APPEAL NO. 002373

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 September 5, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) had not sustained a compensable (back and hip) injury on _____ (all dates are 2000 unless otherwise noted), and that the claimant did not have disability.

The claimant appeals certain of the hearing officer's determinations, taking issue with some of the hearing officer's factual recitations and the fact that the hearing officer had sustained the respondent's (carrier) objection to a leading question. The claimant recited the facts from his point of view, interpreted a witness's testimony and discussed the claimant's reporting of the injury (reporting is not an issue). The claimant requests that we reverse the hearing officer's decision as being against the great weight and preponderance of the evidence and render a decision in his favor. The carrier responded to the points raised and urged affirmance.

DECISION

Affirmed.

The claimant was employed as a bulldozer operator ("finish blade man") by the employer. On the morning of _____, the claimant drove to the employer's construction site and, because he was taking diuretics or had difficulty walking, relieved himself in the parking lot while standing close to his truck. The claimant went to work on the bulldozer and was assisted that morning by HV. At about 8:30 or 9:00 a.m., the claimant's immediate supervisor, JD, drove up, the claimant throttled down the bulldozer and JD told the claimant that he was fired; the claimant testified that he just shrugged without saying anything because he had talked to JD earlier in the day about the parking lot incident and understood that was why he was being terminated. The claimant testified that he was not upset about being fired because he was a very specialized worker and would have no problem finding other work. The claimant testified that he then drove the bulldozer back to where he had parked his truck and, in the process of exiting the bulldozer, he slipped on some mud and fell backward on his back and shoulder, a distance of about a table's height. HV testified that he saw the claimant and JD talking, that he (HV) walked away and did not hear what was being said (and, in any event, HV testified through a translator and would not have understood what was being said). HV testified that the claimant drove the bulldozer away to where the claimant had parked his truck. Exactly how far away HV was from the claimant, and whether HV had gotten into JD's truck (denied by HV), is unclear. HV testified that he was within sight of the claimant and that he, HV, did not see the claimant fall getting off the bulldozer. HV said the claimant was moving slowly in dismounting but that the claimant did not fall.

The claimant testified that after he fell he laid on the ground for three to five minutes and then got into his truck and sat there a few minutes more. The claimant said that he

then drove to the front of the construction site to find JD to report the injury. The claimant said that he saw JD's truck and parked next to it, waiting to see if JD was around. The claimant agreed that about 50 feet away there was a group of supervisors or foremen but that he did not want to report the injury to them because he did not get along with one of the supervisors; that they were not his immediate supervisors, JD was; and that he was embarrassed at being fired and then falling off the bulldozer. JD, in a statement, said that he saw the claimant drive up in his truck and wait; that JD was about 40 or 50 feet from the claimant (but he was in a different direction than the other supervisors). The claimant testified that he did not see JD. The claimant testified that as he was driving out of the driveway, he called TL, who was the claimant's superintendent and long-time friend, to report the injury and that TL told him to report the injury to JD, which the claimant did later that day.

The claimant sought medical attention from Dr. P, a chiropractor, on April 11. In a report dated April 18, Dr. P recites the fall from the bulldozer incident and gives a diagnosis of lumbosacral neuritis and myalgia and/or myositis. An MRI performed on July 6 indicated "a 7 mm extruded disc herniation" at L1-2. It is undisputed that the claimant was hospitalized twice during the period between April 6 and the CCH, but those hospitalizations were due to other health problems unrelated to the claimed injury.

The hearing officer, in her Statement of the Evidence, gives a fairly detailed recitation of the evidence as she understood it and, in the discussion portion, commented:

> The Claimant's testimony was not credible in light of the statements from the other witnesses. Despite some difficulty with translation during the [CCH], the testimony of [HV] was very clear and credible regarding the fact that the Claimant did not fall getting off the bulldozer/tractor and it was consistent with his multiple recorded statements. [The hearing officer discusses her understanding of HV's testimony in some detail.] . . . . Claimant's explanation for his lack of communication with a supervisor at the time of the injury was not credible and was contradicted by his coworkers' statement. Claimant suffered from multiple, severe medical problems which are unrelated to this incident. Although there were objective findings of pathology of the spine, the Claimant had prior surgery and some of these problems appear related to that condition. The Claimant's low back problems are not a result of the claimed injury.

The claimant, in his appeal, takes issue with the hearing officer's recitation of the reason he had difficulty walking; what the claimant did or did not say to JD regarding leaving the job site; how far away the group of supervisors were when he allegedly fell; and the hearing officer's recitation regarding the time line of when the claimant called TL and whether the claimant should have been allowed to refresh his recollection from TL's phone log. The claimant, in the appeal, discusses HV's testimony at length, agreeing that the testimony was credible but putting his interpretation on that testimony. The claimant also emphasizes the reporting of the injury, although notice is not an issue. We have carefully

reviewed all of the claimant's contentions and conclude they all deal with factual issues which are within the responsibility of the hearing officer to resolve. 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.

In that we are affirming the hearing officer's decision that the claimant did not sustain a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

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

Elaine M. Chaney
Appeals Judge

Philip F. O'Neill
Appeals Judge