APPEAL NO. 950341

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On October 17, 1994, a contested case hearing was commenced in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing was continued to December 21, 1994, and the record closed on that day. With respect to the issues before her, the hearing officer determined that respondent (claimant) sustained a compensable low back injury on (date of injury), and that claimant had disability as a result of the compensable injury from May 23 to June 9, 1994. Appellant's (carrier) appeal argues that the hearing officer's injury determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Claimant's response urges affirmance of the injury determination. In addition, claimant's response argues that the hearing officer's disability determination "is appealed on the basis that this Hearing Officer has embarked on a pattern that defeats the purpose of licensed medical care providers having a say so in the medical condition of claimants who are being treated by said doctors." Records of the Texas Workers' Compensation Commission (Commission) show that the hearing officer's decision was distributed to the parties on February 17, 1995, with a cover letter dated February 16, 1995. Claimant's response does not state when he received the hearing officer's decision; thus under Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), claimant is deemed to have received the decision and order on February 22, 1995. A request for review is timely if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision, and if it is received by the Commission not later than the 20th day after the date of receipt of the decision. Rule 143.3(c). In this instance, the 15th day after the deemed date of receipt was Thursday, March 9, 1995, and the 20th day after the date of receipt was Tuesday, March 14, 1995. Claimant's response was mailed on March 21, 1995, and received by the Commission on March 22, 1995. Therefore, although the response was timely filed as a response, it was not timely filed to serve as an appeal and we are without jurisdiction to review the disability determination.

DECISION

We affirm.

Claimant testified that on (date of injury), he was employed as a driver for (employer) and had been employed by the employer for almost nine years. He stated that on (date of injury), he stopped to make a pick-up at (CST), a regular customer on his route. He said that as he was walking back into the truck to get a dolly, after opening the bulkhead door, the dolly rolled forward and hit his left ankle, causing him to fall on his back inside the truck. He stated that the dolly landed on top of him. Claimant testified that the accident occurred at approximately 4:00 p.m. and that his shift had started at about 8:30 that morning. Claimant stated that he called in and reported the injury to his supervisor, after he picked up the packages at CTS. Thereafter, he completed his route, returned to employer's premises and filled out an injury report. Claimant testified that immediately after the fall, his ankle hurt the most, but as he continued to drive, the pain increased in his right hip and back. It

is undisputed that claimant sustained a compensable right hip injury in August 1993 and that he had been off work as a result thereof until about three weeks before the (date of injury) incident.

Claimant testified that he attempted to schedule an appointment with (Dr. M), the doctor who treated him for the (month year) injury, on Monday, May 23rd, but was unable to schedule an appointment until Tuesday, May 24th. In a report of June 2, 1994, referencing the May 24th appointment, Dr. M concluded:

> I am not able to establish that presence of a significantly painful or disabling injury and have no recommendations for treatment. The patient is unwilling to accept this and that is his privilege. My recommendation is that he either return to work or go consult another doctor. I do not feel that he is seriously injured.

Following Dr. M's suggestion to seek another opinion, claimant began to treat with (Dr. A), a chiropractor. Claimant's initial appointment with Dr. A was on May 24, 1994, the same day that Dr. M dismissed him from his care. Dr. A diagnosed a lumbar sprain/strain. In a report of July 6, 1994, Dr. A stated that claimant had four appointments with his office and "was responding to care when his treatment had to be halted due to the controverted position of the insurance company." On June 7, 1994, Dr. A released claimant to full duty. Claimant also was examined by (Dr. T), who released him to return to full duty on June 9, 1994. Thereafter, claimant returned to work and continued to perform his usual duties until he was terminated in July 1994.

(Mr. A) also testified at the hearing. He is a supervisor at one of the customers on claimant's route. In a recorded statement Mr. A gave to carrier's adjuster on June 9, 1994, which he reviewed and signed on July 14, 1994, Mr. A stated that he saw claimant at about 2:30 p.m. on (date of injury), and that claimant was already hurt. In addition, Mr. A stated that claimant told him he would not be in on the following Monday, because he would be off work, receiving workers' compensation benefits. Finally, Mr. A stated in the June 9th statement that claimant had asked him to be a witness and he had refused to do so. In a letter dated July 30, 1994, Mr. A retracted the June 9th statement. In his hearing testimony, Mr. A stated that his statement retracting his prior statement was the truth and that to the best of his recollection claimant had not told him he would be off work due to a workers' compensation injury. However, Mr. A also testified that he felt that he was under pressure and duress to sign the statement of retraction, because although claimant had not directly threatened him, he was concerned because claimant had come to his home and talked with Mr. A's wife about withdrawing the statement and also had come to Mr. A's place of business. Finally, Mr. A stated he had changed his statement to keep claimant and the carrier "off my back."

Mr. A's supervisor, (Mr. W), also testified at the hearing. He stated that Mr. A talked to him about the statement he was going to give carrier both before and after he gave it.

Mr. W further testified that although he was unaware of any threats claimant had made to Mr. A, Mr. A had expressed concern that claimant had come to his home and discussed the possibility of Mr. A retracting his statement with Mr. A's wife.

(Mr. H) who works in shipping and receiving at CTS, the site of the alleged accident, testified that he did not witness claimant's accident. He also stated that when he saw claimant on (date of injury), claimant was sitting on the floor of the truck, rubbing his ankle. He stated that claimant told him that he had just fallen in the truck. (Mr. T), who also works in shipping and receiving at CTS likewise stated that he did not see claimant fall on (date of injury). Mr. T also stated that when he saw claimant on (date of injury), claimant told him he had just fallen in the truck and was holding his back and walking funny.

Finally, (Mr. S), employer's workers' compensation supervisor testified that on (date of injury) after claimant reported the alleged injury to him, he offered to take claimant to the emergency room and claimant declined. Mr. S also stated that contrary to claimant's testimony, he did not tell claimant that he should continue his treatment with Dr. M. In addition, he testified that he did not express any resistance to claimant continuing to treat with Dr. M, instead indicating that the choice was claimant's to make.

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. The hearing officer is the sole judge of the weight and credibility to be given to the evidence and 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 in that evidence, including the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness and could 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); Cain v. Bain, 709 S.W.2d 175, 176 (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 Insurance Company v. Pegues, 514 S.W.2d 492, 495 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); *see also* Appeal No. 94248, *supra*. Carrier points to inconsistencies in the

evidence and in claimant's testimony and argues on the basis of those inconsistencies that there is insufficient evidence to support the determination that claimant sustained a compensable injury. We cannot agree with the assertion that the inconsistencies to which carrier points compel a finding against the claimant on this issue, nor do they demonstrate that the hearing officer's decision and order lack sufficient support in the record. 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 thereto. Campos, *supra*. Nothing in our review of the record indicates that the hearing officer's determination that claimant sustained a compensable injury is clearly wrong or manifestly unjust; therefore, we find no sound basis for disturbing it on appeal. Pool and Cain, *supra*. 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.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge