APPEAL NO. 991813

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On July 28, 1999, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer determined that appellant (claimant) had not sustained a compensable injury on _____ (all dates are 1999), and that claimant did not have disability.

Claimant appeals the hearing officer's findings, asserting that he had injured his back "carrying a heavy piece of cast stone," that certain of the employer's employees "had personal animosity toward him" and that the hearing officer erred in relying on the employees' testimony rather than the medical evidence. Claimant requests that we reverse the hearing officer's decision and remand the case to "a fair Hearing Officer." Respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

Claimant was employed by (employer) performing heavy labor. Claimant testified that on _____, while working on the (C phase) of the Addison Circle project (A project), he picked up an 80- or 90-pound cast stone and "felt a pull in [his] back." Claimant testified that he told a coworker, Mr. BE; Mr. KL, a lead man or supervisor on the project; Ms. JT, employer's office manager; and Mr. RB, employer's owner, the same day or the next day about his injury. (Reporting and notice are not issues.) All those individuals testified at the CCH and all denied that claimant reported an injury, although they all testified to some extent or another that claimant had complained, both before and after _____, of a sore back. At one point claimant told Ms. JT that he had a sore back and Ms. JT said she took some Doan's pills for her sore back. Mr. BE testified that claimant told him he had a sore back and that Mr. BE made an appointment for claimant to see Mr. BE's family doctor, but that when he went to take claimant to the doctor (claimant lived next door to Mr. BE and claimant did not have transportation), claimant said that his back was better and declined to go. Claimant testified that Mr. BE told him it was too late in the day to see the doctor as a "walk-in." Mr. KL and Mr. RB testified that claimant was working on the C phase of the A project around February 18th or 19th rather than on _____. It is undisputed that claimant continued working his regular heavy-duty job from _____ to March 16th without missing any time from work. Both claimant and Mr. RB testified that claimant had a good relationship with the employer and that Mr. RB had helped claimant when claimant had some personal problems in the past. It is undisputed that on or about March 13th Mr. RB had warned claimant about his attitude and ability to get along with other employees and that claimant had not complained of an injury at that time. Mr. RB testified that in spite of the warning claimant continued to show a lack of team effort and sloppy work and that Mr. RB terminated claimant on March 16th. Claimant did not mention a back injury at that time. It is undisputed that claimant called Mr. RB on or about March 18th or 20th, asking for his job back, and that Mr. RB had refused. Mr. RB testified it was then that claimant told him

about his alleged work injury that allegedly had taken place on _____ on A project. Mr. RB said he then reported the claimed injury to carrier. A Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) in evidence shows the first written notice to carrier as March 22nd and a denial by carrier on March 29th.

Claimant first sought medical care at the (clinic) on March 30th, where a report of that date recites a history of "repetitively lifting 100# blocks of cement . . . & began insidious onset low back pain." X-ray studies showed "[h]ypertrophic degenerative changes in the lumbar spine." Claimant was taken off work. Claimant initially claimed disability from _____, but subsequently, at the CCH, changed his contention, claiming disability from March 30th when he was taken off work. An Initial Medical Report (TWCC-61) in evidence, dated March 31st, shows a date of injury of alleged injury date and repeats the repetitive lifting of 100-pound blocks of cement history. The narrative goes on to say:

> By the next morning he was miserable with pain and has been ever since. He continued to work for 2 to 3 more days, but was ultimately terminated from his job because he could not do the work. He is now having sleep problems and taking over-the-counter medications. He is experiencing pain radiating from his lower back down his left legs [sic].

Claimant was diagnosed as having a moderate lumbosacral strain.

The hearing officer, in her discussion, stated that claimant's "testimony was not persuasive" and commented:

> Claimant's evidence is insufficient to support a finding that be [sic] sustained a compensable back injury or had disability. Claimant never reported an injury until after the owner would not re-consider giving him his job back. He performed heavy duty work for two months after the claimed date of injury before seeking medical attention.

Claimant, in his appeal, reiterates that he sustained an injury carrying a cast stone and asserts the employer's witnesses' testimony "was full with inconsistencies" and they had personal animosity towards him.

We have many times held that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In this case, the hearing officer clearly relied on the witnesses called by the carrier

and stated that she did not find claimant's testimony credible. The hearing officer could also consider the inconsistencies between claimant's testimony and the history recited in the medical reports. 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 respective witnesses for that of the hearing officer.

In that we are affirming the hearing officer's decision that claimant did not sustain a compensable injury, claimant cannot, by definition in Section 401.011(16), have 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:

_____
Elaine M. Chaney
Appeals Judge

_____
Judy L. Stephens
Appeals Judge