APPEAL NO. 000603

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 March 1, 2000. The hearing officer concluded that the respondent (claimant) sustained a compensable injury on _____, and that claimant had disability from May 26, 1999, through the date of the CCH. The appellant (carrier) has challenged these conclusions and the underlying factual findings for evidentiary insufficiency. The carrier contends that the hearing officer=s determination that claimant sustained a new back injury at work on _____, is against the great weight of the evidence because claimant specifically told his supervisor and several healthcare providers that he had not sustained a new back injury at work before changing his position and filing a claim. The file does not contain a response from claimant.

DECISION

Affirmed.

The parties stipulated that claimant timely reported the claimed injury of _____. Claimant testified that on that day, a Friday, while working on an air conditioning control box assembly line which was broken, he grabbed a hook and reached out to pull a box towards him on the line, twisting and extending himself in the process, and felt a stabbing pain in his low back; that the event was not witnessed nor did he mention it to anyone at the time; that he finished his shift and went home; that the pain increased to the point that he was mostly bedridden over the weekend; and that on the following Monday, he told his supervisor, Mr. S, that he did not want to have the injury treated as a new work-related injury but rather as the aggravation of his work-related low back injury of _____ which resulted in lumbar spine surgery including a 360E fusion at the L5-S1 level. Claimant stated that he also denied recent trauma when he was seen by the company=s physical therapist, Mr. B, and by emergency room (ER) personnel. He said he thought that perhaps a fusion screw had backed out or that something else had happened at the site of his prior injury. He further stated that he was a long-time employee of the employer, was very fearful of losing his job over another injury, and just wanted to undergo the surgery and return to work. He said that once diagnostic testing revealed that he had sustained a new injury at another lumbar spine level, L4-5, he claimed the new injury.

Claimant further testified that he wanted to see his surgeon, Dr. L, but was told he first had to see Mr. B; that on May 25, 1999, he saw Mr. B, who referred him to the "company doctor," Dr. S; that he saw Dr. S on May 26, 1999, and was taken off work on that date; that he went to an ER on May 27, 1999, where he was given a shot of morphine; that Dr. S referred him to Dr. L; and that he was later referred to Dr. T, who performed a discogram and told him he had a new lumbar spine injury.

Mr. S testified that he was not aware of claimant=s having back pain following his return to work after the fusion surgery and that claimant is an "excellent" employee. Mr. S further stated: "If [claimant] told me he hurt his back at work, I=d take it to the bank. I=d never doubt his word. . . ."

Mr. B testified, and his progress record notes in evidence reflect, that when he saw claimant on May 25, 1999, claimant reported having back pain for the past few weeks and denied a new work injury. Dr. S=s note of May 26, 1999, states that claimant is in with back pain; that he was doing well up until about two weeks earlier but has gradually developed back pain; that he now has exquisite lumbar pain; and that there was no acute incident at work. Dr. S stated that he would refer claimant to his neurosurgeon, Dr. L.

Dr. L=s report of June 10, 1999, states that claimant had done "extremely well" after a lumbar fusion in 1996; that in May claimant felt a twinge in his back and developed a sore back over the weekend; and that he is requesting an MRI and taking claimant off work. Dr. L reported on August 10, 1999, that the MRI scan did not reveal a surgical lesion and that he is referring claimant back to Dr. T, who previously saw claimant for conservative pain management.

Dr. T wrote on January 25, 2000, that the lumbar discogram of November 8, 1999, showed an abnormal disc at L4-5 and that a CT scan showed a right lateral fissure at L4-5, which is the source of claimant=s pain.

The factual findings disputed by claimant are set out in the hearing officer=s Decision and Order. Claimant had the burden to prove that he sustained the claimed injury and that he had disability as that term is defined in Section 401.011(16). Texas Workers= Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers= compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers= Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref=d n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the 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)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref=d n.r.e.). As an appellate reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). The hearing officer specifically œomments in his Statement of the

Evidence that he found credible both claimant and the mechanics and progression of the claimed injury and that such credibility offset claimant=s initial denials of a new trauma at work.

The decision and order of the hearing officer are affirmed.

Philip F. O=Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge