APPEAL NO. 000838

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 28, 2000. With respect to the issues before him, the hearing officer determined that the respondent/cross-appellant (claimant) sustained a compensable injury on _____; and that the claimant had disability as a result of his compensable injury from October 23 to December 3, 1999. In its appeal, the appellant/cross-respondent (carrier) asserts that the hearing officer's determination that the claimant sustained a compensable injury is against the great weight of the evidence. The carrier also challenges the hearing officer's disability determination, contending that the claimant cannot have disability because he did not sustain a compensable injury. The appeals file does not contain a response to the carrier's appeal from the claimant. In his cross-appeal, the claimant asserts that the hearing officer erred in finding only a limited period of disability. In addition, the claimant argues that the hearing officer erred in determining that his injury was a lumbar sprain/strain, contending that the hearing officer should not have made a determination as to the nature of the injury because an extent-of-injury issue was not before him. In its response to the claimant's appeal, the carrier urges affirmance, subject to its appeal of the hearing officer's determination that the claimant sustained a compensable injury.

DECISION

Affirmed.

The claimant testified that on _____, he was loading boxes of computer parts onto an 18-wheeler in the course and scope of his employment with (employer). He stated that as he lifted a box over his head to stack it on the truck, he felt a "pop" in his low back followed by a sharp pain. He stated that the pain subsided somewhat but it returned as he was walking out to his car at the end of his shift. He stated that his pain became increasingly worse over the next two days such that on _____ he went to the emergency room. At the emergency room the claimant was given an off-work slip that states he "needs 7-10 days off of work for back muscle spasm."

On November 3, 1999, the claimant began treating at the (clinic). Progress notes from that visit reflect a diagnosis of lumbar and thoracic strains/sprains and note a history of the claimant's having injured his back lifting a box at work. A November 11, 1999, note from the clinic refers the claimant for a lumbar MRI because of a suspected herniation due to the claimant's severe lumbosacral pain. On November 22, 1999, the claimant began treating with Dr. G, a chiropractor, on the advice of his attorney. Dr. G referred the claimant for a lumbar MRI on November 22nd, which revealed "somewhat congenitally short pedicles, particularly at L3-4 and L4-5 causing some mild congenital decrease in caliber of the central canal"; "[a]ssociated minimal disc bulge and facet hypertrophy cause borderline spinal stenosis at L4-5"; and "[n]o focal disc herniations." Dr. G testified at the hearing that

the claimant presented on November 22nd in "obvious pain" with severe muscle spasms in his back to the point that he had difficulty getting into and out of a chair and on and off the examination table. Dr. G stated that the claimant told him that he had injured his back lifting a box at work. Dr. G opined that the claimant's symptoms were consistent with the mechanism of injury he described. Dr. G stated that he has treated the claimant conservatively with therapy and referred him for injections; that the claimant has not responded to conservative treatment; that he is recommending a surgical consultation with a neurosurgeon; that the claimant has not been able to work since the time of his initial appointment; and that based on the severity of his symptoms on November 22, 1999, the claimant has not been able to work since the date of his injury. On cross-examination, Dr. G acknowledged that his opinion as to the cause of the claimant's injury was dependent upon the history provided to him by the claimant; however, Dr. G maintained that based on the severity of the claimant's symptoms, they were the result of a traumatic event.

On February 22, 2000, Dr. S examined the claimant as a Texas Workers' Compensation Commission-ordered required medical examination doctor. In his report, Dr. S stated that the claimant presented with much pain behavior during his examination. In the history section of his report, Dr. S stated that the claimant did not have immediate pain after lifting the box, which is at odds with the claimant's testimony at the hearing. Dr. S noted that the claimant had a normal musculoskeletal and neurologic exam and that he could not identify any objective findings in the claimant's thoracolumbar examination. Dr. S concluded:

> At the most the patient may [have] sustained a thoracolumbar sprain/strain which would heal within four to six weeks and based on today's evaluation there is no pathology to indicate any persistent pathology. Therefore, at most he had sustained a thoracolumbar sprain/strain on _____ which would have been expected to completely heal without any residual effects by the first week of December 1999 with no residual effects.

In his testimony, Dr. G responded to Dr. S's report stating that he also performed tests to determine if the claimant was malingering and that none of those tests gave an indication of malingering on the part of the claimant. In addition, Dr. G stated that Dr. S was incorrect in his statement that the claimant had delayed onset of his symptoms.

Initially, we will consider the carrier's challenge to the hearing officer's injury determination. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n 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. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. 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 manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier contends that the hearing officer's determination that the claimant sustained a compensable injury is against the great weight and preponderance of the evidence. In so arguing, the carrier emphasized the delayed onset of the claimant's symptoms referenced by Dr. S and the fact that the lumbar MRI revealed preexisting congenital problems in the claimant's lumbar spine. There was conflicting evidence on the question of whether the claimant had immediate back pain after lifting the box. The claimant testified to immediate pain while Dr. S reported that the pain was delayed and the claimant first felt pain while walking to his car at the end of his shift on the date of the alleged injury. The hearing officer was acting within his province as the fact finder in deciding to credit the claimant's testimony over that of Dr. S with respect to the onset of the claimant's pain. In addition, the hearing officer was free to accept Dr. S's opinion that "at most" the claimant sustained a lumbar sprain/strain injury. The factors that the carrier emphasizes on appeal, it also emphasized at the hearing; however, the significance, or lack thereof, of those factors was a matter left to the discretion of the hearing officer as the fact finder. Our review of the record does not reveal that the hearing officer's injury determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool; Cain.

In his appeal, the claimant contends that the hearing officer erred in finding that his injury was a lumbar sprain/strain injury as opposed to just finding that he sustained a compensable lumbar injury. The claimant contends that the hearing officer erred in delineating the nature of the injury because an extent-of-injury issue was not before him. We find no merit in this assertion. We are unaware of any authority that limits a hearing officer from defining the injury where, as here, there is not an extent-of-injury issue before him and the claimant does not cite to any such authority. Thus, we perceive no error in the hearing officer's having determined that the claimant's injury was a lumbar sprain/strain as opposed to simply finding that the claimant sustained a lumbar injury.

The carrier's challenge to the hearing officer's disability determination is premised upon the success of its argument that the claimant did not sustain a compensable injury. The claimant appeals the disability determination, arguing that his disability continued through the date of the hearing. Admittedly, Dr. G testified that the claimant was unable to work because of the severity of his injury. However, Dr. S opined that the claimant's injury

would have resolved within four to six weeks after it occurred and that he would not have had any residual symptoms. In addition, Dr. S opined that the claimant engaged in significant pain behaviors during his examination. The hearing officer was acting within his province as the fact finder in deciding to give more weight to the evidence from Dr. S concerning the severity of the claimant's injury and the period during which the claimant was unable to obtain and retain employment at his preinjury wage because of his compensable injury. Nothing in our review of the hearing officer's determination that the claimant had disability from October 23 to December 3, 1999, reveals that it is so contrary to the great weight of the evidence as to compel its reversal on appeal. Pool; Cain.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. Stephens
Appeals Judge

Dorian E. Ramirez
Appeals Judge