APPEAL NO. 991874

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 July 29, 1999. He determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant, without good cause, failed to timely report the claimed injury and that the claimant did not have disability. The claimant appeals these determinations, contending they are against the great weight and preponderance of the evidence and asserting that the hearing officer was biased. The respondent (carrier) denies bias on the part of the hearing officer and replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

We address the bias allegation first. The claimant's attorney asserts that there was *ex parte* communication prior to the hearing between the hearing officer and the carrier's attorney as evidenced by a purported comment of the hearing officer to the carrier's attorney that "I think you are right she does put in more exhibits than anyone else!." The comment does not appear in the record, nor did the claimant's attorney raise this objection at the CCH or otherwise request recusal. The claimant's attorney also refers to the hearing officer's comments, in the context of asking the attorney to speak louder, that "this is not a whispering contest" as evidence of bias. This comment does appear on the record and the same message to speak up was conveyed to another witness. The request served the vital purpose of insuring that an adequate record of proceedings was obtained. We do not perceive it as insulting or violative of the decorum or courtesy expected in a formal hearing of this nature. We also do not agree with the assertion of "undue interference" by the hearing officer in the attorney's questioning of witnesses. The hearing was protracted and at some points seemingly aimless due in large measure to the claimant's inability to remember important facts of his case. The hearing officer acted properly to effect a fair and efficient hearing. There is no merit to the allegation of bias.

An issue of whether the claimant's current back problems were a result of an injury on _____, was reported out of the benefit review conference. With the agreement of the parties and "for the purpose of clarity" the issue of whether the claimant sustained a compensable injury on _____, was added. We consider this latter phrasing to more accurately reflect the true nature of the dispute and that the former issue was, in effect, merged into the latter.

The claimant worked as a steel fabricator. He has had a history of work-related injuries over the last decade. These included a low back injury in Injury 1 and again on Injury 2. The claimant testified that he returned to full-time unrestricted work after the Injury 2, injury without incident for approximately four years until _____, when, he said, he was "flipping a handrail" with his son, who also worked for the employer. During this

process, according to the claimant, he felt a popping or cracking sensation and immediate severe pain in his back. The claimant said that after work that day he went with his son to Mr. EW, his supervisor, who was then at another job site, and told him his back was hurting from flipping the handrail. The claimant's son drove the claimant to see Mr. EW, but testified that he did not hear the conversation. The son did, however, confirm the flipping incident and the claimant's experience of pain.

Mr. EW testified that the claimant told him at the _____, meeting that his back was "bothering him," but never said he hurt himself at work while flipping a handrail. According to Mr. EW, the reason the claimant came to see him was because the claimant attempted to obtain an appointment with Dr. K, who had treated him for a previous injury, and with Dr. A, but neither would see him unless the employer would guarantee payment.

The primary emphasis of the parties regarding the issue of whether the claimant sustained a compensable injury on _____, was on the MRIs taken before and after this date. An MRI on June 8, 1993, reflected multilevel degenerative disc disease at L3-4, L4-5, and L5- S1 with bulging. An MRI on November 25, 1997, reflected bulging, desiccation and narrowing at various levels and an annular tear at L4-5. Dr. A apparently first saw the claimant on April 30, 1997, with complaints of low back pain. He listed the date of onset of the pain as Injury 2. On June 24, 1997, Dr. A wrote that his "current symptoms/complaints" extend back to 1993. Dr. B, apparently the current treating doctor, completed medical reports on May 17 and June 17, 1999, in which he referred to an Injury 2, date of injury. However, in other earlier reports, he mentions the claimant's history of an _____, lifting incident and stated on March 17 1998, that "[i]n my opinion most of his pain now caused from _____ accident."

On January 28, 1999, Dr. M examined the claimant at the request of the Texas Workers' Compensation Commission. He noted an acute onset of a new type of pain on _____, as related by the claimant and the evidence of the annular tear and concluded that in his medical opinion the claimant's "current symptoms stem from the injury of _____." He also agreed that an annular tear does not need a traumatic event to become symptomatic, but in reasonable medical probability felt the tear in this case was caused by the _____, lifting incident.

The claimant had the burden of establishing that he sustained a compensable injury on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The aggravation of a preexisting condition may be an injury in its own right provided the claimant establishes more than a recurrence or remanifestation of symptoms of the preexisting condition. Rather, there must be some enhancement, acceleration or worsening of the underlying condition with a reasonably identifiable cause. Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993. Whether a compensable injury has occurred is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. In his discussion of the evidence, the hearing officer commented that the claimant's testimony "was rather devoid of much probative value due to numerous inconsistencies and

self-contradictions, as well as being implausible on many occasions and contradicted by other testimony and exhibits." He found Dr. A's opinion that the claimant's symptoms on and after _____, stemmed from the 1993 injury persuasive and credible. The hearing officer also noted that the later MRI showed an annular tear but did not conclude that this in itself established a new injury. Such a conclusion is consistent with the opinions of Dr. A and of Dr. M that a tear could be the result of degenerative processes or trauma, even though Dr. M believed trauma caused the tear in this case.

In her appeal of this determination, the claimant's attorney sets out in detail the evidence which she believes supports the claimant's position and argues that the hearing officer usurped the role of the doctors in this case. The carrier responds with its interpretation of the evidence and stresses the role of the hearing officer as fact finder. Section 410.165(a) provides that the hearing officer was the sole judge of the weight and credibility of the evidence. As fact finder, the hearing officer can accept or reject in whole or in part any of the evidence, including the medical evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993; Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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). The evidence is this case was subject to varying inferences and clearly could have supported a decision in favor of the claimant on this issue. However, it is not enough to prevail on appeal to simply identify evidence in support of the appellant's position. Nor does the existence of some evidence in favor of the claimant's position compel a finding for the claimant. Applying our standard of review to the record of this case, we decline to substitute our opinion of the credibility of the evidence for that of the hearing officer, but find the evidence sufficient to support his determination that the claimant did not sustain a work-related injury on _____.

Sections 409.001 and 409.002 provide that a claimant must give the employer notice of the injury by the 30th day after it occurs. Failure to do so absent good cause relieves the employer and carrier or liability for benefits. To be adequate, the notice must provide the employer information about the general nature of the injury and that it is job related. Texas Workers' Compensation Commission Appeal No. 94936, decided August 23, 1994. Whether and if so when notice is given is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. The claimant did not rely on good cause for an untimely notice, but insists he reported the claimed new injury to Mr. EW on the day of the injury when he asked him to authorize medical treatment. He insisted that he told Mr. EW that the incident at work caused a new and more serious pain in his lower back. Mr. EW insisted that he was only told that the claimant's back "bothered" him and the claimant did not mention an incident at work even when Mr. EW specifically asked the claimant if it happened at work. The question was obviously important in light of the claimant's history of prior injuries and some dispute in the evidence of whether or not the claimant continued treatment after the 1993 injury. Mr. EW also said that he reflected a date of notice of _____, on the Employer's First Report of

Injury or Illness (TWCC-1), which he completed in July 1997, because this was the date of the claimed injury, not because he believed it was the date reported. The resolution of the issue of notice depended, as the parties agreed, on the witnesses' credibility. As noted above, the hearing officer concluded that the claimant had little credibility. In his appeal, the claimant argues that he is credible and that a conclusion that he did not report the injury is "ridiculous." The hearing officer believed Mr. EW's account of what the claimant told him. Under our standard of review, we conclude that Mr. EW's testimony, found credible by the hearing officer, was sufficient to support his conclusion that no timely notice was given in this case.

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:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge