APPEAL NO. 001308

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 May 11, 2000. With regard to the issues before him, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____ (all dates are1999 unless otherwise noted); and that the claimant had disability beginning on September 16 and continuing through the date of the CCH. The appellant (carrier) appealed, arguing that the claimant's "testimony and presentation at the [CCH] were wholly inconsistent, not credible" and factually contradictory. The carrier contends that the hearing officer's decision was "based on nothing more than the nonsensical inconsistent conclusions reached by the Claimant," attacks the workers' compensation system and the claimant's treating doctor. The carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The claimant responds to many of the carrier's points and alleges bias on the part of the carrier's doctor. The claimant urges affirmance.

DECISION

Affirmed.

Initially, we note that both parties attack the credibility of the opposing testimony and medical reports. The claimant was employed as a refrigerator mechanic. The claimant testified that on _____, he was working on some "base rails" of refrigeration units and was required to move a heavy wheel throughout his shift. Whether the claimant felt pain at the time is subject to conflicting evidence (the hearing officer commented that the claimant "felt no pain on that _____"). The claimant said the next morning he woke up with intense pain in his left arm. The claimant's position is that the work of the previous day must have caused his injury because he had done nothing but sleep between working and waking up with pain. The hearing officer summarizes the subsequent events as follows:

> The claimant returned to work on _____ and notified his employer that he was injured. An accident report was completed and it indicated that the claimant believed his injury was caused by "wheels", a reference to the activity that he was performing the previous _____. The claimant was seen by the company's nurse where he was given aspirin. The following day, the employer made arrangements for the claimant to go to the emergency room. [(clinic ER)].

The clinic ER released the claimant to return to light duty. The claimant attempted to perform light duty on September 15 but went home in pain. On September 16, the claimant began treating with Dr. O.

The clinic ER notes recorded a date of injury as _____, and diagnosed a left shoulder strain. The claimant was released to modified duty with certain restrictions and

prescribed medication. A follow-up appointment was scheduled for September 21. In a progress note dated September 16, Dr. O recites a history of throwing "a wheel across a base rail," pain at the time, that the claimant "felt his arm jerk," and pain in his shoulders radiating into the neck. Dr. O took the claimant off work and ordered MRIs. An MRI performed on October 4 showed:

> Disc degeneration is present at C5-6 and C4-5; there is a 2 mm left-sided disc herniation at C5-6 and a 1-2 mm diffuse disc protrusion at C4-5, both of which contain anular fissures. There is spinal cord impingement at C4-5, but no significant stenosis.

The claimant was referred to Dr. R, who in a report dated September 21, repeated the history recited in Dr. O's reports, and assessed the claimant with cervical neuritis, left shoulder strain/sprain, multiple cervical/thoracic trigger points, and radiculopathy left upper extremity.

The claimant continued to treat with Dr. O, initially three times a week and, at the time of the CCH, only one time a week. In a report dated November 3, Dr. O recited in detail how he believed the claimant's injury occurred and concluded:

> The injury that was caused and the damage to his body was evidence on objective findings of a MRI of the cervical spine which revealed 2 levels of disc protrusion that were herniating to the left side which is very consistent with the mechanism of injury the patient has described.

The carrier's position is that the claimant told the employers safety manager that he did not know how he had gotten hurt (in a transcribed statement), and that the claimant's testimony was not credible, was inconsistent, and was contradictory. In a record review dated January 4, 2000, performed for the carrier by Dr. T, Dr. T comments, incorrectly, that no report of injury was made for five days and that the claimant failed to attend an independent medical examination (IME) (there was no evidence to support that statement). Dr. T goes on to state that there is no reasonable basis for an assumption that there was a soft tissue injury and;

> If indeed there had been a shoulder injury from a soft tissue standpoint (strain/sprain) or a disc injury in the cervical spine arising from _____, there would have been inescapable symptoms immediately.

It is very obvious, from both Dr. T's report and the carrier's appeal, that Dr. O is not held in high regard by the employer/carrier and that Dr. T is not highly considered by the claimant (or his attorney). The hearing officer, in his Statement of the Evidence, comments:

> I found [the claimant] to be a credible witness. Based upon his testimony I find that he was indeed hurt while working on the base rails on _____.

> The medical records, including [Dr. O's] establish that the claimant has sustained damage to his body, the extent of which was not an issue before me. I also find it plausible, as stated by [Dr. O], that a delay between an injury and the onset of symptoms is not uncommon. Of the two chiropractic opinions in evidence, I found [Dr. O's] to be more persuasive. [Dr. T's] medico-legal analysis was based on erroneous information. [Dr. T] relied on several factual inaccuracies in reaching his conclusions.

The carrier attacks the claimant's credibility, pointing to certain contradictions and inconsistencies in the claimant's testimony, his recorded statement, and what he allegedly told the employer's safety manager. The carrier also attacks Dr. O's reports and states that this "case is a ridiculous example of an abuse of the workers' compensation system." The evidence was obviously in conflict and we have frequently noted Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts 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). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer obviously gave more weight and credibility to Dr. O's reports and the claimant's testimony than to the contrary, a factor that was the prerogative of the fact finder.

On the issue of disability, the carrier principally hinges its appeal on its contention that there was no compensable injury, but goes on to castigate Dr. O, saying "common sense must overcome the ridiculous exaggeration of treatment and prolonged manipulation of medical care shown by chiropractor [Dr. O]." Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id*. Again, whether an injured employee has disability is a factual determination for the hearing officer to resolve. We further note that even if the hearing officer chose to disregard Dr. O's and Dr. T's opinions, issues of injury and disability may be established by the claimant's testimony alone, if believed, as it obviously was here. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

Upon review of the record submitted, we find no reversible error. 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

Tommy W. Lueders
Appeals Judge