APPEAL NO. 000532

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 10, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and had disability for the period beginning September 27, 1999, and continuing through the date of the hearing. He determined that temporary income benefits are to be paid for all periods of disability until maximum medical improvement is reached.

The appellant (carrier) has appealed, arguing that the inconsistencies in claimant's testimony render his account of the incident unbelievable. The carrier recites the evidence in detail; its argument is in part that the claimant had a preexisting condition or injury before the date he contends he was injured. The carrier argues that it is previous records and statements that should be believed, not the claimant's appearance and testimony at the CCH. The claimant responds that the hearing officer has correctly weighed and reconciled the evidence.

DECISION

Affirmed.

The claimant had been involved in the moving profession a number of years prior to his accident in dispute. He said that it was a frequent occurrence to experience aches and pains in the course of his work.

On _____, a Friday, the claimant said he was unloading a van with Mr. C and was lifting a dresser when he had sharp pain in his lower left neck and down his left arm. He said he mentioned something to Mr. C and they put the dresser down to rest, then resumed the move. A notarized statement from Mr. C agreed that the claimant was lifting a dresser on this date when he complained of sharp pain in his neck.

The claimant said that the next day, he developed numbness in his arm. By Sunday, the claimant, who recounted a family history of cardiac disease affecting both parents, had shortness of breath and palpitations. He was taken to the emergency room (ER) by his wife, and held overnight for observation. The claimant's working assumption was that something was wrong with his heart. He said he reported shortness of breath for over a month, and also reported having neck and arm pain during the weekend, but did not say (as was recorded) that he had left arm pain over the previous month.

The claimant said that he called his dispatcher on Monday, since he was supposed to work, and told him what had happened. He was found to have no cardiac problem. The claimant said he subsequently went to (clinic), which was used by the employer. He was referred to Dr. H, and at first saw him on October 6, 1999, who ordered an MRI and told claimant that he had serious problems in his neck. He eventually went to his family doctor, Dr.

D, and said that he did not initially go to Dr. D because the clinic and Dr. H were the workers' compensation doctors.

Questioned on cross-examination, the claimant said that he did not know Mr. C's last name when he worked with him or at the time he gave an unsworn statement to the adjuster. The claimant's statement to the adjuster indicated that he did "not recall" telling Mr. C about his injury. The claimant said that he understood from Dr. H that everyone has some degree of degenerative conditions, and that claimant felt that his problems in part were due to 21 years of moving furniture.

The ER records note that claimant had left arm pain and numbness over the past month. Several of the notes are illegible. He was seen for chest tightness. Claimant had high blood pressure. The pain diagram shows complaints of mid chest pain. His discharge diagnosis was hypertension and chest pain of non-cardiac origin. Discomfort in his left neck and left arm was noted in the discharge report. When asked why he did not report the dresser incident to the ER doctors, the claimant explained that this was because he perceived the problem as cardiac.

The clinic records from claimant's September 28, 1999, examination diagnosed a cervical strain, and claimant was returned to work with restrictions on driving or using his left arm. He underwent physical therapy as ordered by Dr. P, the doctor at the clinic.

The MRI ordered by Dr. H was done on October 22nd and was reported as showing spinal cord encroachment and pressure at three cervical levels. Many of the findings in these areas are described as anterior extradural defects and spurring.

Dr. B, a doctor for the carrier who did not examine the claimant, opined that the MRI findings showed a chronic condition and he felt it doubtful that the claimant would have been symptom-free prior to the reported lifting incident. Nothing in Dr. B's letter addressed whether an underlying condition would be aggravated by the lifting incident.

Dr. H does address this in a January 19, 2000, letter. He stated that the claimant had definite herniated discs. He agreed that claimant had some prior osteoarthritis, but that this was not the etiology of his problem. Dr. H stated that the problems were definitely related to the claimant's work as a mover, and he felt that claimant experienced an acute onset of a disease process brought on by many years of hard labor. He commented that Dr. B's observations that claimant likely had pain before were not borne out by records of his history.

Concerning disability, Dr. H took the claimant off work on October 6, 1999. Dr. H wrote on November 5, 1999, that there was no way that the claimant could move furniture and he should do some type of clerical work.

A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ).

It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

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.).

The carrier cites no support for its position that unsworn statements and documentary evidence are required to be believed over sworn testimony and explanations during the CCH of perceived "inconsistencies." The claimant satisfied the hearing officer that many of the so-called inconsistencies were accounted for by the claimant's belief that he was having a cardiac episode when he went to the ER the weekend following his lifting incident. The fact that claimant stated to the adjuster in his statement that he could not recall telling Mr. C about his injury is somewhat overcome by the notarized statement from Mr. C that claimant did complain. This is not an inconsistency--it can be reconciled as a true statement to the adjuster ("I do not recall") coupled with later finding out that he did in fact mention something to Mr. C. Likewise, the carrier's assertion that the failure of the claimant to mention the dresser-lifting incident at the ER is a "major" discrepancy is readily (and to the hearing officer, credibly) explained by the claimant's anxiety about his cardiac health, given his family history.

To the extent that the carrier asserted that claimant's problems resulted only from a preexisting degenerative disease, it had the burden of proving this to counter claimant's evidence of the dresser incident and his subsequent pain. It is axiomatic, in caselaw having to do with aggravation, that the employer accepts the employee as he is when he enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). However, the compensable injury includes these enhanced effects, and, unless a first condition is one for which compensation is payable under the act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). Dr. H's opinion additionally provides sufficient support for the hearing officer's finding that a new injury occurred and that the claimant had disability as a result. We affirm his decision and order on occurrence of an injury and subsequent disability.

Susan M. Kelley
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge