APPEAL NO. 991843

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 August 3, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that he has not had disability within the meaning of the 1989 Act. In his appeal, the claimant essentially argues that the hearing officer's injury and disability determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was employed as a journeyman electrician for (employer). He stated that on that date he, Mr. J, Mr. S, Mr. P, and Mr. R were attempting to unload a transformer from a truck to a cart on the loading dock that was about one to two feet lower than the truck. The claimant estimated that the transformer weighed about 895 pounds. He stated that Mr. S, Mr. P, and Mr. R were in the truck pushing it out and he and Mr. J were standing on the dock trying to catch it. He stated that, as he attempted to lower the transformer to the cart, he realized that it was "crushing him" and he called for help. The claimant stated that at that point, Mr. H, his supervisor, came out and instructed him to put the transformer back on the truck, that he lifted it by himself, and that the other employees helped him push it back on the truck. The claimant testified that he felt pain in his low back when he stood up after the incident, but that he thought he would be able to work it out. He maintained that he did not report his injury to his employer because he was a "company man" and "didn't want to make any waves." He stated that he continued to work for the employer until March 11, 1999, noting that he was transferred to another job site on February 18, 1999. He acknowledged that his new job was a demotion in that he was no longer a foreman and his hourly wage went from $20.13 per hour to $18.30 per hour. The claimant testified that on March 11, 1999, he took in an off-work slip to his employer and was laid off.

The claimant initially sought medical treatment on February 22, 1999, the day he reported his injury to his employer. He testified that he went to (clinic) and that he was seen by a nurse practitioner, who diagnosed a lumbar strain and gave him a light-duty release. He stated that on March 2, 1999, he was seen by Dr. S at the clinic who referred him to an orthopedic surgeon. He explained that his appointment with the orthopedic surgeon was canceled because the carrier was disputing his claim. On March 11, 1999, the claimant began treating with Dr. T. Dr. T took the claimant off work at his initial visit. On March 24, 1999, the claimant had a lumbar MRI that had been ordered by Dr. T. The MRI revealed disc degeneration at L4-5 and L5-S1, a left intraforaminal herniation that impinges the exiting left L4 nerve root, and an 8 mm central right paracentral and

intraforaminal disc herniation at L5-S1 that impinges the right L5 and S1 nerve roots. In a letter dated March 24, 1999, Dr. T stated:

> [I]t is my medical opinion that this is a specific work-related injury. The TWCC-61 [Initial Medical Report] outlines the history as related by [claimant] and the lifting of the 800-pound transformer onto the back of the truck required not only elevation but twisting, and this is certainly compatible with the injury of which the patient complains. In fact, it is related to the specific diagnostic point of consideration that was given to this patient including a sacroiliac joint dysfunction strain. It is my feeling that this patient was not capable of working subsequent to the pain onset that he states occurred about a week after he was injured on _____ [sic]. It would suggest that his onset of being unable to work would be more related to 02/17/99 or 02/18/99 as the case may be.

The carrier introduced payroll records which show that the claimant worked eight hours on February 12th, 15th, 16th, 17th, and 18th at the job site where he was allegedly injured. On February 18th, as noted above, the claimant was transferred to a different job. He worked eight hours of straight time and two hours of overtime on February 19th, five hours on February 23rd, eight hours on February 24th, 25th, and 26th and nine and one-half hours of double time on Sunday, February 28th.

Ms. H testified that she is the claimant's neighbor, that one day she saw him get out of his truck, that he was limping and having trouble getting around, that she asked him what happened, and that he told her that he had hurt his back lifting a transformer at work. On cross-examination, Ms. H stated that she could not recall the date that she saw the claimant experiencing pain in his back and that she thought he gave her the details about injuring his back while moving the transformer later in the afternoon of the day she saw him having difficulty getting around or the next day.

Mr. S testified that he assisted in the effort to attempt to remove the transformer from the truck. He acknowledged that the claimant was also involved in that endeavor; however, he stated that he had no perception that the claimant had injured his back at that time. Mr. S stated that he only saw the claimant briefly on the Friday following his alleged injury, that he did not talk to him, and that he saw the claimant on the following Monday, at which time the claimant complained that he had hurt his back having sex with his wife. The claimant acknowledged that he had made that statement to his coworkers, maintaining that he had hurt his back moving the transformer and that he was just "mouthing off" to his coworkers and being "macho" when he made the statement.

Mr. R testified that he also assisted the claimant in attempting to get the transformer off the truck. He stated that he did not learn the claimant was alleging that he had been injured in that incident until the claimant contacted him and asked him for a statement. Mr. R testified that he did not have any knowledge of whether the claimant was injured when he moved the transformer or not.

Mr. H testified that he was the claimant's supervisor at the time of the alleged injury. He stated that he came out of a meeting after the claimant and the other four employees had gotten a corner of the transformer onto the cart. He stated that he told the workers to put the transformer back on the truck because he was concerned that someone would get hurt moving the transformer. Mr. H stated that when he transferred the claimant to another job site on February 18th, telling the claimant that he was not yet ready to be a foreman, the claimant did not mention that he had injured his back on February 11th. Finally, Mr. H stated that he does not think that the claimant injured his back in the incident at work, but it "may have happened."

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury. A review of the hearing officer's decision demonstrates that he simply was not persuaded by the claimant's evidence that his activities at work on _____, caused his herniated discs. He specifically noted several inconsistencies in the claimant's testimony and a prior recorded statement and in the claimant's receipt of unemployment benefits during a period of time he alleges he was unable to work. Those factors were properly considered by the hearing officer in deciding what weight to give to the claimant's testimony. The hearing officer determined that "[a]lthough Claimant has herniated discs at L4-5 and L5-S1, the evidence was not sufficient to conclude that Claimant sustained an injury at work on _____ or any other relevant date, rather than on some other occasion outside of work." The hearing officer was acting within his province as the fact finder in deciding to reject the claimant's testimony and the other evidence tending to demonstrate that he had injured his back moving the transformer at work. Our review of the record does not reveal that the hearing officer's determination that the claimant did not sustain a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co.,15 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse that determination on appeal.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. 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). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge