APPEAL NO. 950191

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 13, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the issues before her, the hearing officer determined that respondent (claimant) sustained a compensable low back injury on (date of injury), that he timely notified his employer of his compensable injury and that he has had disability as a result of the compensable injury from March 30, 1994, through the date of the hearing. Appellant (carrier) argues on appeal that each of these determinations is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Thus, carrier asks that we reverse the hearing officer's decision and render judgment in its favor.

DECISION

Finding no reversible error in the record and sufficient evidence to support the challenged findings and conclusions, we affirm the hearing officer's decision and order.

Claimant testified that on (date of injury), he was employed by the (employer). He stated that he was lifting over his head a box that weighed more than 50 pounds when he felt heat and intense pain at waist-level in his back. Claimant stated that immediately after the lifting incident, he had difficulty walking and had to sit down. Claimant acknowledged that he had previously injured his back in 1992 and had had pain and received treatment as a result thereof into 1993. However, he further testified that the pain in his back on (date of injury), and thereafter was more intense. In addition, he noted that the pain after the lifting incident of (date of injury) radiated down his right leg, which it had not done before. Specifically, claimant testified that after (date of injury), he had difficulty moving his right leg and walking and that he had never had those problems with his prior injury. Claimant testified that he remained seated until it was time for lunch. He stated that during lunch, he reported his on-the-job injury to (Ms. K), employer's human resource manager. In addition, claimant stated that he asked Ms. K to refer him to an orthopedic specialist, because he knew from his prior injury that carrier would not pay for chiropractic treatment. Finally, claimant testified that on the date of the injury, he also told his supervisor, (Mr. R), that he had injured his back lifting the box.

Claimant stated that he continued to work up to March 30, 1994, but he had difficulty walking and his productivity fell to the point that another employee had to be put with him to get the job done. Claimant testified that on March 30, 1994, (Dr. H) obtained the results of his diagnostic testing and determined that claimant needed surgery. He referred claimant to (Dr. Z), a neurosurgeon, for a surgical consultation and on April 1, 1994, Dr. Z performed a hemilaminectomy at L5, partial hemilaminectomy at S1 and an interbody diskectomy at L5-S1. Finally, claimant stated that as of the date of the hearing, he had only been released to light duty following the surgery.

Claimant first sought medical care for his back after the (date of injury), injury on (date) (medical center). In notes from that visit, claimant's chief complaint is listed as pain to right hip and down the leg. Those notes list December 1993 as the date of injury/onset and specifically state that there is "no new injury." Nurse's notes from the (date) visit refer to right leg and foot pain for "3-4 months" and a history of back injury a year ago.

On March 9, 1994, claimant sought treatment for his back from Dr. H. In progress notes of March 9th, Dr. H stated in relevant part:

> [Claimant] is a 27 year old male who complains of pain in his lower back radiating into the right leg for the last 5 months. He has been treated by a chiropractor and has had no relief. He didn't really have a history of injury; the pain just started while he was working.

In progress notes dated March 30, 1994, Dr. H notes that claimant's MRI reveals that he has a "definite surgical lesion" at L5-S1. Accordingly, Dr. H referred claimant to Dr. Z for a surgical consultation on March 31, 1994. In progress notes of that date, Dr. Z states that claimant's low back pain and right leg weakness has been gradual over the past three or four months. Similarly, in his consultation report dated March 31, 1994, Dr. Z notes that claimant "has no history of any recent injury." As previously noted, Dr. Z performed back surgery on claimant on April 1, 1994. In progress notes dated May 23, 1994, Dr. H notes that claimant "did inform me that he did actually have an injury on (date of injury) at work; this occurred when he was lifting a heavy box from a bent position all the way to an overhead position. That's when his back pain and leg pain got much worse." Carrier also introduced physical therapy notes which likewise refer to gradual worsening pain and eventual surgery, and do not identify an on-the-job injury of (date of injury).

