APPEAL NO. 002476

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 September 13, 2000. With respect to the issues before him, the hearing officer determined that the appellant's (claimant) compensable injury of _____, is a producing cause of the claimant's lumbar spine condition after _____; that the claimant did not sustain a compensable injury on _____; that the claimant timely reported his alleged _____, injury to his employer; and that the claimant did not have disability as a result of a _____, compensable injury because he did not sustain a compensable injury on that date. The claimant worked for the same employer on both _____, and _____; however, the employer had workers' compensation insurance with two different carriers. (carrier 1) is the carrier for the _____, compensable injury and the respondent, (carrier 2), is the carrier for the alleged injury of _____. The claimant and carrier 1 both appeal the hearing officer's determinations that the claimant did not sustain a new compensable injury on _____, contending that it is against the great weight of the evidence. The claimant also argues that the hearing officer's disability determination is against the great weight of the evidence, while carrier 1 contends that the hearing officer's determination that the claimant's _____, compensable injury is a producing cause of his lumbar spine condition after _____, is against the great weight of the evidence. Carrier 2 filed a response to both appeals, urging affirmance in each. Carrier 2 did not appeal the determination that the claimant timely reported his alleged _____, injury and that determination has, therefore, become final. Section 410.169.

DECISION

Affirmed.

It is undisputed that the claimant sustained a compensable injury on _____, when in the course and scope of his employment he lifted some two-liter bottles of soda and felt a "pop" and sharp pain in his low back. The claimant was diagnosed with spondylosis, spondylolisthesis, and disc displacement. The claimant testified that on _____, he was working in a light-duty position, cleaning out the bay of a truck, when he bent down, felt a "pop," and again experienced intense pain in his low back. The claimant stated that his pain after the June 4th incident was more intense and that it also went down both his right leg and left leg, whereas there had only been pain down his right leg after the 1996 compensable injury.

The claimant sought medical treatment with Dr. S, a doctor who treated him for the 1996 injury, on June 5, 1998. In his Specific and Subsequent Medical Report (TWCC-64) for the June 5th visit, Dr. S noted that he had given the claimant an injection for back pain at his May 7, 1998, appointment and that the claimant had developed back pain at work on _____. In addition, Dr. S stated that the claimant "[c]omes in today with significant pain in his lower back but no change in neurologic status."

In August 1998, the claimant moved to Indiana where he worked for eight months as a truck driver. The claimant stated that he sought medical treatment in Indiana for his back; however, he did not submit medical records in evidence. In February 1999, the claimant returned to Texas and began treating with Dr. P. In a June 1, 2000, letter, Dr. P addressed the issue of whether the claimant sustained a new injury on _____. Specifically, Dr. P noted that the claimant had preexisting spondylosis and spondylolisthesis which "became symptomatic" with the 1996 compensable injury and that the _____, injury at work caused a "significant re-aggravation." Dr. P referred the claimant to Dr. B for a surgical consultation. In his June 20, 2000, letter, Dr. B opined that the "initiating injury was that of _____ and that due to his progressive symptoms and physical findings, will require surgical intervention." Dr. B also stated that the _____, incident did not significantly alter the claimant's low back condition.

The claimant had the burden to prove that he sustained a new injury in the course and scope of his employment on _____. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That question presents a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence and decides 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 this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. 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 manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, as noted above, there was conflicting evidence on the question of whether the claimant sustained a new injury on _____, or whether he simply continued to suffer the effects of his _____, injury. The hearing officer resolved the conflict by giving more weight to the evidence from Dr. B that the claimant's problems were the result of the 1996 compensable injury than he did to the evidence from Dr. P and the claimant that the claimant sustained a new injury, with different and worsening symptoms, on _____. The hearing officer was acting within his province as the fact finder in so doing. Our review of the record does not demonstrate that the hearing officer's determinations that the claimant did not sustain a new compensable injury on _____, and that the claimant's compensable injury of _____, is a producing cause of his lumbar spine condition after _____, are so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse those determinations on appeal. Pool; Cain.

Given our affirmance of the determination that the claimant did not sustain a compensable injury on _____, we likewise affirm the determination that the claimant did not have disability. By definition, the existence of a compensable injury is a 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:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge