APPEAL NO. 001742

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 July 5, 2000. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the claimant did not have disability; that the claimant had good cause for his failure to timely report his alleged injury to his employer; and that the claimant is not barred from pursuing Texas workers' compensation benefits because of an election of remedies. In his appeal, the claimant argues that the hearing officer's injury and disability determinations are against the great weight of the evidence. In its response to the claimant's appeal, the respondent (carrier) urges affirmance. The carrier did not appeal the hearing officer's determinations that the claimant's late notice of injury was excused by good cause and that the claimant did not make an effective election of remedies and those determinations have become final pursuant to Section 410.169.

DECISION

Affirmed.

The hearing officer's decision contains an accurate factual recitation which will only be summarized here. The claimant testified that on _____, he was working as a water blaster for the employer; that he was assisting other employees in pulling an industrial hose onto an oil rig; and that as he pulled on the heavy hose, he felt pain in his low back. The claimant continued to work until November 1, 1999, when he sought medical treatment from his family doctor, Dr. A. Dr. A's treatment notes reflect that the claimant complained of back pain of several months duration and they do not contain a history of the claimant's having been injured at work; however, they do state that the claimant "[a]dmits to heavy lifting." After treating briefly with Dr. A, the claimant was referred to Dr. K. In his December 20, 1999, report, Dr. K noted that the claimant had had pain in his low back for several years and that the claimant could "not recall any triggering episode for his pain." At a January 5, 2000, follow-up visit, Dr. K noted that "since his last visit [claimant] remembered that in October of 1999 he had an incident where he injured his back" pulling on a heavy hose at work. The claimant was eventually referred to Dr. E, a neurosurgeon, for a surgical consultation. In a progress note of January 10, 2000, Dr. E noted that the claimant had hurt his back while trying to pull on some heavy hoses at work in October 1999 and that his back pain, which he had off and on "for a long time" had become worse and begun to radiate into the left lower extremity after that incident. Dr. E concluded "I believe that maybe his condition aggravated with this injury in October."

The claimant argued that he aggravated his preexisting back condition in the lifting incident at work on _____. The aggravation of a preexisting condition in the course and scope of employment is a compensable injury under the 1989 Act. Peterson v. Continental Cas. Co., 997 S.W.2d 893 (Tex. App.-Houston [1st Dist] 1999, no pet. h.). The claimant has the burden to prove that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ).

The question of whether the claimant sustained a compensable aggravation injury presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before her. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain his burden of proving that the _____, incident at work caused an aggravation of the claimant's low back condition. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant had sustained his burden of proof on that issue. Our review of the record does not reveal that the hearing officer's determination in that regard is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that the claimant did not have disability. The 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Tommy W. Lueders
Appeals Judge