Carrier presented three witnesses, Ms. K, the human resources manager, Mr. R, claimant's supervisor, and (Mr. G), one of claimant's coworkers. Ms. K testified that claimant never reported a (date of injury), on-the-job injury to her. She stated that she recalled having a conversation with the claimant about his longstanding back problems, in which he might have asked her to recommend an orthopedic specialist; however, she maintained that he never reported a work injury to her or attributed his back pain to an on-the-job injury. Mr. R also stated that claimant never reported the (date of injury) work-related injury to him. In addition, Mr. R stated that he observed claimant on a daily basis from (date of injury), to March 30, 1994, and he did not notice any change in claimant's work habits, productivity, or physical appearance. Nor did he ever observe claimant having difficulty walking. Similarly, Mr. G stated that claimant never told him about a work-related injury. However, Mr. G stated that although he could not recall the exact dates, he did notice that claimant had difficulty walking. Lastly, Mr. G stated that claimant did complain to him of back pain and that he probably could have done so in (month year).

Under the 1989 Act, the claimant has the burden of proving that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Whether claimant suffered a compensable injury is a fact question to be resolved by the hearing officer. It is well settled that under the 1989 Act the term injury includes an aggravation of a preexisting condition, whether or not that condition was job related. Texas Workers' Compensation Commission Appeal No. 950038, decided February 16, 1995. The hearing officer is the sole judge of the weight and credibility to be given to the evidence and of the relevance and materiality to assign to the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts and inconsistencies in that evidence, including the medical evidence. Texas Employers Insurance Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer can believe all, part, or none of the testimony of any witness and can properly decide what weight she would assign to the other evidence before her. Campos, *supra*. We will not substitute our judgment for that of the hearing officer where her determinations are supported by sufficient evidence. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In this case, the hearing officer determined that claimant sustained a compensable back injury on (date of injury). In so doing, the hearing officer accepted the claimant's testimony relating his injury to his employment. In Texas Workers' Compensation Commission Appeal No. 931002, decided December 13, 1993, we noted that expert medical evidence of causation is not generally required to prove injury and disability. Rather we stated that in most instances "issues of injury and disability may be established by testimony of the claimant alone and the trier of fact may accept or reject such testimony in whole or in part, and may accept lay testimony over that of medical experts." (*citing* Houston General Ins. Co. v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); *see also* Appeal No. 94248, *supra*. In its appeal, carrier emphasizes that the bulk of the medical evidence does not refer to a work-related injury but instead describes claimant's back pain as longstanding and gradual, arguing that there is insufficient evidence to support the determination that claimant sustained a compensable injury. We cannot agree with carrier's assertion that the lack of medical evidence of causation is sufficient to demonstrate that the hearing officer's decision and order are against the great weight and preponderance of the evidence. As noted above, the hearing officer was permitted to find injury solely on the basis of the claimant's testimony alone, if she determined that it was credible as she obviously did herein. It was within the hearing officer's province as the fact finder to resolve the conflicts in the testimony and evidence and to decide what weight she would assign to the testimony and evidence. Campos, *supra*. There is sufficient evidence to support the hearing officer's injury determination and our review does not indicate that it is so against the great weight and preponderance of the evidence as to warrant reversal on appeal. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Likewise, the fact that the evidence could have allowed different inferences under the state of the evidence herein, does not provide a sufficient

basis for reversing the hearing officer's decision on appeal. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

Next, carrier asserts that the hearing officer erred in finding that claimant has had disability in this case from March 30, 1994, through the date of the hearing. Carrier's argument that claimant did not have disability is premised upon its belief that claimant did not sustain a compensable injury. A compensable injury is a threshhold requirement for disability. Section 401.011(16). Given our affirmance of the hearing officer's injury determination, we likewise reject carrier's disability argument as without merit.

Finally, we turn to the issue of whether claimant timely notified his employer of his injury. The hearing officer found that claimant reported his injury to Ms. K on the day it occurred. Thus, she credited claimant's testimony that he had reported the injury to Ms. K on the day that it happened over that of Ms. K and Mr. R that claimant never told them of a (date of injury), work-related injury. The hearing officer, as the sole judge of the evidence, was permitted to so resolve the inconsistencies in the testimony and evidence to determine that the claimant notified his employer of the injury within the required 30-day period. That determination is supported by sufficient evidence, specifically the claimant's testimony, which the hearing officer believed, and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; therefore, no basis exits for disturbing it on appeal. Cain and Pool, *supra*.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge