APPEAL NO. 950291

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on January 13, 1995, to determine whether the appellant (claimant) had sustained a compensable repetitious trauma injury on (date of injury), whether the claimant timely reported such alleged injury or had good cause for failing to do so, and whether the claimant had sustained disability. The hearing officer, (hearing officer), while holding that the claimant timely reported an alleged injury, determined that the claimant did not sustain a compensable repetitive trauma injury on (date of injury), and that any disability claimant suffered from July 13 to December 18, 1994, was not the result of a compensable injury. The claimant takes this appeal, citing to medical evidence which he says shows he sustained a new injury, and to his own testimony that the nature of his job changed. The respondent (carrier) responds that the credible evidence at the hearing did not indicate that a new injury occurred.

DECISION

Affirmed.

The claimant, who was employed by (employer), suffered a compensable back injury in February of 1992. He was treated by (Dr. M), who diagnosed back strain, and released him to return to work in February of 1993. It was claimant's contention at the hearing that in (month of year) he suffered a new back injury in the form of an aggravation; the carrier's position was that claimant's pain was related to the original injury and that he did not contend that he had a new injury until after he was found to have reached maximum medical improvement (MMI) from the first.

It was claimant's testimony that in 1994 the employer increased its allowable weight limit on the packages he was required to lift; he further contended that many packages were mislabeled and were actually heavier than indicated. This caused him increased pain, he said, in parts of his body (hamstrings, knees, toes, and calves) additional to those which had previously been affected (the left gluteus and the lower back). He said that in (month of year) his supervisor, (Mr. R), spoke to him about a slowdown in his job performance. At that time, claimant said, he told Mr. R that he was having more back pain and that it was a different nature than that from his original injury. Because he was not satisfied with Dr. M, he went to (Dr. R) on July 12th. In a report of that date Dr. R noted that the onset of claimant's symptoms was approximately two years before, that he had been previously treated with medication, and that an EMG and NCV demonstrated L4-5 root lesion on the left side; a subsequent lumbar MRI showed a herniation at L5-S1, while a cervical MRI was normal. On September 16, 1994, Dr. R wrote as follows:

> If I understand the chronology of his problem, patient began suffering from back pain for the first time in October 1992. At that time, no special neuroradiologic x-rays were performed. Patient was released to his full duty in February 1993.

I saw the patient for the first time in my office on July 19, 1994. During the period of February 1993 and July of 1994, I understand the patient's main line of employment used to deal with lifting heavy objects continuously and regularly. It will be difficult [sic] pin point when the patient actually herniated his lumbar disc, since no neuroradiologic studies were performed until July of 1994; however, patient's problem could have been aggravated by the nature of his duties.

Dr. R also completed a Report of Medical Evaluation (Form TWCC-69) on August 10, 1994, stating that the claimant had not reached MMI and that he needed surgical evaluation because conservative treatment was not helping. In December of 1994 claimant was seen by (Dr. S) for a second surgical opinion. She wrote that Dr. M had treated the claimant conservatively, with basically complete resolution of symptoms, and that Dr. M felt that claimant had no permanent impairment from his injury. She also wrote that claimant's symptoms "have been consistent with this diagnosis [herniation at L5-S1] since 1992, namely pain in the posterior aspect of the leg . . . I feel that the patient has not achieved [MMI] as he has not had evaluation for possible surgical treatment for his herniated disc."

The claimant last worked for the employer on July 12, 1994, as the employer would not let him return to work without a full work release. He testified that on December 18th he was hired as a salesman at a car dealership, where he continued to work at the time of the hearing.

Mr. R, claimant's night shift supervisor, stated that he remembered discussing with the claimant the fact that constant repetition was causing more pain, which was slowing claimant's performance. Even though Mr. R conceded claimant was contending he had aggravated his back Mr. R said he never filed a report of injury because he did not believe it to be a new injury since claimant told him his back had never gotten better since the first injury. He also said claimant believed he had been misdiagnosed by Dr. M.

(Mr. T), employer's facility manager and Mr. R's supervisor, said that around December 8, 1994, Mr. R told him claimant was requesting a letter stating that he had had a new injury; however, he said Mr. R told him that the claimant had not told him he had had a new injury. Mr. T also testified that claimant had never told him he was injured any time in (month of year). (Mr. S), employer's safety supervisor, said he had attended two benefit review conferences (BRC) with claimant, that the first one concerned whether the claimant had reached MMI for the first injury, and that a new injury wasn't mentioned until the second BRC. The claimant acknowledged that he alleged a (month year) date of injury at the second BRC.

The hearing officer held that the evidence undisputedly establishes that claimant timely reported an alleged injury of (date of injury), to Mr. R. As to the issue of whether the claimant actually sustained a new injury, the hearing officer reasoned as follows:

> While . . . [Dr. M] diagnosed a strain which had since resolved, and Claimant was later diagnosed as having sustained a herniated disc, which might logically be attributed to Claimant's alleged injury of (date of injury), the Hearing Officer also notes that in the opinion of [Dr. S], claimant's symptoms had been consistent with a diagnosis of a herniated disc since 1992. Although the Hearing Officer could decide this case on the basis of Claimant's testimony to the effect that his symptoms were different in 1994 than they had been previously, Claimant did not make a particularly persuasive witness in his own behalf, when questioned regarding the changes or similarities in his symptoms; therefore, this decision has been made with significant reliance placed upon the relevant medical records.

In his appeal the claimant points to the medical reports of Drs. R and S as supporting his contention that he suffered a new injury in (month of year); he also compares the results of examination and treatment by those doctors and that of Dr. M and states that his symptoms changed. While claimant's arguments have some merit, the fact that the evidence could support a different result is not sufficient reason to overturn the hearing officer's decision. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The 1989 Act provides that 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). Further, the hearing officer can believe all, part, or none of the testimony of any witnesses, and resolves conflicts in the evidence, including medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We will reverse the decision of the hearing officer only where it is so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Upon our review of the medical evidence as set forth above, we cannot say that that is the case here. While Drs. R and S identified the cause of claimant's persistent pain and recommended further treatment including surgery, their reports can be read as indicating that claimant's problem was ongoing and continuous. To the extent that the hearing officer discounted claimant's own testimony, we observe that an appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

In short, our review of the evidence of record indicates that the hearing officer's decision finds support in the evidence and that it was not against the great weight of the evidence. Cain, *supra*. The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge