APPEAL NO. 950233

This appeal is considered under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 1, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the issues before him, the hearing officer determined that respondent (claimant) sustained a compensable back injury on (date of injury), and that he had disability as a result of the compensable injury from (date), through the date of the hearing. Appellant's (employer/carrier) appeal challenges the hearing officer's injury determination. In addition, employer/carrier alleges error in the hearing officer's decision to exclude an exhibit. Claimant's response urges affirmance and maintains that the hearing officer properly excluded carrier's exhibit.

DECISION

We affirm.

Claimant testified that he has been employed as a bus driver for employer/carrier for six years. He stated that he does not drive the same route every day, but instead fills in where a driver is needed on any given day. Claimant testified that on (date of injury), he was driving a handicapped bus equipped with a wheelchair lift. Claimant stated that he stopped to pick up a passenger in a wheelchair. When the passenger arrived at his destination and was exiting the bus, the lift malfunctioned and he could not get off the lift. Claimant stated that in accordance with company policy, he radioed the dispatcher and asked for assistance from his supervisor in offloading the passenger. The dispatcher did not answer claimant's call and claimant's supervisor likewise did not respond. After waiting for approximately 20 minutes for assistance from his supervisor, claimant decided to help the passenger in getting off the bus by himself. Claimant testified that he had to lift the back of the passenger's wheelchair up over the bottom flap of the lift, which would not flatten out. Claimant testified that after he lifted the passenger over the lift, he felt pain in his lower back, which became more severe as he continued his shift. Claimant stated that after he completed his shift, he reported the incident to his supervisor. Claimant further testified that after the benefit review conference of December 7, 1994, he began to look for the passenger he had helped on that day and eventually identified him as (Mr. H). On January 19, 1995, claimant's attorney provided Mr. H's name and telephone number to employer/carrier. Employer/carrier apparently made several attempts to contact Mr. H but was unable to do so until January 30, 1994, when it conducted a telephone interview with Mr. H.

Mr. H testified at the hearing that he rode the bus driven by the claimant on (date of injury). He also stated that he had difficulty getting off the bus that day because the lift malfunctioned. Mr. H stated that he waited for a period of time for claimant to attempt to contact his supervisor for assistance before claimant even attempted to help him get off the bus. Mr. H stated that he lost his temper and began to yell at claimant to assist him in exiting the bus. Thus, claimant picked up the wheelchair from the back and pushed him off the lift. Mr. H stated that he was unaware that claimant had injured his back while assisting

him, until he was contacted at a later point about being a witness. Mr. H stated that he and claimant were not friends and that he had not even known who claimant was until after the incident. Finally, Mr. H stated that he has had difficulty getting on and off employer/carrier's buses on numerous occasions. He stated that he had made a mistake in his telephone interview of January 30, 1995, and that the incident that he described therein occurred after (date of injury). He maintained that on (date of injury), the lift in the bus he was riding malfunctioned and that claimant had to lift him over the end of the lift so that he could get off the bus.

On (date), claimant began treating with (Dr. G) for his back injury. In his Initial Medical Report (TWCC-61), Dr. G diagnosed lumbar sprain/strain and lumbar syndrome. As early as October 6, 1994, Dr. G had ordered an MRI; however, because of some delay in authorization of the MRI it was not completed until November 22, 1994. The MRI revealed:

1.Accentuation of lumbar lordosis.

2.Narrowing of the L4-5 intervertebral disc space.

3.Dehydration of the L4-5 disc.

4.Diffuse posterior annular protrusion of the L4-5 disc.

On the basis of the MRI findings, Dr. G determined that claimant needed an orthopedic evaluation, which was denied by employer/carrier. Dr. G took claimant off work as of October 29, 1994, and he continued claimant in an off-duty status through the date of the hearing.

Initially, employer/carrier argues error in the hearing officer's exclusion of the transcript of Mr. H's statement of January 30, 1995. As noted earlier, claimant apprised employer/carrier of Mr. H's identity and provided a telephone number for him on January 16, 1995. Apparently, employer/carrier's efforts to contact Mr. H were unsuccessful until January 30th, just two days before the hearing. Mr. H's statements in that conversation were different than his testimony at the hearing. Mr. H explained those differences at the hearing by stating that he had been mistaken at the time of interview and had recalled and recounted an incident which actually occurred at some point after (date of injury). The hearing officer refused to admit the transcript of Mr. H's prior statement because it was not exchanged with claimant's attorney and because it was unsigned and unsworn. In sustaining the objection to the admissibility of the transcript, the hearing officer specifically noted that employer/carrier could use the statement for impeachment purposes.

In its appeal, employer/carrier argues that the hearing officer erroneously excluded the statement. Employer/carrier argues that in limiting it to using the statement for impeachment, the hearing officer "prevented a full presentation of evidence by the Carrier

and also does not allow a full view of the evidence by the Appeals Panel." In response, claimant's attorney noted that the hearing officer told employer/carrier's attorney that any part of the statement that he wanted to have considered had to be read into the record. Employer/carrier's counsel thereafter read only one paragraph of the statement into the record and limited his questioning of Mr. H about his prior statement to that paragraph. The abbreviated reference to the inconsistencies between Mr. H's statement of January 30, 1995, and his hearing testimony is solely attributable to the inexplicable decision on the part of employer/carrier's counsel to limit his reference to and questioning about the statement. As such, we cannot agree with employer/carrier's assertion that the hearing officer erred in excluding the evidence. The hearing officer was under no obligation to explain how to impeach a witness with a prior inconsistent statement. The fact that employer/carrier now regrets its decision to engage in limited impeachment of Mr. H with his statement is of no moment. That decision can in no way be attributed to the hearing officer; therefore, it does not rise to the level of error on his part and certainly does not constitute reversible error in rendering an evidentiary ruling sufficient to justify reversal on appeal. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. App.-San Antonio 1981, no writ) (To obtain a reversal for the admission of evidence, a party must demonstrate that the evidence was actually erroneously admitted and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment.").

In its appeal, employer/carrier also argues that the hearing officer's injury determination is against the great weight and preponderance of the evidence. In so arguing, it points to alleged inconsistencies in the testimony of claimant and Mr. H. In his decision, the hearing officer acknowledged some discrepancies as to the details of the events of (date of injury); however, he also noted that "those inconsistencies were not sufficient to make Claimant's testimony incredible regarding the essential elements of his claim." As we have noted on many occasions, the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165. As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts in the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will not substitute our judgment for that of the hearing officer where her determinations are supported by sufficient evidence and are not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

In this instance, the hearing officer determined that the inconsistencies in the testimony herein did not relate to the material facts of the injury: that on (date of injury), claimant was driving a bus on which Mr. H was a wheelchair passenger; that as Mr. H was attempting to get off the bus on that date, the lift malfunctioned and Mr. H could not exit; and that claimant lifted the back of the wheelchair up over the end of the lift to offload Mr. H. The hearing officer was acting within his province as the finder of fact in resolving the inconsistencies in the testimony and evidence in favor of finding that claimant sustained a compensable injury. Our review of the record indicates that that determination is supported by more than sufficient evidence and no basis exists for disturbing it on appeal. Pool,

supra. Employer/carrier did not specifically challenge the hearing officer's determination that claimant had disability from (date), through the date of the hearing. Given our affirmance of the injury determination, we note that the disability determination has become final pursuant to Section 410.169.

Finding no error in the exclusion of employer/carrier's exhibit and sufficient evidence to support the hearing officer's injury determination, the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge