APPEAL NO. 000240

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 20, 1999. The issues at the CCH were whether the respondent (carrier) is relieved from liability under Section 409.002 because of the appellant's (claimant) failure to timely notify his employer of his injury pursuant to Section 409.001; whether claimant sustained an injury in the course and scope of his employment; and whether claimant had disability. The hearing officer determined that the carrier is relieved of liability under Section 409.002 because of claimant's failure to timely notify his employer of his injury; that claimant did not sustain an injury in the course and scope of his employment; and that, because claimant did not sustain a compensable injury, he did not have disability. The claimant appeals, contending that the employer had "actual knowledge of an injury," that we should "liberally construe" the 1989 Act in claimant's favor and that there is no medical evidence of any other cause for claimant's failed bone graft. Claimant requests that the Appeals Panel reverse the decision and order of the hearing officer and render a decision in his favor. The carrier responds, urging affirmance.

DECISION

Affirmed.

As the hearing officer points out, this case is complicated by the fact that claimant undisputedly had sustained a prior work-related injury to his back in either _____ or 1985, that he had spinal surgery in the form of a discectomy in 1985, that he had further spinal surgery in the form of a 360E fusion at L5-S1 in 1987 and that his treating doctor and surgeon was and is Dr. M. (Testimony was that the _____ case was settled under the pre-1989 Act for $37,000–plus five years of future medical expenses.) Claimant was basically doing well after the 1987 surgery with episodes of intermittent low back pain. Claimant was employed in 1997 by the employer as a forklift driver and passed a preemployment physical. It is undisputed that the employer, including DD, employer's warehouse foreman, and BP, employer's operation's supervisor, were aware of claimant's prior back injury.

Claimant testified that on _____, a Saturday, he was assisting in the installation, which included some heavy lifting, of some heavy metal racks at work when he felt a sharp pain in his low back. Claimant testified that he told his supervisors, DD and BP, about his pain. Exactly what was said is in dispute. DD and BP testified that the racks were installed on July 18, 1998, and claimant's job consisted of tightening nuts and bolts on the rack with a wrench. At one point, claimant testified the he told DD and BP that he was "fixin' to go home–I don't feel good–my back is bothering me." It is undisputed that claimant only worked a half day on July 11th. There is some dispute whether DD was at work that day and/or if he had left before claimant complained about his back on July 18th. BP

testified that claimant did comment that his back was hurting him on the day that they were installing the racks but that BP thought it was due to claimant's prior back injury. BP and DD denied that claimant had ever reported a work-related back injury to either of them. BP testified that he had seen claimant limping with back pain from time to time and assumed it was from the old back injury. In evidence are time cards, signed by the claimant, which included a statement that he had sustained no injuries for the week ending July 18th, and other cards for subsequent periods indicating he had not been injured.

Claimant continued working after _____ (or 18th) and testified that his back pain got progressively worse. Claimant returned to Dr. M on January 26, 1999. In a progress note of that date, Dr. M notes that claimant "[h]ad basically been doing well with moderate intermittent low back pain . . . until approximately 2-3 months ago. Notes that with a lifting motion had low back pain radiating down the RLE." Dr. M's impression at that time was acute low back pain. Dr. M put claimant on light-duty status with restrictions of no lifting, no bending, and to be allowed to sit and change positions as necessary. Claimant continued to work at light duty until February 3, 1999, when Ms. SM, employer's general manager, called claimant in to tell him they no longer had light duty available within Dr. M's restrictions. Ms. SM testified that claimant became very upset and said that he badly needed the job and, to accommodate claimant, she suggested that claimant might apply for group health disability benefits. Ms. SM said that based on what claimant told her, she filled out the group disability forms. Among other things, the group claim information form marked the claim was due to an injury, marked "No" as work related and referenced claimant's _____ injury. On another portion under employee statement, the form states the "disability [was] due to" an "injury/accident" stating "_____ work related injury [circumstances] NOT A JOB RELATED INJURY WITH OUR COMPANY." The forms were signed by claimant and he testified that he had read what Ms. SM had written. In a letter dated March 9, 1999, the group health disability carrier denied the claim because it was a work-related back injury. Claimant was left on the employer's rolls in a nonpay status until June 6, 1999, when he was terminated.

Claimant was seen by Dr. N as a consultant, and in a report dated February 3, 1999, Dr. N noted complaints "started approximately 4 months ago," the 1985 "diskectomy, and in 1986 a 360-degree procedure" and commented "He does not know what exactly could have caused his pain or discomfort . . . ." No mention is made of the rack incident in July 1998. Claimant continued to see Dr. M, who in a progress note of April 13, 1999, noted:

> However, at S-1 there appears to be a breakdown of the fusion with what appears to be soft tissue density surrounding the right S1 root and partially filling the right neural foramen.

