APPEAL NO. 000017

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 December 6, 1999. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a helper installing air conditioning units. He testified that on _____, while pulling on a pipe, his lower back popped and he felt pain. He did not report what happened that day because, he said, he thought it would resolve. He continued working until (second date of injury), when he bent over, felt his lower back pop again and severe pain. According to the claimant, he reported both incidents to his boss, Mr. R. He said that Mr. R suggested that the first incident was on (first date of injury). The employer referred the claimant to Dr. F, where, he said, there was a discussion of the date of injury, and Dr. F's office told him they would just use (second date of injury), as the date of injury. This date of injury is reflected on the Initial Medical Report (TWCC-61) prepared by Dr. F. Eventually, the claimant changed treating doctors to Dr. S, who diagnosed lumbar/cervical strain, myofascitis, and radiculitis with a date of injury of (second date of injury). The claimant conceded that these medical records refer to an (second date of injury), date of injury, but believes they "really discuss" a date of injury of _____. Much effort during the CCH was directed to the apparent discrepancy in the date of injury despite the fact that there was no disputed issue as to the date of injury. In a recorded telephone interview with an adjuster, claimant explained that the date of injury was _____, and that the (second date of injury), date derived from the date of his first visit with the doctor and, in effect, took on a life of its own. Adding to the complications was the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) signed by the claimant on September 17, 1999, which contains an (first date of injury), date of injury.

Mr. M, the physical therapist working with the claimant, testified that the claimant only complained of low back, not cervical pain, and there were inconsistencies in his test results that led Mr. M to suspect symptom magnification. Mr. R testified that he first learned of the claimed injury in a conversation with the claimant early on (second date of injury). When the claimant described the job on which the injury allegedly occurred, Mr. M said he looked in the log book and determined that this activity occurred on (first date of injury). According to Mr. M, the claimant did not describe any second incident on (second date of injury), nor did Mr. M observe any physical problems with the claimant while working between August 16 and (second date of injury), 1999. A recorded interview of a

coworker/witness to the incident generally supports the claimant's account of an _____, injury.[1]

The claimant had the burden of proving he sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide and could be proved by his testimony alone if found credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In her decision and order, the hearing officer commented that she believed the claimant's testimony was "self-contradictory in significant aspects." These included what he reported to his doctors about the injury and the discrepancies in the date of injury. While the claimant provided an explanation for these discrepancies, it was up to the hearing officer as sole judge of the weight and credibility of the evidence to accept or reject these explanations. Section 410.165(a). She also found persuasive Mr. M's testimony and concluded that the claimant's complaints of pain were not to be accepted at face value. In the same way, she found the statement of the coworker, supportive of the claimant's position, generally not persuasive. 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 find the evidence sufficient to support the hearing officer's determination that the claimant did not sustain a compensable injury on _____, as alleged.

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).

[1] Attached to the claimant's appeal was a handwritten statement of a person identified has having helped him fill out various forms. This was not in evidence at the CCH and will not be considered for the first time on appeal. *See* Section 410.203(a)(1).

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