APPEAL NO. 990568

This appeal arises 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 17, 1999. With respect to the issues before him, the hearing officer determined that the appellant/cross-respondent (claimant) sustained a low back injury in the course and scope of his employment on _____; that he did not timely report his injury to his employer, without good cause for his failure to do so; and that he did not have disability within the meaning of the 1989 Act because he did not sustain a compensable injury. In his appeal, the claimant asserts that the hearing officer's determinations that he did not timely report his injury and that he therefore did not sustain a compensable injury or have disability are against the great weight of the evidence. In its response to the claimant's appeal, the respondent/cross-appellant (carrier) urges affirmance. In its cross-appeal, the carrier challenges the hearing officer's factual findings that the claimant injured his back in the course and scope of his employment and that the claimant was unable, because of his low back injury, to obtain and retain employment at wages equivalent to his preinjury wage for 1.25 hours on July 7, 1998, for four hours on July 17, 1998, for 1.5 hours on July 22, 1998, and from July 27, 1998, through the date of the hearing, as being against the great weight of the evidence. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The claimant testified that on _____, he was working for a temporary agency and was assigned to work for a client company that made fittings for the beverage industry. The claimant stated that on _____ he picked up a bucket of metal tubing, that weighed about 35 pounds, and felt a sharp pain in his low back. The claimant testified that he completed his shift on _____ and that he was not scheduled to work again until July 6th. He stated that he was able to work part of the day on July 6th and then he had to leave because his back pain became intolerable. On July 7, 1998, the claimant had an appointment with Dr. M, who diagnosed chronic low back pain. Dr. M's progress notes do not include a history of the claimant's having injured his low back lifting the bucket at work on _____, although the claimant insisted that he told Dr. M about that incident. Dr. M apparently took the claimant off work for a week and then the claimant attempted to return to work. He stated that he was able to work for the period from July 13th to July 17th, but he had leave work early "once or twice" because of his back pain.

On July 24th, the claimant had an initial appointment with Dr. C, a chiropractor. In progress notes from a July 27th visit, Dr. C notes increased pain from three to four weeks ago. Those notes state that the claimant has to pick up 35-pound buckets and that he had increased back pain from doing so. Finally, the progress notes provide that the claimant "believes this may be a work injury." Dr. C's Initial Medical Report (TWCC-61) states that

the claimant "was bending and lifting buckets at work when he injured his low back." Dr. C took the claimant off work on July 27th and continued him in an off-work status thereafter.

The claimant testified that he reported his injury to Mr. C, the employer's on-site manager, on July 7, 1998. The claimant maintained that he reported his injury to Mr. C a second time on July 24, 1998, when he gave Mr. C a copy of Dr. C's off-duty slip. The claimant testified that Mr. C left the room where they were talking and spoke to Mr. P, a supervisor with the client company, and that when Mr. C returned to the room where he was talking with the claimant, the claimant's employment at the company was terminated.

Mr. S, the employer's regional manager, testified that he was the branch manager at the time of the claimant's alleged injury. Mr. S testified that he first learned that the claimant was alleging that he sustained a work-related back injury on August 5, 1998, when someone from Dr. C's office called requesting insurance information. Mr. S testified that after that conversation, he called Mr. C and asked if he knew anything about the alleged injury. Mr. S stated that Mr. C denied that the claimant had ever reported a work-related back injury to him and that Mr. C also asked the other supervisors at the client company and they likewise did not have any knowledge of the claimant's having sustained a back injury at work. Mr. S stated that he completed the Employer's First Report of Injury or Illness (TWCC-1) on August 5, 1998, listing July 6, 1998, as the date the injury was reported. He maintained that he put that date because that is the information the claimant provided; however, he testified that his subsequent investigation revealed that the claimant had not reported his injury on that date.

Mr. C testified that he is the employer's account manager and an on-site supervisor assigned to work at the client company. He stated that at some point the claimant advised him that he could not work because of his back pain; however, he maintained that the claimant did not tell him that he had injured his back working for the employer. Mr. C maintained that he did not learn that the claimant was alleging that he sustained a work-related back injury until he was so advised by Mr. S after August 5, 1998. The carrier also introduced a recorded statement from Mr. P, a production supervisor with the client company and Mr. O, a lead man for the client company, who both stated that the claimant never told them that he had sustained an on-the-job back injury working for the client company, insisting that he attributed his back problems to a prior compensable injury he sustained working for a grocery store. The claimant acknowledged that he had sustained a prior compensable low back injury.

Initially, we will consider the carrier's assertion that the hearing officer's determinations that the claimant sustained a low back injury in the course and scope of his employment on _____ and that as a result of that injury, he was unable to obtain and retain employment at his preinjury wages for 1.25 hours on July 7th, four hours on July 17th, 1.5 hours on July 22nd, and from July 27th through the date of the hearing are against the great weight of the evidence. Both of those questions presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165(a). He resolves conflicts and inconsistencies in the testimony and evidence before him and

decides the weight to be given to the testimony and evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. 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. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Injury and disability determinations can be established by the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). In this instance, the hearing officer found that the claimant was injured in the course and scope of his employment and that that injury caused him to be unable to work for certain periods of time. Those factual determinations are supported by the claimant's testimony and by Dr. C's off-duty slips. As the fact finder, the hearing officer was free to credit that evidence over the evidence tending to demonstrate that the claimant was not injured at work on _____. Our review of the record does not demonstrate that those determinations are not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse them on appeal. Pool, *supra*; Cain, *supra*.

Finally, we will consider the claimant's assertion that the hearing officer's determination that he did not timely report his injury to his employer is against the great weight of the evidence. That question also presented a factual question for the hearing officer. The claimant maintained that he reported his injury to his employer, specifically to Mr. C, on July 7th and July 24th. However, Mr. C, Mr. P, and Mr. O maintained that the claimant never advised them that he had injured his back performing his work duties at the client company. To the contrary, they maintained that he attributed his back pain to a prior compensable injury he sustained with another employer. Mr. C stated that he did not learn that the claimant was alleging a work-related back injury until Mr. S so advised him and Mr. S testified that he did not learn that the claimant was alleging an on-the-job back injury until August 5, 1998, when Dr. C's office called for insurance information. It was the hearing officer's responsibility as the fact finder to resolve those conflicts and inconsistencies and to determine what facts had been established. He did so by giving more weight to the evidence from Mr. C, Mr. P, Mr. O and Mr. S than to that of the claimant. The hearing officer was acting within his province as the fact finder in so doing. That determination is not so contrary to the great weight of the evidence as to compel its reversal on appeal. Accordingly, the hearing officer properly determined that the claimant did not sustain a compensable injury and that he did not have disability because he did not timely report his injury to his employer. *See* Section 409.002.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Dorian E. Ramirez
Appeals Judge