APPEAL NO. 94064

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 16, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) suffered a back injury in the course and scope of his employment on (date of injury), and, if so, whether he had disability entitling him to temporary income benefits (TIBS). The hearing officer found in favor of the claimant on both issues. The respondent (carrier) appeals arguing that there was "no evidence of any accident upon which to base a finding of injury in the course and scope of employment" and that the evidence established that the claimant did not sustain disability because he was terminated for cause. The claimant replies that the evidence is sufficient to support the decision of the hearing officer.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant testified that he worked in the automobile department of a (employer) where he was responsible for writing repair orders and selling repair services. He stated that about 8:30 on the morning of (date of injury), he was walking across the employer's parking lot on his way to punching in on the time clock. According to his testimony, as he walked around a car, he slipped on the curb of a landscaped area and, because of the position he was in, twisted his back. He stated that he did not fall to the ground, but felt a pull and pain in his back which he described as "excruciating." There were no witnesses. Because he could not walk any farther, he returned to his car and drove to the back of the service center. He stated that within five minutes of the injury, he reported it to his supervisor (Mr. C). Mr. C purportedly only told the claimant to keep him informed. Because he was unable to continue with his normal duties, the claimant testified he went that same day to (Dr. M), a chiropractor.

Dr. M recounted the injury as occurring when the claimant felt a pull as he walked through the grass by the parking lot at his work place. He diagnosed a moderate sprain/strain of the lumbar spine and a mild sprain/strain of the cervical spine. He issued a work excuse notice from (date of injury), until June 25, 1993, when he released him to light duty (lifting limit of 20 pounds, no long periods of standing). He worked six hour shifts on June 25th, 26th and 27th, but because of the pain, he returned to Dr. M who again took him off work from June 28, 1993, through June 30, 1993, and returned him to light duties on July 1, 1993. Dr. M released him to regular duties on September 10, 1993.

The claimant testified that he told not only Mr. C of his injury but also (Mr. H), a manager trainee, and (Ms. S), a secretary. He recalled that he told Ms. S that he injured his back when he slipped on a curb and denied telling any supervisor that his present condition was related to a prior injury. He admitted, however, conversations at work before this accident about a previous back injury. An undated, handwritten statement of Ms. S related that he was limping because he stepped down from a curb in the parking lot "and

must have twisted his back in an old injury area that had bothered him a lot in the past. He told me he injured it originally playing ball with his kids." Mr. C, in an undated statement, reports that the claimant told him he injured his back "getting out of his car and that he would not be able to come into work today." Mr. C continued that "[b]ecause of his back being hurt before I did not question it anymore." The claimant admitted that he had collected workers' compensation benefits for a back injury 10 or 12 years ago and that in August 1992 he had another slip and fall accident, which injured his entire right side, while working for his previous employer. He also admitted to suffering a whiplash injury in an auto accident in February 1992.

According to a signed statement of (Mr. B), the department manager, the claimant gave him a medical slip on June 29, 1993, authorizing light duty and four hour work days. When questioned, the claimant told Mr. B he injured himself at home while getting ready for work. Mr. B also reports being told by other employees that the claimant said he was injured while coaching his son's little league team. According to Mr. B, the claimant refused to set out oil and air filters on display counters on June 29, 1993, saying they were too heavy. The next day he refused to install an air filter in a customer's car because he could not lift or bend over. On July 1, 1993, he threatened to sue his employer for his injury "as he had injured himself dressing for work." On July 2, 1993, he was terminated, according to Mr. B, for "refusing to comply with directives." The claimant stated that he was not at work on June 29 and 30, 1993, and therefore did not give his work releases to Mr. B on June 29th, nor refuse orders from his supervisor on either of these days. He also contends, contrary to Mr. B's statement, that he was terminated for refusing to do certain jobs which would have aggravated his condition. The jobs included lifting entire cases of oil, lifting heavy hoods of automobiles and leaning over the engine compartments and driving "low slung sports cars from outside into the service area." He also stated that he never told Mr. B his injury was from little league coaching because the season was already over in May. Although he may have told his coworkers his injury was "an old war injury, an old football injury," whenever a management person asked, he always said he injured himself in the parking lot. He contended that he was unable to work until September 10, 1993, when Dr. M released him to unrestricted work.

Mr. B also testified that he met the claimant on June 28, 1992, which was the day Mr. B first arrived on the job from another store in (city). He corrected his written report to indicate that he first spoke with the claimant not on June 29, but June 28, 1993, when he counseled him. He had asked the claimant not to lift cases of oil, but to put individual air and oil filters on the display racks but claimant refused. According to Mr. B, the claimant's reaction to his attempts to counsel him was that "he didn't think he should have to put up or tolerate with any of this B.S." Claimant again told Mr. B he hurt himself getting ready to come to work.

