APPEAL NO. 991626

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 12, 1999, a contested case hearing (CCH) was held. With regard to the two issues before him, the hearing officer determined that respondent (claimant) sustained a compensable (low back) injury on injury 2 (all dates are 1998 unless otherwise stated), and that claimant had disability from July 21st through the date of the CCH.

Appellant (carrier) appeals, contending that claimant did not sustain a new injury on injury 2, that claimant had "ongoing degenerative back problems," that claimant's current condition is a "progressive continuation" of a prior noncompensable back injury, that the medical records do not substantiate a work injury, that the hearing officer erred in finding claimant's prior injury had resolved and that since claimant did not have a compensable injury, claimant does not have disability. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds to the points raised by carrier and urges affirmance.

DECISION

Affirmed.

Claimant had been employed as a construction superintendent for the employer construction company and a predecessor company for a number of years. Whether claimant had back problems prior to January is in dispute (claimant says not, but some records, going back to injury 1, might indicate otherwise). Claimant traveled extensively in his job and it is relatively undisputed that claimant sustained a low back injury in January, working at a job site in state 1. Claimant testified, and it is not seriously disputed, that he met with employer's owners and it was agreed that claimant would seek medical care from his group health coverage and employer would continue his full pay. Claimant's family doctor was Dr. E, who was treating claimant for diabetes and hypertension. Claimant was referred to Dr. W for surgery for his January back injury. Dr. W performed surgery on March 3rd and, in an operative report, commented that a decompressive L3-4 laminectomy was performed on the left, and:

> A similar procedure was repeated on the right side and we observed the disk on this side without evidence of significant disk displacement being identified.

How claimant progressed after that procedure is in dispute (claimant saying that he recovered fairly well and carrier pointing to medical records and reports noting continued complaints of back pain). In May claimant met with the employer partners and one of the partners apparently expressed a desire to discontinue claimant's salary after June 1st. In a letter dated May 21st, to Dr. E, Dr. W comments that he was allowing claimant "to return to work June 8 at half days only for the first two weeks." Claimant testified that he returned to work within the doctor's restrictions on June 7th, that he was feeling "pretty good" and that

the doctor had told him to "take it easy." It is relatively undisputed that claimant was assigned "a couple of punch-list jobs" locally which consisted only of very light work in June. Claimant testified that he was released to full duty by the end of June and was assigned a job in State 2 as a construction superintendent building a fast food restaurant. Claimant testified that he was doing well, but a note dated July 9th noted claimant "has had some pain that goes into his low back and right thigh." Claimant testified that he went to State 2 on July 8th (the parties did not comment on the discrepancy that Dr. W notes a visit on July 9th, while claimant says he was in State 2 on July 8th). In any event, claimant went about the employer's business, obtaining permits and setting up communications, etc. On July 17th a trailer was delivered to the job site and claimant testified that on Monday, injury 2, as he was carrying some light office supplies ("a set of plans, pencil sharpener, stapler . . . ."), he fell or tripped and "couldn't straighten up." Claimant said that he went back to the motel and called his supervisor, the project manager, Mr. L, who was also claimant's son, and reported the injury. Mr. L made arrangements to get claimant back to Texas the following day. Claimant filed a workers' compensation claim on August 10th.

Claimant was referred to Dr. P, a neurosurgeon, who, in a report dated July 23rd, noted that claimant "had spinal stenosis surgery in March of 1998. He had excellent results but over the past several weeks, he has developed progressively increasing pain from his back radiating into his right anterior thigh and down to the knee." Dr. P noted that an MRI showed "a free fragment, probably at L3-4" which needed to be removed. The report goes on to say that Dr. W said that because "it is his [claimant's] second surgery, he [Dr. W] recommended a fusion from L3-4 and asked me [Dr. P] if I would help him." A hospital discharge summary showing a discharge on July 29th states that "an MRI . . . showed a large free fragment at L4 on the right side." An operative note, transcribed July 28th, has a finding of "a large free fragment disc herniation that had ruptured into the axilla of the L4 nerve on the right side." The note goes on to state that the "mesial portion of the facet on the right L3-4 was removed." Claimant contends that the reports:

> clearly reflect the fact that the claimant received two distinctly different injuries to the low back, the injury in January of 1998 being to the <u>left side</u>, and the injury of July of 1998 being to the <u>right</u> side. [Emphasis in original.]

In a chart note dated September 22nd, Dr. W notes that claimant, on injury 2, had "tripped" carrying something from his van and "this exacerbated the pain going into the back and right hip and I think that is the source of his extruded disc that required surgery." In a letter dated December 15th, Dr. W stated:

> [Claimant] was reinjured on the job back on July 20 of this year. He slipped and fell and that led to a new injury of his spine that required his second operation. It was done July 24, 1998. I do think this was a new injury.

Dr. P, in a letter dated January 4, 1999, stated:

> Claimant was doing quite well after his surgery in March of 1998, until he fell at work in July and developed an acute pinched nerve. He was transferred to

Fort Worth and had a decompression and fusion. His present weakness and inability to ambulate is due to the accident in July of 1998.

Carrier offers the record reviews of Dr. H, who, in a report dated December 17th, asserts that claimant's July symptoms "are continued manifestations of his prior back problems," cites some Appeals Panel decisions on aggravation and states that "[w]hether or not his treatment physician feels that the surgery of July 1998 is related to the fall in July is of no consequence," citing an Appeals Panel decision that a claimant's history does not in and of itself prove the injury was sustained in the manner claimed. As claimant points out, the tone and Appeals Panel citations might question the objectivity of Dr. H's opinion. In another report dated March 23, 1999, Dr. H repeats his prior opinion (without legal citations) and comments on what he perceives to be inconsistencies in Dr. W's reports, calling Dr. W's reports "very disingenuous."

The hearing officer found that claimant returned to work in June with his January injury "medically resolved" and that claimant sustained a new injury on injury 2 as a result of a fall. Carrier cites medical notes dating back to injury 1 showing claimant had a history of back complaints and cites more recent notes and reports which indicate that claimant had continuing back complaints after his March 3rd surgery. Carrier cites inconsistencies in the medical records and Dr. H's reports. If there were conflicts and inconsistencies in the medical records it was the hearing officer's responsibility to resolve those contradictions and inconsistencies. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). As we have frequently noted, the 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight 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.

Carrier asserts as error the hearing officer's finding that claimant returned to work from his January 1998 injury with this injury medically resolved. It is undisputed that claimant returned to light duty for three weeks or so in June and that for two weeks or so in July was able to perform his assigned duties in State 2until he tripped and/or fell on injury 2. While there are certainly medical records in evidence which would indicate that claimant had continuing back complaints during June and July, there is testimony to the contrary and, as claimant noted, he had gone back to work just three months after back surgery and "the fact that he was continuing to have some pain is absolutely predictable." These factors were all noted to the hearing officer who is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). While another fact finder could have easily found that claimant's January injury had not resolved, the relatively undisputed fact that claimant tripped and/or fell on injury 2 supports the end conclusion that claimant sustained a new injury. The hearing officer could also consider that while the injuries were at the same level, the injury 2 injury dealt with disc fragments on the right, where the March

surgery was for a laminectomy on the left. This also was a factual determination for the hearing officer to resolve and, even though another fact finder could have drawn different inferences from the same evidence, this does not provide a basis for us to reverse the hearing officer's decision on appeal. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Carrier appeals the disability findings on the basis that claimant did not have a compensable injury. Having affirmed the hearing officer's decision that claimant sustained a compensable injury, we also affirm the hearing officer's decision on disability.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge