APPEAL NO. 000493

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 February 2, 2000. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____ (misstated in the Decision and Order as _____), whether the claimant had disability from the injury sustained on _____ (mistated in the Decision and Order as _____), and whether the respondent (carrier) was relieved of liability because of the claimant's failure to timely report an injury. The hearing officer determined that the claimant did not sustain a compensable injury on _____; that the claimant failed, without good cause, to timely report an injury; and that, since there was no compensable injury, there can be no resultant disability. The claimant appeals, urging that the claimant's evidence was strong, that the carrier's evidence is not credible and that the decision should be reversed. The carrier responds that the evidence fully supports the determinations of the hearing officer and asks that the decision be affirmed.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth fairly and adequately the pertinent evidence in the case and it will only be outlined here. The claimant, a mechanic, testified that on _____, as he was trying to break a bolt loose on a transmission, the bolt broke and all of a sudden he fell back on his left knee and heard a "popping" sound. He acknowledged that he had prior serious knee problems and surgeries from an automobile accident years earlier, although he stated that he did not have any problems that he knew of with his left knee after 1981. He testified that after the _____ incident, he finished the job and left early. He states he reported the incident to the sales manager, CS, and states the owner also was aware of the injury although he did not report it to him. The claimant continued working, at least part of the time, until April 30, 1999. He saw a Dr. L at a clinic on June 4, 1999, at which time the clinic called the employer about workers' compensation. Dr. L's report reflects a history of claimant's twisting his left knee and feeling a "pop" on April 6, 1999, and lists a tentative diagnosis of left knee internal derangement. A later MRI report indicated osteoarthritis, horizontal tear of the posterior horn of the medial meniscus, and complex tear of the the posterior horn of the medial and lateral meniscus. Claimant was seen in September 1999 by a Dr. S, whose history indicates that claimant did not have any problems with his left knee after surgery in 1981 until _____, and opined that the claimant sustained a new injury to the left knee because "in all reasonable medical probability he had aggravation of a pre-existing condition." The claimant's written report of the claimed injury dated June 14, 1999, appears to show a date of injury of _____.

Regarding the evidence presented that the claimant did not have any problems with his left knee after the 1981 surgery, the carrier placed in evidence a report from a Dr. O who had examined the claimant in 1998. Dr. O's report shows x-rays of the left knee

revealed considerable narrowing of the medial joint space and degenerative changes and indicates bilateral degenerative and traumatic arthritis of his knees and that he should not stand or walk for more than half an hour. Carrier also called CS and the owner of employer, GC. CS, who no longer works for the employer, testified that the claimant had stated before he was hired that he had knee problems and might be off at times; that the claimant frequently complained or talked about his prior knee injury and indicated he was being treated by the VA for the problem; that he in fact was off at times because of the knees; that he indicated he might have to have surgery and a draining procedure for his knee; that he never indicated or reported an injury from an _____ or _____ incident; that the first she heard anything about a claimed work-related injury was when a call came in from the clinic on June 4, 1999; and that if he had indicated an injury at work she would have reported it and seen that he received medical treatment. GC testified that the claimant frequently complained of his knee condition and related it to a "war" injury. He stated the claimant never mentioned or showed signs of having sustained an injury on the job and that he first became aware of a potential workers' compensation claim being asserted when he got a call from the clinic on June 4,1999. He inquired of all employees and none was aware of any incident or an on-the-job injury by the claimant.

Credibility was a key factor in this case, the assessment of which is generally the responsibility of the hearing officer. Section 410.165(a). In this regard it is apparent that the hearing officer did not accept the claimant's testimony as establishing that a compensable injury was sustained on _____, or that he notified the employer of the claimed injury no later than 30 days after the date of the injury. Clearly, there was a degree of conflict and inconsistency in the evidence and testimony for the hearing officer to resolve (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and in doing so he could believe all, part, or none of the testimony of any given witness, including the claimant. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Here, there was some inconsistency in the testimony concerning the claimed date of injury, about the claimant's continuing to work and about his prior injuries and the more recent condition of the knees before _____. There was also direct conflict in the testimony regarding any indication or reporting of a work-related injury from an _____, incident, until a call from the clinic on June 4, 1999. Although Dr. S opined that the claimant had an aggravation injury, his opinion has to rely to a significant degree on the history from the claimant, a matter in contention for the hearing officer to resolve. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ); Texas Workers' Compensation Commission Appeal No. 992619, decided January 5, 2000 (Unpublished). With the claimant having the burden of proof to show a compensable injury and timely notice, it is apparent the hearing officer concluded the claimant did not meet that burden and gave greater weight to the evidence presented by the carrier on the issues. From our review of the evidence we cannot conclude that the findings and conclusions of

the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). With the finding of no compensable injury and untimely notice, there cannot be disability as defined in the 1989 Act. Section 401.011(16). Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge