APPEAL NO. 94333

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 February 18, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) sustained a compensable injury on (date of injury), and, if so, whether he has resulting disability for the period claimed. The hearing officer found in favor of the claimant on both issues. The appellant (carrier) appeals arguing that the decision of the hearing officer is erroneous and contrary to the preponderance of the credible evidence. The claimant submitted no response.

DECISION

We affirm.

The issues in this case and the credibility of the claimant were hotly disputed. The claimant testified that he worked as a laborer or helper in the installation of metal products for the employer. He stated that on (date of injury), he was assisting (Mr. B) in the installation of a metal stairway on the outside of a building. The process included putting in place a 23 feet long metal stringer or support structure for the steps. He estimated that this weighed approximately 200 pounds. In the process, Mr. B stood on the upper floor or balcony and pulled on the stringer with a rope attached to one end while the claimant positioned himself under it and "walked it up" by lifting it over his head at one end while the other end rested on the ground. He stated that as he had the stringer over his head with his arms extended he slipped on some debris and lost his balance. This caused him to twist himself into a squatting position and fall to his right knee until he regained his balance. He completed the job and continued working the rest of the day. He said that over the weekend the pain in his back worsened and he told Mr. B the following Monday that he thought he pulled a muscle. He continued working until September 10, 1993. He missed work the following Monday and Tuesday, September 13th and 14th, and because the pain was shooting through his legs, he went to a local emergency room on September 15, 1993. X-rays of the lumbar spine and right knee were essentially negative. He was diagnosed with lumbar (L5) and right knee sprain. The emergency room physician excused him from work until September 22, 1993. He next saw (Dr. O) on September 28, 1993, who noted that the claimant had a previous laminectomy in 1985 and diagnosed his condition as post laminectomy and diskectomy with symptoms of radiculopathy of the right lower extremity. He requested an MRI scan of the lower spine, but this was not done apparently because the carrier refused to approve the procedure. Dr. O concluded that: "We may end up with some problems returning him back to work because of this [failure to approve the MRI]." Although an Initial Medical Report (TWCC-61), completed on January 11, 1994, by Dr. O, states "pt working," the claimant testified that he had no idea why the form said this and he was still was unable to work as of that time and as of the date of the hearing. He denied ever telling Mr. B that he hurt himself working on his house instead of his place of employment.

Mr. B testified that he was working with the claimant on (date of injury), in raising the stringer. He said that he could see the claimant down below the entire time and never saw him twist himself or fall. He was sure that if the claimant let go of his end, he would have noticed from where he was pulling because he then would have had the full weight of the stringer. He said the claimant "might have" told him of the injury that day, but does not specifically recall because they all "moan and groan" about their aches. He said that about two or three days later, the claimant said he may have hurt himself on the job or at home and mentioned only his lower back. He said he never noticed any difference in how the claimant worked after the alleged injury.

(Mr. BR), the president of the employer, testified that he saw his employees for about a half hour every morning and never noticed any change in the claimant's appearance and that the claimant never reported any injury to him until the claimant's wife called on the afternoon of September 14, 1993, to say he hurt himself on the job on (date of injury). Within a couple days, he said that the claimant came by to say he would report for light duty on September 24th, but never showed up after this. He also recalled giving the claimant some plywood to work on his house about the time of the alleged accident and recalled that the claimant re-injured his left leg in a fishing accident shortly before the claimed accident.

(Mr. H), the assistant manager and claimant's supervisor, testified that although he did not witness the accident he saw the employees, including the claimant, every morning and did not notice any physical differences in the claimant. He did not have any knowledge of the alleged injury until the claimant's wife called.

Based on this evidence, the hearing officer determined that the claimant sustained a compensable injury on (date of injury), and that he had disability from September 10, 1993, to the date of the hearing.

The carrier, in its appeal, asserts that the hearing officer "completely disregards and/or misinterprets all of the evidence introduced by the carrier" on the compensability issue. He points out that Mr. B's testimony was compelling while the claimant's was inconsistent and that the hearing officer was "mistaken" to rely on the claimant's testimony as opposed to Mr. B's, even more so because the claimant was an admitted three time convicted felon. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). It is the responsibility of the hearing officer under the 1989 Act to resolve conflicts and inconsistencies in the evidence, including medical evidence, and to determine what facts have been established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgement for that of

the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer clearly found the claimant's testimony that he was injured credible even after considering what the carrier points out both at the hearing and on appeal to be inconsistencies. We have frequently observed that the testimony of a claimant alone, if found credible by the trier of fact, can be sufficient evidence that an injury occurred. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. Similarly, sprains and strains can be compensable injuries. Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993. We believe that the testimony of the claimant in this case about the circumstances of his injury was sufficient evidence on which the hearing officer could base his decision that the claimant suffered a compensable injury. This testimony, bolstered by medical evidence of an injury, was not so contradictory or implausible as to require our rejection of the fact finder's determination. Nor do we consider the fact of the claimant's prior convictions either alone or in combination with Mr. B's testimony that he did not observe an accident on (date of injury), dispositive of the issue of credibility. While we may have reached a different conclusion had we been fact finders, this alone is not a sufficient reason to reverse a decision of a hearing officer. When reviewing a hearing officer's decision 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, a standard not met in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The carrier also argues on appeal that the hearing officer's decision on the disability issue is "wholly erroneous" and supported only by the testimony of the claimant. Disability is defined by the 1989 Act as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether disability exists is a question of fact for the hearing officer to decide, and a finding of disability may be based on the testimony of the claimant alone even in the face of contradictory or inconsistent medical evidence. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The carrier argues, and the claimant essentially agrees, that the only medically based release from work was given by the emergency room physician, and extended only until September 22, 1993. In addition, it points to the curious statement in Dr. O's TWCC-61 which states "pt working" as constituting the great weight and preponderance of the evidence.[1] The claimant was clear in his testimony that he did not believe he could work because of his injury on (date of injury). While the record here could support contrary inferences on the question of disability, we cannot say that the determination of the hearing officer based on this testimony is subject to reversal or without sufficient evidence in the record. *See* Texas Workers' Compensation Commission Appeal No. 93620, decided September 7, 1993.

[1]The claimant supplemented his appeal with another report from Dr. O completed after the hearing which contained the same "pt working" language. This evidence is cumulative at best and we will not consider it for the first time on appeal. Section 410.203(a). *See also* Texas Workers' Compensation Commission Appeal No. 93924, decided November 17, 1993.

Without going into each and every discrepancy in the testimony pointed out by the carrier, we simply do not think that the evidence presented by the carrier constituted the great weight and preponderance of the evidence. Finding sufficient evidence to support the decision and order of the hearing officer, we affirm.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge