APPEAL NO. 94353

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held in (city), Texas, on February 9, 1994, with (hearing officer) presiding as hearing officer. Two issues were presented at the CCH:

1.Did the appellant (claimant) sustain a compensable back injury on (date of injury)?

2.Does claimant have disability from (date of injury) to present?

The hearing officer determined that claimant did not sustain an injury in the course and scope of his employment on (date of injury). Accordingly, the hearing officer further determined that the claimant does not have disability as defined by the 1989 Act. The hearing officer decided that the claimant is not entitled to workers' compensation benefits. In his request for review, the claimant essentially challenges the sufficiency of the evidence to support the hearing officer's decision and order. In its response, the respondent (carrier) asserts that there is sufficient evidence to support the hearing officer's determinations and urges affirmance.

DECISION

Finding no error in the hearing officer's conclusions of law and sufficient evidence to support his factual findings, the decision and order are affirmed.

There was substantial conflict in the evidence presented at the CCH. However, apparently claimant was hired by (employer), Incorporated (employer) as a laborer on or about September 24, 1993, but he did not begin working until (date of injury). In the afternoon of (date of injury), claimant and another employee, (Mr. H), were moving a 55-gallon barrel filled with clamps. Claimant contends that he had pain in his back after moving the barrel; however, the claimant said he did not tell anyone but Mr. H about the alleged injury and he finished his shift. Claimant returned to work on (date) and was assigned to clean up an area, which entailed filling wheelbarrows with debris and emptying them in to a dumpster. Claimant stayed on the job until noon. He testified that at that point, the pain was so bad that he started to look for his supervisor, (Mr. M), to let him know about his injury. Claimant testified that he could not find Mr. M; however, the pain was so bad that he decided to go home. Claimant acknowledged that he did not tell anyone that he was leaving.

After he got home, claimant testified that he attempted to contact Mr. M by telephone, but his attempts were unsuccessful. Thereafter, he called employer's central office and told the woman who answered the phone about his injury. She apparently convinced claimant to seek medical treatment and he went to the emergency room at Hospital. After examining the claimant, an emergency room doctor gave claimant some pain medication and told him to go home and rest and return in two days if the pain continued. Claimant went back to the emergency room two or three days later and was treated by (Dr. G). Claimant

continued to treat with Dr. G until December 21, 1993. Claimant testified that he stopped his treatment with Dr. G because he believed that the carrier would not pay additional medical bills. Claimant testified that he had not worked since (date), because of his back and leg pain and also because he has not been returned to work by either Dr. G or (Dr. M), a doctor whom claimant saw at the carrier's request.

Mr. H, who worked for the employer for three days, gave a recorded statement in November 1993 at which time he said he was unaware of any injuries on the job except for a worker who hurt a finger. However, at the hearing, he testified that the claimant told him he had back pain when they set the barrel down.

On cross-examination, claimant acknowledged the validity of Carrier's Exhibit L, which is a life time check of the workers' compensation claims filed by the claimant. Exhibit L revealed that claimant had had 10 prior claims for workers' compensation and that six of those claims involved injury to the claimant's back. Several of the claimed back injuries occurred on the first day at work or within a few weeks of employment. In addition, claimant testified on cross-examination that he had been involved in an automobile accident in 1992, which preceded the alleged injury in this case, in which he sustained a back injury. Finally, there were medical records and reports in evidence which showed that claimant had a laminectomy and a fusion at L5-S1 in 1984, and that he was diagnosed with a herniated disc at the L5-S1 level as early as 1990 and that surgery was recommended. However, claimant did not have the recommended surgery. A CAT scan done on October 3, 1993, showed a bulging disc at L5-S1. Dr. G diagnosed a bulging disc at L5-S1 with sciatica, Dr. M diagnosed a lumbosacral sprain, and (Dr. H), who reviewed the medical records, stated that it was possible that the lifting incident aggravated the claimant's symptoms. According to a report of a rehabilitation nurse, Dr. G told her the claimant's fusion was still intact, and Dr. M told her the claimant had a new injury.

The claimant has the burden of proving that he sustained a compensable injury, which may include an aggravation of a prior injury or condition. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. A claimant's testimony is that of an interested party and only raises an issue of fact to be resolved by the hearing officer. Escamilla v. Liberty Mut. Ins. Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Under the 1989 Act, the hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony and judges the credibility of the witnesses and the weight to assign their testimony. Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact. National

Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied.) Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that claimant had not carried his burden of proving a compensable injury. In so doing, the hearing officer apparently chose not to believe claimant's testimony concerning the alleged injury and in addition, resolved the inconsistencies in the other evidence against the claimant. Our review of the record indicates that there is sufficient evidence to support that determination and, contrary to claimant's assertions, nothing in the record indicates that it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Because the hearing officer found that claimant did not sustain a compensable injury, he correctly determined that claimant did not suffer disability within the meaning of the 1989 Act, as the existence of a compensable injury is a prerequisite to a finding of disability. *See* Section 401.011(16).

Finding that there is sufficient evidence to support the decision and order of the hearing officer, we find no basis for disturbing them on appeal and affirm.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge