for that of the hearing officer, but find the evidence sufficient to support her determination that the claimant sustained a compensable injury as claimed.

The self-insured appeals the disability finding on the grounds that the claimant "presented inadequate medical evidence to support a nine month inability to work" and refers to a functional capacity evaluation (FCE) which the self-insured describes as confirming an ability to return to work in a light to medium capacity as of February 20, 2000. We first note that the definition of disability is the "inability as a result of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Nowhere does this definition require proof of an "inability to work." Whether disability exists is also a question of fact for the hearing officer to decide and can be proved by a claimant's testimony alone if deemed credible

by the hearing officer. Appeal No. 93560, *supra*. Generally, an employee who has been issued a limited work release is not required to seek work while still suffering the effects of the compensable injury in order to establish disability. Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991. The FCE was evidence of a return to limited duty and did not necessarily end disability. We believe the testimony of the claimant and the work excuses of Dr. S and Dr. R provide sufficient evidence to support the disability determination.

Finally, the self-insured appeals the exclusion of a surveillance videotape of the claimant's activities on May 11, 12, and 13, 2000, shortly before the third and final session of the CCH because it was not timely exchanged. The self-insured argues that it exchanged the tape when it became available and that the activities in the tape only occurred shortly before the videotape was made. It is not clear whether the self-insured is arguing that the opportunity to tape only arose then or that the claimant did not demonstrate the ability to perform such activities until then. In any case, it did not disclose whether earlier attempts were made to obtain this kind of evidence or why they were unsuccessful. We review evidentiary rulings on an abuse of discretion standard and will reverse a decision of a hearing officer only if the decision is wrong and outcome determinative. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Texas Workers' Compensation Commission Appeal No. 941414, decided December 6, 1994. We find no error in this evidentiary ruling and question whether it, in any case, produced the wrong decision on the disability issue. This is particularly so since disability does not involve an inability to work but an inability to earn the preinjury wage.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

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Alan C. Ernst  
Appeals Judge

CONCUR:

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Tommy W. Lueders  
Appeals Judge

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Robert W. Potts  
Appeals Judge