APPEAL NO. 002502

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 June 12, 2000. The case was returned to the hearing officer for reconstruction of the record (one side of the audiotape was blank) in Texas Workers' Compensation Commission Appeal No. 001507, decided August 10, 2000. A CCH to reconstruct the missing portion of the record was conducted on October 2, 2000, with Erika Copeland again presiding as the hearing officer. With regard to the issues before her, the hearing officer determined that the appellant/cross-respondent (claimant) had not sustained a compensable injury on _____ (all dates are 1999 unless otherwise noted); that because the claimant had not sustained a compensable injury, the claimant did not have disability; that the claimant timely reported his claim to his supervisor; and that the claimed date of injury was _____.

The claimant appealed the determinations that he had not sustained a compensable injury and did not have disability, emphasizing medical reports from Dr. D and his own testimony. The claimant requests that we reverse the hearing officer's decision on those issues and render a decision in his favor. The respondent/cross-appellant (self-insured), in a contingent appeal, appeals the determinations on timely notice to the employer and the claimed date of injury. The self-insured also responds to the claimant's appeal, urging affirmance on those issues.

DECISION

Affirmed.

The claimant testified that he was a custodian at one of the self-insured's schools and that on _____, as he was lifting and moving some 15 or 20 folding tables, he heard a pop in his back and felt pain. The claimant testified that he told his supervisor about his injury that same day and asked to see a doctor.

The claimant testified that he initially saw Dr. PC, who referred him to Dr. D, an orthopedic surgeon. The only report from Dr. PC, on or about October 28, is an off-work slip of that date taking the claimant off work until November 3, without explanation. A progress note dated October 14 (two weeks prior to the alleged accident) from Dr. PC states that the claimant "presents today with back discomfort, headaches, and just feeling run down." An employee accident report, apparently completed by the claimant, has as the date of injury "unknown" and states that the claimant began losing time on October 28. In a written statement dated November 13, the claimant stated: "I started getting pains in my back soon after the hernia surgery on 6/14/99. I thought the pain was due to the surgery." Other forms the claimant completed allege a _____ date of injury. Progress reports from Dr. C indicate that the claimant was complaining of back pain as early as April or May. A note of May 25, and others, refer to a left inguinal hernia surgery, "hypertension and arthritis" and an "adenocarcinoma" some months prior to the alleged

_____ table incident. A progress note dated June 21 from Dr. C comments "[the claimant] is not in any hurry to go back to work." Progress notes after the claimant's hernia surgery of June 14 continue to reference complaints of back pain.

In evidence is a physical therapy (PT) request dated November 2, from Dr. D, ordering PT three times a week for four weeks for low back pain. Dr. D took the claimant off work for four weeks. The claimant relies on a progress note dated January 4, 2000, where Dr. D stated:

> This patient initially injured himself at work in May of last year. He was thought to have a hernia and underwent hernia repair and did not have any improvement whatsoever in his symptoms. He reinjured himself on _____ and developed low back pain, groin pain and pain to the lower extremities.
>
> * * * *
>
> I think this patient was injured at work. It is possible that he may have injured his back and had a problem with a hernia on the left hand side during the first episode. It is not rare to have pain that radiates to the groin especially with L5 radiculopathy. The patient re-injured himself later that year on _____. I think his injuries are work related.

Dr. T performed a record review and in a report dated June 2, 2000, commented:

> The medical notes are confusing in this regard in that they suggest that some injury occurred as early as _____ and/or _____. What this was is not documented. In any case, the patient in July of 1999 required EMG/NCV studies of the right lower extremity because of pain, which was determined to be abnormal. X-rays of the lumbar spine were normal. MRI of the lumbar spine was abnormal, showing significant L4-5 mild disk and facet changes as well as an L3-4 bulge.

Dr. T goes on to comment that Dr. D has suggested "that there were no internal changes from the 10/19/99 MRI [pre-table incident] when compared to the 4/7/00 MRI." Dr. T concluded "that the alleged event of _____ is a non-issue."

The hearing officer, in her Statement of the Evidence, comments that there "are too many inconsistencies in the evidence with regard to the claimed date of injury and the source of the claimed injury." The hearing officer goes on to note that Dr. D's "conclusory opinion" was "based on the history as given by Claimant." The hearing officer also notes that the October 19 and the April 7, 2000, MRIs showed no significant internal change."

The evidence on all the appealed issues is clearly in conflict. 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). In this case, the hearing officer accepted the claimant's testimony that he timely reported his alleged injury on _____ but was obviously persuaded that the claimant had sustained his back injury at some time prior to the October 19 MRI and that a subsequent April 2000 MRI showed no appreciable change from the prior MRI. We find the hearing officer's decision on all the issues to be supported by the evidence.

In that we are affirming that the claimant has not sustained 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. 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