APPEAL NO. 001833

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 July 13, 2000. The issues at the CCH were injury, timely report of injury and disability. The hearing officer concluded that the respondent (claimant herein) suffered a compensable injury on _____, that the claimant timely reported his injury to the employer and that the claimant had disability from February 7 through July 13, 2000. The appellant (carrier herein) files a request for review challenging a number of the fact findings of the hearing officer and specifically contending that the evidence did not establish injury or timely report of injury. The carrier also asserts that the claimant's preexisting condition was the sole cause of his disability. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the Decision and Order of the hearing officer.

The claimant testified that he injured his lower back on _____, when he was lifting cores from a machine at work. The claimant went to a hospital emergency room on February 6, 2000, where he was diagnosed with acute thoracolumbar and abdominal strain. The claimant testified that he reported his injury to his supervisor on February 6, 2000, and provided the supervisor with a medical slip from the emergency room. The claimant testified that when he provided the medical slip to his supervisor he was given different duties but had difficulty performing them The claimant further testified that he had been unable to return to work as result of his injury beginning on February 7, 2000. This is supported by medical evidence from Dr. R, D.O., the claimant’s treating doctor at the time of the CCH, who expressed the opinion in a letter dated May 30, 2000, that the claimant had been off work due to his injury since February 28, 2000, which was the date of the claimant's first visit with Dr. R. Dr. R also expressed the opinion in the same letter that the claimant's lack of therapy due to the denial of the claim by the carrier was prolonging the claimant's recovery and contributing to his absence from work.

The claimant testified that he had been involved in a motor vehicle accident in January 1999. There is a record of a lumbar MRI which was taken in May 1999 as result of that accident. This MRI indicated a "very small central bulge at L5-S1." The report of a lumbar catscan on May 2, 2000, states in part, "L5-s1 level shows a Grade 1 central disc protrusion." Dr. R characterizes this as a change in the lumbar spine and states that the claimant's current injury was not related to his previous injury.

The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole

judge of the relevance and materiality of the evidence as well as of 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, 702 (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, 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review, the hearing officer's decision is clearly supported by the testimony of the claimant and the medical reports of Dr. R. The fact that the claimant had a previous injury does not preclude him from suffering injury. It is in fact well established that employer takes an employee in the condition in which he is hired and the aggravation of a preexisting condition can constitute a compensable injury.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). The claimant testified that he reported his injury the day after it happened. The claimant's testimony is sufficient to support the hearing officer's finding of timely notice and there is no contrary evidence whatsoever.

Disability is a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. In the present case the hearing officer's finding of disability was supported by both the claimant's testimony and medical evidence. The carrier argues that the claimant's January motor vehicle accident is the sole cause of any disability the claimant has suffered. The burden to prove sole cause is on the carrier and there is no evidence that the claimant's disability found by the hearing officer was solely caused by the claimant's January 1999 motor vehicle accident.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge