APPEAL NO. 002107

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 16, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) had not sustained a compensable injury on _____, and that the claimant did not have disability.

The claimant appealed, contending that he had sustained a low back injury which was supported by the medical evidence and that the hearing officer's decision is against the great weight and preponderance of the evidence. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (self-insured) responds, urging affirmance.

DECISION

Affirmed.

The claimant was employed as a custodian in one of the self-insured's schools. The claimant testified that on Friday, _____ (all dates are in 2000 unless otherwise noted), as he was throwing a trash bag into a dumpster his foot slipped, causing him to injure his back. There is contradictory evidence whether he felt pain at the time or not. The claimant finished his shift that day without reporting his injury. The claimant subsequently reported the injury to a supervisor on Monday, _____, and saw a doctor that same day. The claimant was subsequently terminated.

There was substantial testimony that the claimant had been having problems with his supervisors, that he had been counseled for tardiness and missing work on January 24, and that he had been told that he had to call in 24 hours prior to missing work unless it was an emergency. There was also testimony that the claimant, who worked an evening shift, would bring his family to work and they would also do some of his work. The claimant was again tardy on February 23 (because, according to the claimant, he had to take his ailing father to the doctor) and he had a confrontation with two of his supervisors. Those supervisors testified that the claimant was instructed, both verbally and in writing, to report to Mr. F office (Mr. F was the self-insured's director of facilities and operations and had authority to hire and fire) at nine o'clock Monday morning, February 28. According to Mr. F, the decision to terminate the claimant was made on Friday, February 25, and the meeting on February 28 was for Mr. F to inform the claimant that he was being terminated. The claimant was late to the February 28 meeting which had to be canceled because one of the supervisors could not be present. The claimant denied that he was aware that he was supposed to meet with Mr. F and said that he was just coming in to pick up his paycheck. According to the supervisors and Mr. F, the claimant left after the meeting was canceled and, about an hour later, came with a translator to report the injury. (In dispute is how well the claimant could communicate in English.) The self-insured alleges this is a retaliation claim and that the claimant knew that he was going to be terminated.

The claimant first saw Dr. B on February 28. In a report of that visit, Dr. B recited that the claimant had immediate low back pain and that on examination the claimant made less than a full effort in some testing. Dr. B diagnosed "[o]verextension and strenuous movements," acute lumbar strain/sprain, and sciatic radiculitis as well as several other items. Dr. B released the claimant to light duty. The self-insured subsequently denied the claimant's claim and according to the claimant, Dr. B refused to treat him further. The claimant's attorney then referred the claimant to Dr. C. The claimant apparently first saw Dr. C on March 20 and in a report of that date Dr. C recited the trash bag-throwing incident and diagnosed "[l]umbar IVD w/o myelopathy," sacroiliac sprain/strain, lumbar radiculitis, myalgia, and myospasms. Dr. C took the claimant off work and in evidence are a number of S.O.A.P. notes of treatment.

The hearing officer, in the discussion portion of his decision, commented:

> The claimant's testimony was less credible than that of the Self-Insured's witnesses, and overall was not persuasive. By the same [token], the medical evidence, which was entirely dependent on the claimant's own description of his symptoms (the only objective diagnostic test was absolutely unremarkable), cannot be regarded as reliable. The claimant has therefore failed to sustain his burden to show that any injury occurred as asserted and that he was unable to return to his usual job duties due to any physical impairment.

The evidence was in conflict and the hearing officer clearly did not find the claimant's testimony credible. 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). 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.

Although not specifically appealed, we note that a finding of disability is dependent on a compensable injury and in that we are affirming the hearing officer's decision of no compensable injury, the claimant cannot, by definition, have disability. Section 401.011(16).

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:

Kenneth A. Huchton
Appeals Judge

Judy L. Stephens
Appeals Judge