APPEAL NO. 000309

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 January 20, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and had disability from September 30 through December 21, 1999. The appellant (self-insured) appeals, stating that the claimant failed to prove that he had sustained a compensable injury and that there is insufficient evidence to support the hearing officer's determinations. There is no response from the claimant in the appeals file.

DECISION

We affirm.

All dates are 1999 unless otherwise stated. The claimant was employed by the self-insured for approximately 14 years. He said that on _____, while lifting a box of bags, he felt a tingling sensation in his back that began to hurt. He was working the night shift at the time, which ran from 11:00 p.m. to 8 a.m.; the accident happened around 1:30 a.m. The claimant's job was box assembly and he was cleaning up when the accident happened.

The claimant agreed he did not report his accident, but later that night he went to the self-insured's nurse and told her about it. However, he agreed he told her he had pain, not that he had just lifted a box.

The claimant said that he first sought medical treatment on _____ and had an MRI the next day. He was treated at the hospital and the MRI was scheduled by the doctor he saw there, Dr. A. He agreed that he was neglectful in not telling the doctor how this happened, but said he was not trying to make this a "big thing" against the self-insured. He was told he had a herniated disc.

The claimant initially did not claim a workers' compensation injury at work. He was unclear as to exactly when he first reported it to his supervisor, Ms. S, although he believed it was within a week after the injury. A written statement from Ms. S denies this. In evidence is a report of a work-related injury form he filled out on October 8th. The claimant said that this was after he researched herniated discs on the Internet and realized how serious it could be.

The claimant agreed that a month before, in August, he felt the same tingling in his back; he took pain pills and it went away. He denied, however, that he already had his MRI scheduled as a result of that pain. When it was shown that the nurse's notes of _____ (2:00 a.m.) recorded a conversation of concern about his upcoming MRI, he agreed it had been already scheduled, but again changed his testimony on questioning by the hearing officer and maintained he could not have discussed the MRI with the nurse

because it was not scheduled until later that day. The claimant was asked a number of times why he did not initially report his injury as work related and he answered merely that it was neglect on his part not to do so. He said that he subsequently reported it as work related not because it was his "best guess" that it happened at work, but because he knew. However, when asked why he initially reported it as not work related when he sought a leave of absence on October 4th, claimant said he did not really know. He changed his reason for request to be out after he realized that workers' compensation benefits would pay more. Upon later questioning by the hearing officer, he said that this was not the reason because workers' compensation had not actually paid much at this point and he had to bear some expense from his own pocket. His leave of absence was originally scheduled to end on October 18th, but he denied that he was changing his claim for leave because he found out it would cost too much otherwise. Claimant did not return to work until December 22nd. He said the employer told him to return checks that had been paid to him through a Texas Workers' Compensation Commission interlocutory order.

Ms. H, the human resources director for the self-insured, testified that when claimant came in to request a leave of absence, his doctor had taken him off work for two weeks. She said that the claimant said he had a herniated disc and the first question she asked was whether it was work related. He said no, and she asked again if he was sure. She said that if she forgot to ask this question, she would probably have gotten into trouble. Ms. H said a couple of days later the claimant came back and said that he had questions about his leave, and contended then it was work related. When she questioned this change, the claimant said he hadn't realized before how important the question was. She then referred claimant to the person in charge of workers' compensation claims.

Dr. A wrote on November 16th that the claimant started complaining of back pain a month before the _____ visit, and that his back hurt more severely that night, with radiating pain down his leg. Dr. A said that if an x-ray report indicated a fall in the shower, it would not accurately reflect what Dr. A understood about the injury and was likely an error. Dr. A's report indicates he ordered an MRI on _____ because of his belief that claimant had a herniated disc.

Plainly, different inferences could have been drawn from the evidence presented as to whether an injury occurred on _____, as opposed to a month earlier or at some point off the job. However, the hearing officer particularly commented that, notwithstanding the contradictions in the claimant's case, the claimant appeared credible to the hearing officer. The hearing officer may have determined that the fact that claimant may have done an assessment of what was most advantageous to him when he was out of work did not necessarily mean that the injury was not work related to begin with. It is this determination that he is charged to make when he has the opportunity to personally observe the demeanor of the claimant during testimony, and especially upon the hearing officer's own close questioning about the failure to immediately claim a work-related injury.

An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the

evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

In this case, there is sufficient support for the hearing officer's decision, and we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge