APPEAL NO. 000427

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 January 25, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____ (all dates are 1999 unless otherwise noted), and did not have disability. The claimant appeals, challenging the sufficiency of the evidence and contending that his testimony and evidence was credible and consistent. Claimant also challenges the hearing officer's decision on the basis that respondent (carrier) failed to either initiate payment or issue a written denial within seven days as provided for in Section 409.021(a) as interpreted by the 4th Court of Appeals in Downs v. Continental Casualty Co., No. 04-99-00111-CV (Tex. App.-San Antonio, January 26, 2000, n.w.h.)). Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier responds, urging affirmance.

DECISION

Affirmed.

Many of the factual details of this case are in dispute. It is undisputed that claimant was a forklift operator/laborer assigned to work at one of the employer's construction sites. Claimant testified that on _____ he had been assigned to clean up debris around the construction site and, as he was walking backward, using a shovel, his foot caught on something, causing him to trip and fall backward, striking his low back on a curb or raised portion of the concrete slab. In dispute is whether claimant was sweeping or cleaning up, whether claimant was inside or outside and whether or not there was scaffolding present. Claimant testified that he had immediate pain and went to find his immediate supervisor, Mr. RS, and report the injury. Claimant said that when he could not find Mr. RS, he told another foreman on the job, Mr. S, that he had injured himself and was going home and that Mr. S said okay. Mr. S testified that he was on a second floor and that claimant climbed a ladder and told him that he had hurt his knee. Later, when Mr. RS asked where claimant was, Mr. S told him that claimant had gone home sick. The next day, (day after injury), claimant came in to get his paycheck and spoke with Mr. RS. Mr. RS testified that claimant gave conflicting stories about cleaning up and/or sweeping (which would indicate claimant was inside a building). Mr. RS testified claimant said that he thought he "was fine" and would return to work the following Monday but "that when he came back to work, he didn't want to be put on cleanup." Other details, such as how far claimant fell, the height of the curb, etc., are in dispute. Mr. RS completed an accident form which stated "cleaning up and was backing up and tripped and hit lower back on slab."

Claimant went to the (clinic), apparently a clinic the employer used, on (second day after injury). The history states, "pt c/o L.B.P x 2 dys & tripping and falling and hitting his LB

on concrete." Claimant testified that he was treated very roughly at the clinic ("he laid me on the table, he took my legs and he just threw them behind my head, which bruised me. . . .") and that he left before treatment, a diagnosis or other testing was done. The clinic note states "pt left clinic . . . to go to the Emergency room [ER]." Claimant went to the ER on August 31st and an ER record indicated a low back muscle strain and claimant was taken off work for three days. Claimant subsequently retained an attorney and claimant's attorney referred claimant to Dr. S. In a report dated September 23rd, Dr. S recites a history of an accident "while [claimant] was cleaning up debris," that claimant had immediate intense pain and that claimant "had difficulty with walking due to the pain." (Neither Mr. RS nor Mr. S noted claimant had any difficulty walking on _____ or ____.) Claimant was diagnosed as having lumbar hyperflexion/hyper-extension, sciatica, paresthesia and low back pain. Claimant was taken off work until an orthopedic consult could be obtained. Claimant was referred to Dr. D for the orthopedic consult. In a report dated November 4th, Dr. D recites a history of falling backward while working with a shovel and hitting "his back against some concrete." Claimant gave Dr. D a history of an injury "about nine years ago." (Claimant admitted a 1991 injury. Cross-examination brought out a more recent 1995 back injury where claimant was off work several months, which claimant explained that he had forgotten.) Dr. D noted tenderness in the lumbosacral region and "[m]ild to moderate . . . muscle spasm present." Dr. D referred claimant for an MRI. An MRI performed on January 10, 2000, indicated minimal posterior disc bulge at L4-5 and a minimal central and paracentral disc bulge at L5-S1.

Carrier points out what it considers some discrepancies between transcribed statements and claimant's testimony regarding whether there was scaffolding present, how far claimant fell, how high the concrete slab was, and whether claimant injured his knee, upper or lower back. The hearing officer, in her Statement of the Evidence, commented:

> However, there are some points in the fact situation that cause this Hearing Officer to question whether the injury actually occurred. First, the Claimant, although in severe pain was able to ascend and descend a ladder. Second, he failed to ask for medical treatment on either of the two occasions he reported his injury. Third, [Mr. S], whose testimony this Hearing Officer found to be credible, testified that the Claimant told him it was his knee which was injured and as he saw the Claimant walk away he did not exhibit any outward signs of Claimant being in pain much less severe pain. Further, on the occasion when the Claimant informed [Mr. RS] of the injury instead of requesting medical attention he requested a change in his work duties. He asked [Mr. RS] if he came in on Monday if could he change his duties to something other than clean up.

Claimant appeals, recites the applicable standard of review and stresses the consistencies in his position, the inconsistencies in carrier's evidence and what he considers "mischaracterizations" by the hearing officer of Dr. D's report. Claimant also requests that

we "take judicial notice that Claimant was **not** represented when he gave his statement." (Emphasis in the original.)

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies 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). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight 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). In this case, the hearing officer obviously gave greater weight to the inferences raised by Mr. S and Mr. RS than the testimony of the claimant, as was within her prerogative to do. Because another fact finder could have drawn different inferences from the evidence, which would have resulted in a different result, does not provide a sound basis for us to reverse the hearing officer's decision. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

In part B of his appeal, claimant points out that he had complied with the timely reporting requirements but yet "the Carrier fails to file their Payment of Compensation or Notice of Refused/Disputed Claim [TWCC-21] within seven days as **mandated** by . . . § 409.021(a)." Claimant, without giving the citation, then refers to the Downs, *supra*, decision. First, we note that the CCH was held on January 25, 2000, and the Downs decision was issued one day later, on January 26, 2000. The "pay or dispute" provision of Section 409.021(a) was not raised as an issue or even mentioned at either the benefit review conference (BRC) or the CCH. Section 410.151(b) provides that an issue which was not raised at a BRC "may not be considered" unless the parties consent or the Texas Workers' Compensation Commission [Commission] determines that good cause existed for not raising the issue at the BRC. The issue, not having been raised, and not even mentioned, has not been preserved on appeal. The hearing officer made no findings on when carrier disputed compensability (although carrier's TWCC-21 is in evidence) and we decline to consider an issue not considered at the CCH and raised for the first time on appeal.

Claimant next contends that the carrier failed to timely answer the interrogatories propounded to it pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(a) (Rule

142.13(a)). Claimant made an objection to carrier's failure to timely answer the interrogatories at the CCH, in essence, asking that all carrier's evidence be excluded. As claimant alleges, the hearing officer did not make a ruling regarding claimant's contention that no good cause existed. We note that neither the 1989 Act nor Commission rules provide a specific remedy against a party that fails to comply with the discovery other than to exclude that evidence which had not otherwise been exchanged. The only remedy is that absent a good cause finding, any unexchanged information and documents may be excluded. Texas Workers' Compensation Commission Appeal No. 990697, decided May 17, 1999; Texas Workers' Compensation Commission Appeal No. 982829, decided January 15, 1999. We review the hearing officer's ruling, or nonruling in this case, on an abuse of discretion standard. We find that the hearing officer did not abuse her discretion and the error, if any, is harmless error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

In that we are affirming the hearing officer's decision that claimant did not have a compensable injury, claimant cannot, by definition in Section 401.011(16), 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:

Gary L. Kilgore
Appeals Judge

Dorian E. Ramirez
Appeals Judge