APPEAL NO. 990334

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 January 27, 1999. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; gave his employer timely notice of the claimed injury; and did not have disability. The claimant appeals the adverse determinations, expressing his disagreement with them and asks that additional evidence be considered. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The determination of timely notice has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant worked as a long distance truck driver. He testified that on _____, he had a "hard time" raising the dolly legs on a trailer. This, he said, involved turning a crank with much difficulty. He then drove his load to (City 1) where he arrived some eight hours later. Because of a power outage at the delivery location, the claimant had a two-hour delay in unloading the truck. He spent the time sleeping in the cabin of his truck and woke up with pain in his left hip. He reported this the next day to his supervisor. The claimant said he thought he only suffered from a muscle pull. At first he apparently believed his hip pain was caused by the way he was sleeping in the truck cabin, but some two days after the onset of pain, he said, he realized it was caused by trying to raise the truck dolly. The claimant acknowledged that he had a prior work-related back injury in 1983, but considered himself pain-free for the last 15 years. He was terminated from his employment on July 31, 1998.

The claimant first sought medical treatment on August 17, 1998, from Dr. H. Dr. H diagnosed intervertebral disc disorder with radiculitis/neuritis and muscle spasm. The history contained in Dr. H's Initial Medical Report (TWCC-61) relates the incident of sleeping in the cab and waking with a hip pain. The claimant also was treated by Dr. P apparently on referral from Dr. H. Dr. P diagnosed discogenic lumbar pain and requested further consultations and testing. No history is given by Dr. P.

In a transcribed telephone conversation of September 10, 1998, with an adjuster, the claimant gave an account of noticing his pain when he woke up on _____. No mention is made of the dolly incident. Similarly, in the report of the benefit review conference (BRC), the claimant's position is that his pain/injury was caused by his sleeping in the cab of the truck and there is no mention of the dolly.

We address first the evidentiary matters raised by the claimant in his appeal. He asks that the hearing be reopened to allow for the consideration of additional information about his prior injury. He said this was not offered at the CCH because he did not have it available then. Presumably, he is referring to his 1983 back injury. Similarly, he states that he should have offered into evidence an MRI report, which "through an error" was not submitted. The 1989 Act provides that the Appeals Panel is limited in its consideration of only that evidence which was part of the record before the hearing officer, along with the written request for review and the response thereto. Section 410.203. A party is responsible for being prepared to present its case at the scheduled CCH. No request for a continuance was sought. Under these circumstances, we decline to remand this case for the taking of this evidence.

The Clerk of Proceedings received from the claimant two separate mailings of March 18 and March 22, 1999, which contained copies of a March 10, 1999, "Neurological Consultation" done by Dr. HL, on referral from Dr. H. No further information about the circumstances of this report was attached nor is there any indication a copy was sent to the carrier. The report itself refers to an MRI of December 30, 1998, which presumably is the same MRI that the claimant "through an error" did not introduce at the CCH. The report also contains a history of the trailer dolly and the sleeping incident. The consideration of a request for review generally does not extend to evidence attached thereto or separately submitted that was not made part of the record. Texas Workers' Compensation Commission Appeal No. 92111, decided May 6, 1992. Only were we to determine that the new evidence came to the claimant's knowledge after the hearing, that it was not due to lack of diligence that it came no sooner, that it was not cumulative and that it is material enough to probably change the outcome of the hearing would we remand for it to be considered by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993. This report obviously did not exist at the time of the hearing. We consider it at best cumulative of the other evidence and will not allow it to be a vehicle for introducing MRI test results that were available at the time of the CCH, but not then offered by the claimant into evidence.

Regarding the substantive issues, the claimant had the burden of proving that he sustained his low back injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide and could be proved by the claimant's testimony alone if deemed credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. The claimant expressly denied at the CCH and again in his appeal that he was contending that the sleeping in the truck cab caused him any injury. Rather, he insisted it was caused by twisting the dolly crank and that he realized this some two days after the incident. Yet the medical evidence does not reflect this history, nor does the BRC report or his transcribed statement. The hearing officer was the sole judge of the weight and credibility of the evidence. Section 410.165(a). In the hearing officer's discussion of the evidence he was troubled by the lack of evidence that the claimant attributed his claimed injury to twisting the dolly and relied exclusively on

the awkward- sleeping theory of causation, at least up to the time of the CCH. We will reverse a factual determination of a hearing officer only if that determination is 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the claimant for that of the hearing officer.

Given the position of the claimant at the CCH, we question why the hearing officer elected to discuss a possible aggravation-type injury simply from awkward sleeping. The hearing officer commented that the claimant only demonstrated pain, not an injury, and that pain in itself is not compensable. *See* Texas Workers' Compensation Commission Appeal No. 93812, decided October 22, 1993. Nonetheless, he formally found that the claimant did not sustain a back injury "by taking a nap in the cab of his truck . . . ." We find the evidence sufficient to support this determination.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Elaine M. Chaney
Appeals Judge