The pertinent determinations of the hearing officer are:

FINDINGS OF FACT

4.Claimant twisted his back when he slipped on a curb in the parking lot of employer's store while walking from his car to employers (sic) store to report to work on (date of injury).

5.Employer designated the parking lot where claimant parked his car on (date of injury) as the employee parking area, and this parking lot
was so closely related to employer's store as to be fairly treated as part of employer's premises.

6.Claimant suffered a lumbar and cervical sprain as a result of slipping on a curb in the parking lot of employer's store on (date of injury).

7.Claimant was unable to obtain and retain employment at his preinjury wage because of his lumbar and cervical sprain from (date) to September 10, 1993 when he was released to return to full-duty work.

8.Claimant performed light duty work for employer for fewer than 8 hours per day on June 25, 26, 27, 1993 and July 1,2, and 3, 1993.

9.Claimant was not terminated for cause on July 3, 1993, because one of the three disciplinary actions required for his termination was not based on his willful misconduct, but resulted from miscommunication between claimant and his supervisor regarding whether claimant was ordered to stock oil filters or cases of oil that exceeding (sic) his lifting restriction.

CONCLUSIONS OF LAW

3.Claimant suffered a back injury that arose out of and in the course and scope of his employment on (date of injury).

4.Claimant suffered disability as a result of his (date of injury) compensable injury from (date) until September 10, 1993.

The carrier contends on appeal that there was no evidence of any accident on which a finding of an injury in the course and scope of employment could be made. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury which results in some period of disability. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). An accident is an undesigned, untoward event, traceable to a definite time, place and cause. Olson v. Hartford Accident and Indemnity Company, 477 S.W.2d 859 (Tex. 1972); Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. Whether an injury occurred as alleged in the course and scope of employment is a question of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165 provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the

evidence as well as the weight and credibility to be given the evidence. In reviewing a no evidence point, we consider only the evidence and reasonable inferences therefrom which, viewed in its most favorable light, support the finder of fact, and reject all evidence and inferences to the contrary. *See* Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987); Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. We will uphold the challenged finding of the hearing officer if any evidence of probative force supports it. Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. A claimant's testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Company, 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. In this case, the claimant testified that he slipped on a curb in the employee's parking lot - an action fairly within the definition of an accident. He explained some apparent inconsistencies in his later descriptions of how the accident occurred by saying he always gave a true account to those in supervisory positions while giving a less precise versions to fellow employees with somewhat vague references to prior injuries. He also disputed Mr. B's written account of what happened. Mr. B conceded that these accounts in counseling memoranda were written some days after the counseling when he had his first opportunity to record the information. The claimant also testified that he suffered immediate excruciating pain after the accident. Dr. M diagnosed sprains and strains. The 1989 Act defines injury as damage or harm to the physical structure of the body. Section 401.011(26). Sprains and strains can be compensable injuries. *See* Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993. The hearing officer thus credited the claimant's account of how he suffered an injury. This account constitutes some evidence of probative force which is sufficient to support the hearing officer's finding of a compensable injury and withstand a "no evidence" challenge. We will not overturn it on appeal.

The carrier also argues on appeal that the claimant did not have disability as a result of an injury, but that he was terminated from his employment for cause unrelated to any injury. Disability is defined as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 410.011(16). Whether disability exists is a question of fact. Texas Workers' Compensation Commission Appeal No. 931026, December 22, 1993. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). When reviewing a hearing officer's decision on a sufficiency of the evidence challenge, we will reverse such decision only if it is so contrary to the overwhelming weight 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 (Tex. 1986). The hearing officer made findings of fact that the claimant was unable to obtain and retain employment because of lumbar and cervical strain and that he was not terminated for cause.[1] The carrier argues on appeal

[1]This latter finding is somewhat confusing. The implication of the finding is that the claimant was not terminated for "just" cause based on the hearing officer's finding that the supervisor "miscommunicated" about what the employee was required to do and that the miscommunication resulted in a misunderstanding which in turn became the basis for the termination. Clearly both parties believed that the claimant was terminated. The claimant's non-

that the evidence establishes termination and that this in effect precludes the existence of disability. The Appeals Panel has observed that "while the reason for termination may be a factor to evaluate, the focus of an inquiry as to disability is on the inability to 'obtain and retain' employment at equivalent wages." Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992. The claimant testified about his inability to work because of a back injury. Dr. M concurred in this view until he issued a release to normal duties effective September 10, 1993. Whether the claimant was terminated with or without just cause was only one element for the hearing officer to consider in determining that the claimant had disability. We conclude that the claimant's testimony that he was unable to work as a result of his back injury, together with evidence of Dr. M's course of treatment and conclusions about the claimant's inability to return to work, after previous unsuccessful attempts to return to work, provided sufficient evidentiary bases for the hearing officer's determination of disability and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge

return to work is, in any event, consistent with the hearing officer's finding of disability.