APPEAL NO. 93606

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993)(1989 Act). Following a June 11, 1993, contested case hearing in (city), Texas, appellant (hereinafter claimant) appeals the determination of hearing officer (hearing officer) that he did not suffer a compensable injury to his back in the course and scope of his employment on or about (date of injury). The respondent (hereinafter carrier) essentially responds that the decision of the hearing officer is sufficiently supported by the evidence and should be affirmed.

DECISION

We affirm the decision of the hearing officer.

The claimant had worked as a floor hand for (employer) since December 4, 1992. He testified that on (date of injury), after moving pipe and drill collars, his back began to hurt a little. On (date), when he reached down to pick up the end of a pipe, he said he felt "a tearing burning sensation" in his back, and he and a coworker, (RE), switched pipe ends so that claimant could carry the low end. He said he reported the injury to (RS), his supervisor, who he said discouraged him from reporting it as a workers' compensation injury. He also said RE had indicated the same thing to him.

That evening claimant rode home with the crew, including RE, RS, and (LH). At that point claimant said he was immobilized by pain and RE and LH had to assist him into his house. That evening he went to the emergency room at Hospital where he said he was diagnosed with ligament strain. He did not return to work the following day because he said the emergency room doctor had advised bed rest.

Claimant tried unsuccessfully to contact (RC), who was employer's tool pusher and part owner of the company, to tell him about his injury. Instead, he talked to RS who referred him to carrier.

The claimant maintained that his coworkers knew of his injury, that RE suggested he seek medical attention, and that RS was initially going to testify for him. RE, however, denied any knowledge of an injury, said he was not lifting pipe with claimant that day, and said he did not assist claimant into his house. He said that while riding home one day claimant said he was unhappy with RC and that he could go to the hospital and claim his back was hurting and it could not be detected. He said the next day, when he came by to pick claimant up, he was told claimant had gone to the hospital the previous night and would not be reporting for work. LH, employer's (Mr. D) man, also said that claimant never complained of an injury and that he did not assist claimant into the house on the evening of (date). He, too, said claimant had said in the car that he could say his back was hurting and no one could detect it. Claimant denied making this statement. Two acquaintances of claimant's gave affidavits stating that they observed two coworkers assisting claimant into

his house the evening of (date), and urging him to see a doctor.

RC testified that the first he knew of claimant's injury was when RS brought in an excuse from the emergency room; before that time, he said, no one had reported to him that claimant had been hurt. RC said that employer has a safety program which rewards periods of time with no reportable accidents, but he denied that injuries were not reported or that employees were fired for claiming an injury.

Medical records in evidence show that, following the emergency room visit, claimant saw (Dr. H) on January 21st. Dr. H's initial impression was lumbosacral strain and spondylolysis at L4 and 5; he stated that an MRI would be indicated if there was no improvement. On March 1st Dr. H stated that claimant continued to have severe low back pain with radiation down the left leg; he also indicated that further treatment was on hold pending approval by carrier. On March 12th claimant was seen by carrier's doctor, (Dr. E) who noted an earlier MRI scan showing a markedly degenerative L3-4 disc with suggestion of posterior protrusion, and mild bulges at L4-5, L5-S1. While Dr. E found claimant's symptoms to be "slightly magnified," he also noted radicular symptoms in the left leg as well as evidence of weakness. Dr. E concluded that further testing was recommended.

On May 17th claimant saw (Dr. M), a neurosurgeon, who found "pan lumbar degenerative disc disease with localization at L4-5 left," and who suggested claimant undergo lumbar discography to delineate the problem. At the hearing claimant testified that he told Dr. M of an incident occurring sometime after January 11th in which he fell down steps at home, face first, and required 20 stitches in his face. However, Dr. M's report only notes the work-related incident of January 11th.

This case involved diametrically conflicting testimony between the witnesses. When reviewing a question of the factual sufficiency of the evidence to support a finding, we consider and weigh all the evidence, both in support of and contrary to the challenged finding, and uphold the finding unless we determine that the evidence is so weak or against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of its weight and credibility. Article 8308-6.34(e). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may also believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The trier of fact also judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Further, a doctor's recitation of the history of an injury as reported to

him by a claimant, although admissible to show the basis of a doctor's opinion as to the cause of the claimant's problems, is not competent evidence that the injury in fact occurred on the date alleged by the claimant. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

After reviewing the record in this case, we conclude that the hearing officer's determination that the claimant did not suffer a compensable injury while working for employer is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust.

The decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge