APPEAL NO. 94095

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 15, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) injured his back in the course and scope of his employment on (date of injury), and, if so, whether he suffered disability as a result of this injury. The hearing officer found against the claimant on both issues. The claimant appeals arguing that the evidence he presented "clearly indicates" he met his burden of proof on the issue of injury in the course and scope of his employment and that he also established disability resulting from this injury. The respondent (carrier) replies that the decision of the hearing officer is supported by the evidence and should be affirmed.

DECISION

Finding sufficient evidence to support the decision and order of the hearing officer, we affirm.

The claimant worked for an employee leasing company as a shop foreman at a door installation company. He testified that around 11:00 a.m., on (date of injury), he was making a delivery to a customer. According to his usual practice, he lifted the door out of the bed of a pickup truck, rested it on the back of the truck and then repositioned himself under the door to carry it on his back to the customer's garage. He testified that he had to carry the door by hand and not use a dolly in order not to damage the door. He said that he twisted himself in the process of picking up and carrying the door and felt pain in his lower back. He had no help lifting the door and said he had never felt pain this bad before. He continued to work the rest of the day until his normal shift was over at 5:00 p.m. The next morning, Saturday, (date), when he woke up, his back felt sore, but he thought it was just normal "every day" kind of pain. He admitted to tossing a "nerf" football with his children for about a half hour that Saturday. The next day, his back bothered him even more. He stated that he told (Mr. R), his supervisor, the first thing Monday morning, (date), that he hurt his back, but did not know for sure how he got hurt and it might have been because of a previous spinal tap he underwent, or maybe was due to passing the football on Saturday, or perhaps was caused by lifting doors. He worked a full day on (date), and after work saw (Dr. W), a chiropractor. According to the claimant, Dr. W told him his back was injured by lifting or carrying something, and that it was too severe to have been caused by playing catch. Dr. W. gave him a light duty excuse which the claimant stated he presented to Mr. R the next day. He was able to work only a half day on June 15th because, according to the claimant, there was no light duty for him to perform and Mr. R sent him home. On June 17th, Dr. W released him from all work. The claimant stated that his wife called (Ms. T), the bookkeeper at his place of employment, on (date) to report the incident, but disputes that she told Ms. T that his injury was not job related. The claimant also testified he had a conversation with (Ms. D), the manager at the employee leasing company, on the evening of June 17th in which she said she would set up an appointment for him with her doctor because she was concerned that he get help from more than a chiropractor. He stated he did not keep the appointment she set up for the following Monday because he had already

seen Dr. W. He said he did not realize his injury was job related until his discussions with Dr. W. He submitted a notice of injury, TWCC-41, on June 17th.

On (date), Dr. W diagnosed lumbar paravertebral myofascitis, sciatic neuritis and nerve root compression syndrome. In a series of letters (two in October 1993 and two undated, but virtually identical), Dr. W stated a diagnosis of "lumbar disc injury" and that in all medical probability because of the severity of the injury, the claimant injured his back while at work, not playing catch. On July 29, 1993, (Dr. B), a neurologist to whom Dr. W referred the claimant, found "bilateral L5 and S1 radiculopathy." On October 4, 1993, (Dr. P), a Texas Workers' Compensation Commission (Commission) selected designated doctor, diagnosed muscle ligamentous strain of the lumbar spine and low back pain and returned the claimant to unrestricted work.

Ms. T testified that early on (date), she received a call from the claimant's wife who told her that the claimant had hurt his back, but not to worry because it did not happen on the job. She asked Ms. T to look after her husband so he would not hurt himself more. The claimant's wife did not testify.

Mr. R testified that on the morning of (date), the claimant told him he hurt his back from football or possibly because of new soles he had put on his shoes. No mention was made by the claimant of his injury being the result of a spinal tap or lifting doors. He reiterated that company policy was to report injuries as soon as possible. He testified that even though the claimant was at work the afternoon of (date of injury), he never reported any injury. He said that after the claimant gave him the light duty excuse, he told the claimant he could pick up some supplies and do other light duty work. Meanwhile, Dr. W called Mr. R asking him about the claimant's workers' compensation claim. When Mr. R asked the claimant about this, the claimant left and returned with a full duty excuse. The claimant then told Mr. R, that Dr. W could tell his injury was from lifting, not playing football. Still, according to Mr. R, the claimant never said he was injured picking up a door on (date of injury). Mr. R also recalled that the claimant had other work related injuries in the past and he never had a problem immediately reporting them.

Ms. D testified that she first knew of the claimed injury on (date of injury) when she was told of the claimant's light duty excuse. She talked to the claimant's wife that evening by phone. She believed that the claimant was present because his wife relayed the conversation between Ms. D and the claimant. Ms. D stated that she told the claimant's wife that she needed some specific information about the injury in order to complete the necessary reporting forms. The claimant's wife would not tell her when, where or how the accident occurred and, after she consulted with her husband, would only say "we'll talk later." Ms. D filled out the Employer's First Report of Injury or Illness (TWCC-1) on June 22, 1993, from information contained in Dr. W's report.

The relevant determinations of the hearing officer appealed by the claimant are:

FINDINGS OF FACT

6.Claimant complained to his supervisor, [Mr. R], on Monday, (date) that his back hurt, but did not report that an injury occurred at work, and performed his normal duties the entire day.

7.Claimant's wife reported to [employer's] bookkeeper on (date) that the injury was not work related.

10.Claimant was not precluded by a compensable injury from obtaining and retaining employment at preinjury wages from June 17 to October 4, 1993.

CONCLUSIONS OF LAW

3.Claimant failed to prove by a preponderance of the evidence that he was injured in the course and scope of his employment on (date of injury).

4.Claimant suffered no disability as the result of a compensable injury on (date of injury).

A "compensable injury" is "an injury that arises out of and in the course and scope of employment for which compensation is payable . . . ." Section 401.011(10). The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). This is ordinarily a question of fact to be determined by the hearing officer based on his or her evaluation of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as the finder of fact, is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and is entitled to believe all or part or none of the testimony of any one witness. Texas Workers' Compensation Commission Appeal No. 93416, decided July 8, 1993. In reviewing the sufficiency of the evidence to support a finding, only if we determine that the evidence is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust do we reverse. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

In the instant case, there was conflicting evidence about what the claimant considered to be the cause of his low back pain. The claimant's wife, according to Ms. T's testimony, specifically told her that the claimant was not attributing his injury to anything that occurred on the job. Although the claimant denied his wife ever gave this account of his injury, she did not testify. The claimant himself reported at least three possible causes for his pain. Ms. D testified that when she queried the claimant about the details of his injury so that she could complete the necessary reports, the claimant, through his wife, was evasive and unresponsive. Having thus reviewed the record, we conclude that the findings and conclusions of the hearing officer appealed by the claimant

are not so against the great weight of the evidence as to be manifestly wrong and unjust. *See* Texas Workers' Compensation Commission Appeal No. 93440, decided July 15, 1993.

"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). Since the claimant failed to establish that he sustained a compensable injury, he could not have disability as defined by the 1989 Act.

The decision and order of the hearing officer are affirmed.

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Alan C. Ernst
Appeals Judge

CONCUR:

_____
Lynda H. Nesenholtz
Appeals Judge

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Gary L. Kilgore
Appeals Judge