APPEAL NO. 002066

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 August 1, 2000. With regard to the three issues before him, the hearing officer determined that the respondent (carrier) did not timely contest compensability of the claimed injury; and that the appellant (claimant) had not sustained a compensable injury; that because the claimant had not sustained a compensable injury, the failure to timely contest compensability did not create an injury (Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.) as a matter of law that the claimant did not have disability.

The claimant appeals, stressing his testimony and medical evidence that support his position; argues that the carrier presented no medical evidence "that fully contradicted my testimony"; and contends that the hearing officer misapplied Williamson. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier responds that there is sufficient evidence to support the hearing officer's decision and urges affirmance.

DECISION

Affirmed in part; reversed and rendered in part.

The claimant was employed as a "quality auditor" which required frequent travel. The claimant testified that on _____, after finishing an audit in Arkansas while exiting the building he stepped off a curb or elevated surface, turned his ankle and twisted his right side. The claimant said that the client company escort saw him stumble and then bend down to tie his shoe and asked if he was all right. The claimant did not report the incident at the time and drove home. The claimant subsequently reported the incident (reporting is not an issue) and sought treatment from his treating doctor, Dr. C on April 6, 1999. The claimant testified that he had had prior back problems in 1998 but they had resolved and that he had not had any numbness or incontinence prior to _____.

Records and progress notes from Dr. C are in evidence. In a progress note of August 11, 1998, Dr. C notes that the claimant has had a number of traumatic injuries to his low back "since the age of 13" (the claimant is now 52 years old), that the claimant has a recent loss of bladder control and that the claimant has a "[l]ong history of low back pain . . . and loss of bladder control." Dr. C's note of April 6, 1999, notes that the claimant "is again having problems with his low back" and has an assessment of "[r]ecurrent low back problems." There is no mention of stepping off a curb or of a sore ankle. The claimant said that Dr. C took him off work, but that is not reflected in the records. Dr. C referred the claimant to Dr. T, who had apparently treated the claimant in 1998. Dr. T, in a report dated September 3, 1998, notes continuing right hip and back complaints, an incident where the claimant fell on his back, episodes "of continence," and "numbness over the right lateral thigh" and discusses an MRI which was normal except for degenerative changes. Several other progress notes from Dr. T are handwritten and fairly illegible but

do not reference the misstep on _____. The first reference to this incident is a report from Dr. R), another referral doctor. In a report dated October 15, 1999, Dr. R had an impression of "[r]ight greater trachanteric bursitis." In a letter dated June 14, 2000, to the claimant's ombudsman, Dr. R writes:

> In March of 1999, [claimant] had an injury at work in which he pulled something in his right hip area. It appears that this was the onset of his symptoms and, in my opinion, this would be a compensable injury. I do not think the disc itself is injured and I do not think he is going to need surgery.

The claimant filed a request for short-term disability benefits on May 11, 1999, alleging a "low back strain." On the line which asked when the symptoms first appeared or the accident happened, the claimant wrote "1961." (The claimant had previously filed for short-term disability benefits in August 1998.)

The claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated July 1, 1999, regarding the _____, incident. The carrier, on a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated January 27, 2000, stated its first written notice of the claimant's injury was received on December 6, 1999. The TWCC-21 was filed with the Texas Workers' Compensation Commission on March 8, 2000. The carrier concedes that its TWCC-21 was not timely filed and relies on Williamson, *supra*.

Fairly clearly the evidence is in conflict and the medical records contradict some of the claimant's testimony. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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 medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association 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. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. 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 we will 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Injury may be proven by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the liability from common knowledge to find a causal basis.

The claimant, in his appeal, argues that the quantity and quality of his evidence was equal to the evidence of the carrier. That, however, was a matter for the hearing officer to resolve. The claimant also argues that no medical evidence presented by the carrier "fully contradicted my testimony." The burden is on the claimant to prove his case and the carrier is not obligated to present any evidence to contradict that of the claimant. In this case, the hearing officer could consider that the claimant's past medical problems were more extensive than testified to by the claimant; that there was a gap of several months before the _____, incident is referenced in the medical records; and that the claimant had initially applied for short-term disability benefits due to this episode. In any event, those were contradictions for the hearing officer to resolve. 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, *supra*; Pool, *supra*. Applying this standard of review to the record of this case, we affirm the hearing officer's decision that the claimant did not sustain an injury in the course and scope of his employment.

Regarding the Williamson, *supra*, issue, the carrier concedes that its TWCC-21 was not timely filed but contends that "the carrier's failure to contest compensability cannot create an injury as a matter of law." We agree with that contention in the abstract; however, we note that in this case the claimant had a prior injury to his back and, therefore, the claimant had damage or harm to the physical structure of the body (i.e., an injury). In a similar case, Texas Workers' Compensation Commission Appeal No. 001214, decided July 20, 2000, the hearing officer found that the claimant, in that case, had not sustained an injury in the course and scope of his employment and applied Williamson; the Appeals Panel commented:

> In Williamson, the court held that if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier's failure to contest compensability cannot create an injury as a matter of law. The Appeals Panel has held that Williamson is limited to situations where there is a determination that the claimant did not have an injury, that is no damage or harm to the physical structure of the body. In the instant case, claimant claimed a back injury and the hearing officer found that claimant has a back injury, although she determined that the injury did not occur in the course and scope of employment. Because there was a finding of injury, Williamson is not applicable. Appeal No. 992584 [Texas Workers' Compensation Commission Appeal No. 992584, decided January 3, 2000].

In Appeal No. 001214, *supra*, we reversed the hearing officer's decision that the claimant, in that case, had not sustained a compensable injury and rendered a new decision that the claimant's back injury was compensable as a matter of law because the carrier waived its right to contest compensability of the back injury. Similarly, in this case, the hearing officer found that the claimant sought medical treatment for "recurrent back problems"; while we affirm that the recurrent back problems were not the result of an injury in the course and

scope of employment, we reverse the hearing officer's decision and render a new decision that the claimant's back injury is compensable as a matter of law because the carrier waived its right to contest compensability of the back injury.

On the issue of disability, although the carrier states that the claimant did not appeal the finding of no disability, our review of the claimant's appeal discloses that the claimant "rebuts" the hearing officer's conclusion that the claimant did not have disability and that findings of "no disability are completely inconsistent with this case law finding [Williamson, *supra*]." We agree. In that the hearing officer's finding of no disability was predicated on a finding that the claimant did not sustain a compensable injury, we also reverse the hearing officer's decision on that issue. The hearing officer, in Finding of Fact No. 15, found that the claimant was unable to obtain and retain employment at his preinjury wage from May 16, 1999, and continuing through April 14, 2000. Accordingly, we render a new decision that the claimant had disability from May 16, 1999, through April 14, 2000.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge