APPEAL NO. 950224

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001, *et seq*. On November 23 and December 28, 1994, a contested case hearing (CCH) convened in (city), Texas, with (hearing officer) presiding. The issues were whether claimant had sustained a compensable injury on (date of injury), and whether he had the inability to obtain and retain employment equivalent to his preinjury wage (disability) as a result of that injury.

The hearing officer determined claimant had injured his back on (date of injury), and had disability therefrom through the date of the final session of the hearing.

The carrier has appealed, asserting that the decision of the hearing officer is against the great weight and preponderance of the evidence. The claimant responds that the decision is not reversible and should be affirmed.

DECISION

We affirm.

Claimant was employed by (employer) as a winder. He stated that he hurt his lower back on (date of injury), in the course of his day's activities. He could not recall a specific incident, but stated that part of his activities involved lifting and moving steel cores that weighed in excess of eighty pounds. Although he acknowledged that forklifts were supposed to perform this task, they were not always available. The statement of (Mr. H), a supervisor for the employer, confirmed that occasional lifting of the cores was part of the job, perhaps as frequently as once an hour.

Claimant's supervisor (Mr. ML) stated that claimant complained of back pain that morning, before he went on shift. Both Mr. ML and another supervisor, (Mr. V) agreed with claimant's testimony that he complained at around 5:00 p.m. of increased back pain, and paramedics were called. The undisputed testimony was that claimant was adjudged to have a back strain and advised to stop work for a couple of days. However, claimant never returned to work. He said that he retained an attorney later that month.

Claimant agreed that his employer had offered to refer him to a doctor but that he declined to see a doctor of their choice. Claimant stated he did not see a doctor of his own until his attorney referred some doctors. He eventually saw (Dr. M) on September 30, 1994. Claimant said he did not see a doctor sooner because the carrier refused to pay for medical treatment. There was no proof to the contrary from the carrier.

Dr. M, reciting claimant's history of the occurrence, and based upon his diagnosis of severe lumbar strain, took him off work on October 20, 1994 ("until he felt better") and prescribed physical therapy. Claimant's testimony at the second session of the hearing indicated minimal compliance with the recommendation for therapy. Claimant testified

(again without dispute from the carrier) that the carrier would not pay for further testing to rule out a herniated disc. Claimant stated he had not paid Dr. M any money and Dr. M had agreed to work with him pending the outcome of the CCH.

Claimant stated he had been in an automobile accident that he said was minor, on September 17, 1994. He stated that it was a left side impact and that it injured only his neck area. He stated that he consulted with a different doctor, (Dr. Z), for his neck injury and did not ask him to examine his lower back. Claimant characterized his lumbar pain as on-and-off. He very briefly testified that although he felt he could try to work, both he and Dr. M were concerned about the possibility of reinjury until it could be determined whether he had a herniated disc.

A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ). In this case, there was testimony from several witnesses supporting a finding of injury. The hearing officer could and evidently did credit the testimony of the claimant on the matter of disability. 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 Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The record in this case does not lead us to the conclusion that the hearing officer's determination has been clearly wrong. We would note that a trier of fact cannot be faulted for finding a preponderance of evidence based in large part upon a dearth of evidence contrary to the testimony or even scant medical evidence on the issues. The trier of fact may choose to believe claimant's testimony, bolstered by the carrier's witnesses, and evidence of disability, over speculation that claimant's attorney and doctor had an arrangement to defer billing, or assertions of prior workers' compensation claims.

We affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge