APPEAL NO. 000416

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 18, 2000, a hearing was held. The hearing officer determined that appellant (claimant) did not sustain a compensable injury on _____; did not give timely notice of an injury to his employer with no good cause for late notification; and does not have disability. Claimant asserts that he did sustain an injury, did give timely notice (or if he did not, had good cause for delay until Dr. M, told him he had a "new" injury), that respondent (carrier) did not timely dispute, and he did have disability. Carrier replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____, the date, claimant testified, he was injured. His testimony said that when he stood up from strapping materials together for shipment, he felt a "real strange sharp pain in [his] lower back"; claimant did not say whether he had been squatting down or had bent over to do such strapping. Claimant said that he told his supervisor, MP, the next day that "my back was hurting"; on cross-examination he also said, "I told him that my back was hurting and I was going to see if I could work. . . ." Claimant also said that it was "fair to say" that "it was not until September 20, 1999 that your employer knew that you were alleging a new work-related injury." MP testified that claimant told him he was "sore," but also said that claimant has regularly used that word since his _____ injury. He added that he was with claimant when he saw Ms. M, who is a safety coordinator; according to MP, Ms. M "asked him a direct question, you know, Did you hurt yourself again?" to which claimant replied, "no, I'm just sore." Mr. D testified that he is senior director of safety; he said that on September 24, 1999, he was in a meeting with claimant about the assertion of an injury; he said claimant was asked if he had reported his injury to his supervisor; according to Mr. D, claimant replied that "he had not."

Claimant had sustained a low back injury on _____, for which he was being treated by Dr. B. Dr. B had found claimant to be at maximum medical improvement on February 2, 1999, with a seven percent impairment rating (IR). After that February 2, 1999, visit, claimant returned to Dr. B on May 4, 1999 (three months later), complaining of recently incurred left-sided low back pain. Then on August 13, 1999 (three months and one week after the May visit), Dr. B's record shows claimant again returned reporting "increased back pain and pain down his left leg, extending a bit farther now. . . ." His back pain was further described as "in the same location" but "more severe now" and he was said to have taken "a few days off" from work. Dr. B's August 13, 1999, note contains no reference to any 1999 injury, but did observe that claimant does "repetitive bending" at work with "some heavy lifting." On August 17, 1999, Dr. B wrote that claimant had called in on that day reporting that he felt better and wanted his restriction to light work increased to medium

work, apparently to return to work. Again, nothing was mentioned about a 1999 injury. On August 27, 1999, Dr. B wrote that claimant was in and had an epidural injection. He added that the employer had no work for claimant who still had low back pain. Again, nothing was said of a 1999 injury or any particular event at work.

Claimant began seeing Dr. M on September 9, 1999. Dr. M's "Quantum Chiropractic Travel Card" reflects that on September 9, 1999, claimant appeared as a new patient; that his low back pain "has worsened"; that the case is workers' compensation with "TWCC 53 [Employee's Request to Change Treating Doctors] files in case"; and "it is not a new injury." Claimant also submitted a form for changing his treating doctor on September 9, 1999, in which the date of injury is said to be _____. Claimant testified that he wrote that date on the form; Dr. M testified that he wrote that date on the form. The testimony of these two gentlemen presented a conflict in the evidence for the hearing officer to reconcile. The record also shows that claimant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on September 10, 1999, stating that the date of injury was _____. The record also shows that on September 9, 1999, Mr. MA, attorney, signed a TWCC-41 which said that claimant sustained an injury on _____.

MRI reports were in evidence from before and after _____. An MRI of August 17, 1998, says that the L4-5 disc is "desiccated and degenerated"; there was also said to be a "small" herniation at this level. At L5-S1 "subtle spondylolisthesis" was present, with the disc being "desiccated and degenerated" and with a "small" herniation with mild bilateral neural foraminal narrowing. Then on September 27, 1999, an MRI showed signal intensity "consistent with central disc herniation" at L5-S1. Signal intensity at L4-5 was said to indicate "degenerative disc disease" but no evidence of disc herniation. There was no evidence of spinal stenosis.

Dr. M testified that he believes claimant has a new injury, that claimant now has limitations in his range of motion which the IR of seven percent provided in early 1999, for the _____ injury, did not note. Dr. M also said that claimant's "motor weakness" now is not the result of "a gradual process. It's usually due to nerve irritation." But Dr. M agreed on cross-examination that a nerve conduction study in October 1999, was a "normal nerve conduction study" and further agreed that such a study is "significant" as to whether or not there is "new nerve-root involvement."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Whether an incident reflects an injury or a continuation of the effects of a past injury is a factual determination for the hearing officer to make. While objective evidence is not required for a decision in such a case as this, the hearing officer can certainly consider objective evidence presented in the form of MRIs and nerve conduction studies and can draw reasonable inferences from those studies. Similarly, the hearing officer can consider that initial medical records of both Dr. M and Dr. B after _____, contain no reference to any recent injury. Not only could the hearing officer consider that claimant's own testimony did not provide evidence of notice of an injury given to his

employer until over 30 days after _____, he could choose to give significant weight to the testimony of MP and Mr. D about what claimant said. The evidence was sufficient to support the determinations that claimant did not sustain a compensable injury, did not give timely notice, did not have good cause for his untimely notice, and did not have disability.

This hearing had three issues, as stated. There was no issue as to timely dispute of compensability by the carrier; that point will not be addressed on appeal.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Elaine M. Chaney
Appeals Judge