

APPEAL NO. 980227
FILED MARCH 20, 1998

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 January 14, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer.

With regard to the issues at the CCH, she determined that the respondent (claimant) sustained a compensable injury on _____, and had disability from September 30, 1997, to the date of the CCH. The appellant (carrier) appeals, seeks a reversal of the decision and argues that it is contrary to the evidence. The claimant responds and seeks an affirmance of the decision.

DECISION

We affirm.

The hearing officer fairly summarizes the facts in the decision and we adopt her rendition of the facts. We discuss only those facts necessary to our decision. The claimant testified at the CCH that on _____, he was employed performing general maintenance duties for (employer) and sustained a neck, back, and groin injury while lifting an air conditioning unit. He testified at the CCH that the air conditioning unit weighed 150 to 250 pounds, while the employer's representative, Ms. C, testified it weighed 50 pounds. Ms. C said the claimant had some disciplinary problems prior to _____, that she gave him a negative disciplinary report on _____, prior to his providing her with notice of his injury, and that he was terminated on September 30, 1997, due to the disciplinary problems. The claimant acknowledged that he was involved in a March 1997 motor vehicle injury but said any back injury therefrom resolved quickly.

On September 30, 1997, the claimant's initial choice of treating doctor, Dr. E, diagnosed a lumbar spine strain and released him to return to work with a 20-pound lifting restriction. A lumbar x-ray taken at Dr. E's direction was negative. On October 16, 1997, his treating doctor, Dr. V, diagnosed a lumbar disc displacement, a lumbosacral sprain/strain, lumbosacral radiculopathy, a thoracic sprain/strain, cervical disc displacement, a cervical sprain/strain, cervical brachial neuritis and headaches. A December 17, 1997, computerized tomography (CT) test taken at Dr. V's direction revealed a disc protrusion at the L4-5 level of the claimant's back. Dr. V's records indicated that he excused the claimant from work since September 30, 1997.

An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). An employee has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The contested case hearing officer, as finder of

fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. 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. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

We will not substitute our judgment for that of the hearing officer when the determination is not 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We conclude that the compensability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

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). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. The disability determination is supported by Dr. V's reports and, therefore, we conclude that the disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm. Cain, *supra*.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Elaine M. Chaney
Appeals Judge