Claimant was subsequently seen by Dr. S, who in a report dated April 19, 1999, indicated that claimant "had been doing quite well until last Summer . . . [when] he had been driving a truck." Dr. S noted a "failure of fusion at L5-S1." Dr. M, in a progress note of April 27, 1999, comments that Dr. S agrees that claimant would benefit from further surgery. On

July 9, 1999, claimant had additional spinal surgery in the form of a "combination anterior and posterior fusion at L5-S1 with neural compression." In a report dated August 5, 1999, addressed to claimant's attorney, Dr. M stated:

> I am writing you regarding [claimant], and specifically regarding his back pathology. I feel that given his history, in that the onset of his renewed pain was his lifting incident on _____ at work, I feel that one would need to fairly assess the fact that his present problems as well as need for treatment for these problems is secondary to the injury obtained at work on or about _____.

This is the first reference Dr. M makes to a _____, lifting incident. Claimant continues to be symptomatic and has not been released to return to work. Claimant has been unable to work, and claims disability, from February 4, 1999, to the date of the CCH.

In evidence is a copy of an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated June 14, 1999, alleging a _____, injury "lifting metal racks." It is unclear when the TWCC-41 was filed. Ms. SM testified that she first became aware that claimant was alleging a workers' compensation claim alleging an injury on _____, on July 9, 1999, when she received a phone call (from whom is not clear). Ms. SM then proceeded to complete the Employer's First Report of Injury or Illness (TWCC-1) on that date.

Claimant also submits the statement of (PH), a friend who sometimes drops by claimant's place of employment. BP agrees that PH may have been present the day the metal racks were being installed. That statement says:

> I [PH] remember telling [claimant] that I [PH] had hurt my back moving those metal racks when [claimant] told me that he thinks he had hurt his back lifting those metal rack[.] I also remember someone saying why are we not using the fork lift[.]

Among the hearing officer's disputed findings are the following pertinent findings of fact:

## FINDINGS OF FACT

7. On _____, the Claimant was one of a group of workers putting up metal racks (special project) which he considered a heavy lifting activity; and again he felt pain in his low back like in the past.

8. On _____, the Claimant told his supervisors ([BP] and [DD]) that "he was not feeling good and his back hurt", but failed to include that his condition was caused by any work-related activity.

* * * *

10. On _____, or anytime thereafter, the Claimant did not adequately communicate to his Employer that he was claiming a new injury.

* * * *

17. On July 9, 1999 , the Employer for the first time learned that Claimant was alleging a workers' compensation claim with a _____, date of injury.

* * * *

19. The Claimant failed to meet his burden of proof and did not establish that he sustained an injury in course and scope of his employment on _____.

**CONCLUSION OF LAW**

5. Because Claimant did not sustain a compensable injury, he did not have disability.

Claimant, in his appeal, contends that BP "however, indicated actual knowledge of an injury based on the fact that the Claimant was suffering from back pain" and that applying "the requirement of liberally construing the [1989 Act] in favor of injured workers, there was adequate notice." The evidence and hearing officer's finding was clear that claimant only said he was not feeling good and that his back hurt without referencing that fact to a work-related incident. Section 409.001 requires that an employee notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether, and if so when, notice is given is a question of fact for the hearing officer to determine. The hearing officer found that claimant did not relate to BP or DD that his back pain was work related and claimant's own testimony supports that finding. While it is apparent that the claimant did report his back was bothering him and that he did not feel well, a notification to be sufficient notice must show or indicate the work-relatedness of the particular injury or condition, and this is particularly so if there is a prior injury or condition. Texas Workers' Compensation Commission Appeal No. 92154, decided June 4, 1992; Texas Workers' Compensation Commission Appeal No. 961203, decided August 5, 1996. Claimant urges a liberal construction of the notice issue and that just because claimant said his back was hurting and he was limping a liberal construction requires us to accept that claimant was giving notice of a work-related injury (even though claimant apparently did not

mention the rack incident for almost a year). While DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980) and Albertson's Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999) indicate liberal construction is still viable in the law, claimant under the guise of liberal construction would not only have us set aside the hearing officer's findings of fact but asks us to substitute our findings of fact. We do not believe that is the intent of liberal construction. 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.

Claimant in his appeal stresses Dr. M's August 1999 letter to claimant's attorney and his interpretation of the medical records that claimant's injury was "post-traumatic" rather than merely a failed fusion. Claimant further seems to accept as fact that there was a lifting incident on _____. The hearing officer makes no such finding. What claimant was actually doing (lifting versus tightening nuts and bolts) is certainly in dispute. Further, claimant, in applying for group disability and relating his history to the doctors, at least until June 1999, seems to be relating his complaints to the _____ injury. In any event, 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). We hold that the hearing officer's decision is supported by sufficient evidence.

Because we are affirming that claimant did not sustain a compensable injury, claimant by definition in Section 401.011(16) cannot 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge