APPEAL NO. 002068

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 August 7, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury; that the date of the alleged injury was _____; that the claimant did not timely report his alleged injury and did not have good cause for his failure to do so; and that the claimant has not had disability because he did not sustain a compensable injury. In his appeal, the claimant argues that each of those determinations is against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that while he was tightening a discharge pipe, his wrench slipped causing him to fall to the ground, landing on his right knee on the cement floor. The claimant testified that two coworkers were assisting him and that they fell also, landing on the back of his neck. The claimant stated that Mr. S, the president of the employer, witnessed the fall. In addition, the claimant testified that he reported his injury to Mr. S. The claimant stated that he first sought medical treatment on December 8, 1999; that his fall at work occurred either one or two days before December 8th; and that he called Mr. DS, the vice-president of the employer, on December 8, 1999, and told him that he was going to the doctor because of his fall at work.

Mr. S testified that he could not recall an incident where the claimant and two other employees fell at work. Mr. S stated that he first learned that the claimant was alleging that he sustained a work-related injury on _____, when the claimant came in to report that he was going to have surgery on February 17, 2000, and that his injury was work related.

Mr. DS testified that he first learned that the claimant was alleging that he sustained a work-related injury on _____, when he came in to report that he was going to have surgery on February 17, 2000. Mr. DS specifically denied that the claimant had told him on December 8, 1999, that he was missing time to go to the doctor because of his fall at work. In addition, Mr. DS stated that he contacted the claimant on February 14th to obtain the information to complete the Employer's First Report of Injury or Illness (TWCC-1) and that the claimant could not tell him when or how his injury occurred.

The claimant first sought treatment on December 8, 1999, from Dr. PC. Dr. PC's records reflect that the claimant complained of right knee pain of three months duration and that the claimant did not recall any history or trauma to his right leg. Dr. PC referred the claimant to Dr. S. In his January 19, 2000, progress notes, Dr. S diagnosed probable radicular pain in the right leg and noted that the etiology of the claimant's injury was

unclear. Dr. S referred the claimant for a lumbar MRI which revealed disc bulging at L2-3 and L3-4, and a disc protrusion at L4-5. Dr. S referred the claimant to Dr. HC for electrodiagnostic testing. Dr. HC's January 26, 2000, report includes a history of the claimant's having fallen at work four months ago, landing on his right knee and buttock. Finally, Dr. S referred the claimant to Dr. G, a neurosurgeon. In his _____, report Dr. G gives a history of the claimant's having had problems with his back off and on for several months and that the claimant did not recall a specific injury to his back. Dr. G diagnosed an acute herniation at L4-5 and recommended spinal surgery. On February 17, 2000, Dr. G performed a right L4-5 hemilaminectomy with disc removal.

Initially, the claimant challenges the hearing officer's determination that the date of his alleged injury is _____, stating that "there is not even a scintilla of evidence to suggest the date of injury is _____." We find no merit in this assertion. The claimant testified that he listed December 8, 1999, as the date of his injury at the suggestion of the carrier's adjuster because it was the day he first sought medical treatment and that the fall at work occurred either one or two days before December 8th. As such, the claimant's testimony supports the hearing officer's determination that the fall at work occurred on _____, and we perceive no error in the hearing officer's having found a date of injury consistent with the claimant's testimony.

The claimant had the burden to prove that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n 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. 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 manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that the fall described by the claimant occurred; however, she further determined that the fall did not cause damage or harm to the physical structure of the claimant's body and that it did not result in an injury. The hearing officer was acting within her province as the finder of fact in so finding. Our review of the record does not demonstrate that her determination that the claimant did not sustain a compensable injury as a result of his fall at work is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse the hearing officer's injury determination on appeal. Pool; Cain.

The hearing officer also determined that the claimant did not report his alleged injury to his employer until _____. In so doing, the hearing officer credited the testimony from Mr. S and Mr. DS that they did not learn that the claimant was alleging that he

sustained a work-related injury until _____, over the claimant's testimony that he reported his injury to Mr. S on the day that it occurred and to Mr. DS on December 8, 1999, when he called in to say that he was going to the doctor for the injury he sustained in his fall at work. The hearing officer also gave more weight to Mr. S's testimony that he did not witness the claimant's fall than she did to the claimant's testimony to the contrary. As the fact finder, the hearing officer was free to give more weight to the testimony of Mr. S and Mr. DS than to that of the claimant. Nothing in our review of the record demonstrates that the hearing officer's notice determination is so contrary to the great weight of the evidence as to compel its reversal on appeal.

Given our affirmance of the determinations that the claimant did not sustain a compensable injury and that he did not timely report his alleged injury to his employer, we likewise affirm the determination that the claimant did not have disability. 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). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge