APPEAL NO. 980145
FILED MARCH 3, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 18, 1997. With regard to the issues at the CCH, [the hearing officer] determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals, seeks a reversal of the decision and argues that the great weight and preponderance of the evidence is contrary to it. The respondent (self-insured) responds and seeks an affirmance of the decision.

DECISION

We affirm.

The hearing officer fairly summarizes the facts in the decision and we adopt his rendition of the facts. We discuss only those facts necessary to our decision. The claimant testified at the CCH that on _____, he injured his back pushing a cart of pants in the self-insured's clothing manufacturing plant. On (day after date of injury), the claimant's treating doctor, (Dr. H), stated the claimant injured his back at work the day before and took him off work. On July 16, 1997, Dr. H opined that the claimant sustained an (date), injury, did well afterward and sustained a new back injury on _____.

The claimant admitted that he sustained a prior compensable back injury on (date), while working for the self-insured. On August 21, 1996, the Texas Workers' Compensation Commission-appointed designated doctor (Dr. B), in the claim involving that injury, certified that the claimant reached maximum medical improvement with a 10% impairment rating. The self-insured's adjuster regarding the prior claim, (Ms. H), provided a signed, notarized statement, wherein she stated that the claimant's impairment income benefits (IIBS) in the prior claim terminated on March 20, 1997, and that the claimant's attorney in the prior claim telephoned her regarding the termination of the claimant's IIBS on May 19, 1997. The self-insured presented a videocassette tape of the claimant dragging a cooler, carrying a five-pound bag of ice and playing soccer on June 20, 1997. The claimant testified that he was not actually playing soccer that day, but rather was warming-up with his team.

An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). An employee has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The hearing officer, in the "Statement of the Evidence" portion of the decision, commented that the claimant's testimony was not

credible. The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

We will not substitute our judgment for that of the hearing officer when the determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We conclude that the compensability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

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). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability, by definition, depends upon there being a compensable injury. *Id*. Since we affirm the determination that the claimant did not sustain a compensable injury, we also affirm the determination that he did not have disability.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge