APPEAL NO. 010685

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 March 12, 2001. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable low back injury on _____; (2) the claimant gave his employer timely notice of the injury; (3) the employer had actual knowledge of the injury on the date of the injury; and (4) as a result of the claimant's compensable injury of _____, the claimant had disability beginning November 9, 2000, and continuing through the date of the hearing.

The appellant (carrier) has appealed the above determinations and, in addition, asserts that the hearing officer inappropriately moved up the date of the CCH thereby prejudicing the carrier's right to a fair hearing and that the hearing officer overstepped his authority to fully develop the record. The claimant responds, urging affirmance.

DECISION

Affirmed.

FACTS: On _____, the claimant was employed by (employer) as a maintenance mechanic. The employer had brought in Mr. G from its (city 1) operation to oversee the repair and refitting of a machine. The claimant was to act as Mr. G's "helper" during the project. While working on the machine, the claimant reported to Mr. G that he had injured his back. At the time, Mr. G told the claimant to report the injury to Mr. N, the shop supervisor. The claimant testified that he reported the injury to Mr. N that day as well as the next. Mr. N testified that he did not remember the claimant reporting any injury to him until October 20, 2000.

Appealed Issue 1 and Decision: The hearing officer did not err in making the determination that the claimant gave the employer timely notice of the injury and that the employer had actual knowledge of the injury on the date of the injury.

Rationale: On appeal, the carrier asserts that Mr. G did not hold a supervisory or management position at the time of the claimant's injury and therefore was not a person to whom notice of injury could be given pursuant to Section 409.001. The carrier further asserts that the claimant did not report the injury to Mr. N until October 20, 2000, which is more than 30 days from the date of the injury. There was conflicting evidence presented as to when the claimant reported the injury to Mr. N. Additionally, conflicting evidence was presented regarding whether or not Mr. G, as the senior mechanic, held a supervisory position. Although testimony was given establishing that the claimant's employer did not consider Mr. G to be a supervisor at the time, testimony was given that Mr. G directed the claimant's work. In his testimony, Mr. N agreed that Mr. G was "basically the foreman" on the job which Mr. G and the claimant were working on. In order for a person to be considered as holding a supervisory position for purposes of receiving notice of an injury, it is not necessary that they have hiring, firing, and disciplinary authority; rather, task-

assigning authority may be sufficient to confer the status of a supervisor. *See* Texas Workers' Compensation Commission Appeal No. 010226, decided March 20, 2001. The hearing officer found the claimant to be credible in his testimony. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. 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.

Appealed Issue 2 and Decision: The hearing officer did not err in making the determination that the claimant sustained a compensable injury and had disability.

Rationale: On appeal, the carrier asserts that because the claimant continued to work for a week after the injury, and did not seek medical attention until October 22, 2000, he had neither an injury nor disability. Again, the hearing officer found the claimant's testimony and explanation credible. The claimant had the burden to prove that he sustained the claimed injury and that he had disability as that term is defined in Section 401.011(16). Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The Appeals Panel has stated that in workers' compensation cases, the disputed issues of injury and disability can, generally, be established by the lay testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992. However, the testimony of a claimant, as an interested party, only raises issues of fact for the hearing officer to resolve and is not binding on the hearing officer. Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). As an appellate-reviewing tribunal, the Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain, *supra*; In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Appealed Issue 3 and Decision: The hearing officer did not err in moving up the CCH date.

Rationale: On appeal, the carrier asserts that it was prejudiced by the hearing officer's decision to grant the claimant's request to move up the date of the CCH and deny its request for a continuance. The carrier has waived this argument. Prior to the rescheduled CCH, the carrier filed a Motion for Continuance on the grounds that one of

their witnesses would be out of town on the new date. The Motion was denied on the grounds that there were alternate means to introduce the witness' testimony into the record. The carrier failed to reassert, or even mention, its denied Motion at the CCH. An affidavit from the absent witness was submitted into evidence. There is no showing that the carrier was prejudiced by any of the prehearing rulings issued by the hearing officer.

Appealed Issue 4 and Decision: The hearing officer did not overstep his authority in developing the record.

Rationale: The carrier asserts that the hearing officer questioned one of its witnesses, Mr. N, with an improper purpose in mind at the end of its case-in-chief. Upon review of the record in this case, it cannot be said that the hearing officer interjected himself excessively in this proceeding. The carrier called Mr. N to testify as to Mr. G's position with the employer. Through the carrier's own questioning, Mr. N testified that Mr. G was not a supervisor, but he was in charge of the job in question; that Mr. G comes in to oversee all big maintenance projects; and that the claimant was helping him. It was entirely proper for the hearing officer to ask clarifying questions of a witness to assist in determining what the facts are. Section 410.163(b).

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Michael B. McShane
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge