APPEAL NO. 92703

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1992). On October 6, 1992, a contested case hearing was held in (city), Texas, with hearing officer, (hearing officer), keeping the record open until November 13, 1992. She determined that appellant, claimant herein, did not prove that she injured her back while bending over to lift records at work and did not show that timely notice was given. Claimant asserts that findings of fact and conclusions of law on which the decision are based are in error, points out that medical data supports its position that a compensable injury occurred, and says statements of workers and time cards are consistent with notice having been given at the time of the injury. Carrier responds that this case provides fact questions for the hearing officer to decide and that there was sufficient evidence to support her decision.

DECISION

Finding that the decision and order are supported by sufficient evidence of record, we affirm.

Claimant began work for employer, an electronics company, as a temporary employee, in 1990. In January 1991, she became a "full-time" employee. In the first part of (month), (year), she alleges that she hurt her back while bending over behind a work station picking up orders/records weighing approximately 10 pounds. She testified that she could not straighten up and went to her supervisor, (Mr. C), to report her problem. Her testimony was, "I told him that I hurt my back, and he asked me should I fill out an accident report, and I said I didn't know, you know. And so I--almost certain that he told me to go home, and I know I'm--I'm sure I went home that day because I was in so much pain--."

Prior to the hearing, however, claimant said in a statement purporting to have been made on April 2nd, that the incident occurred "around July, '91" and, when asked if she reported anything to her supervisor at the time, said, "I'm not sure." On April 8, 1992, claimant was telephonically interviewed and again said in response to a question about reporting the incident at the time, "I really can't remember; I don't know if I told my boss then or not." She also said in that interview that she first thought her back pain was related to work when she talked with (Dr. W) on March 25, 1992. The first person claimant had seen for treatment of her back was a chiropracter, (Dr. K). Dr. K's record of (date) states, "[t]he patient states she developed low back pain two weeks prior to her seeking treatment at this office. She stated `I don't know' what caused the condition."

A deposition by written interrogatories was taken of Dr. W on November 4, 1992. Dr. W stated therein that claimant was seen on March 25, 1992 and that a history and physical examination were accomplished. The history did "not include information from the patient as to why she has chronic back pain." Dr. W did not reach an opinion based on "reasonable medical probability" that claimant was injured on the job. This deposition is not listed as evidence by the hearing officer in her opinion signed on December 2, 1992, nor

does the statement of evidence indicate that the information in the deposition was considered. The record of hearing, however, plainly shows that the hearing officer agreed to keep the record open, without objection by carrier, so claimant could take the deposition in question. The 1989 Act does not require a hearing officer to provide a statement of evidence and when one is provided, the Appeals Panel has only said that it should fairly represent the evidence, not that it include all evidence. (We note that Dr. W's answers did not support claimant's position.) While the hearing officer's opinion should state that evidence received while the record was kept open was in fact admitted into evidence, we believe the record as a whole shows that the deposition was admitted.

Claimant provided statements from coworkers, (Ms. S), (Ms. G), and (Ms. P), all of whom said that they could tell claimant's back hurt her in (month year), while at work. Ms. S and Ms G. added that claimant had gone home one day because of the pain. None saw the incident or heard any exclamation accompanying the incident. Claimant acknowledged that time cards for early (month) do not show that she departed early from work, but pointed out that on some occassions there is a computer added punch out at quitting time that may have occurred. She also acknowledged that she had been in a motorcycle accident 10-12 years before and in a car accident in 1985 but said that neither injured her back. An MRI dated July 12, 1991 shows claimant to have a small herniated disc at the L5-S1 level.

Claimant's supervisor, Mr. C, on cross-examination testified that at sometime in (month year) claimant told him that her back had "flared up." He added:

Mr. C--at home or something like that? She may have said that it--it had happened at work while at work, and I--I asked her if it was a--an on-the-job accident and she said no, that that's when she told me about the accident that she'd had 10 or 11 years ago.

. . . .

Mr. KThen I'll rephrase the question. Do you remember her at any time saying to you, "While I've been working, my back has flared up"?

Mr. CNo, sir.

. . .

Mr. CNo. You know, she never once alluded to the fact that the work was causing the back--back--had caused the back injury.

Mr. C acknowledged that he had to countersign for a computer punch added to a time card at the end of a day when one had not been made by the individual at the time; he could not remember whether he had done that in regard to claimant at that time in (month year).

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. She could consider claimant's credibility to be an issue because she is an interested party. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977 no writ). In addition, the hearing officer is responsible for resolving conflicts and inconsistencies in the evidence, whether those be between claimant and her supervisor or between statements made by claimant at different times. *See* Ashcraft v. United Supermarkets Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The hearing officer could believe that claimant did tell the chiropracter, who she first saw within a month of the allegation, that she did not know what caused the injury. That statement is consistent with claimant's statement of April 8, 1992 in which she said that she first thought her problem was "related to work" in March 1992 when she talked to Dr. W. These representations by claimant are consistent with the testimony of Mr. C that claimant did not relate her back pain to any activity at work. The hearing officer could choose to give more weight to Mr. C in regard to the issue of notice than he did to claimant's testimony at the hearing. Both Finding of Fact No. 4 that said claimant did not injure her back at work, and Finding of Fact No. 5 that said claimant did not report an injury as required by the 1989 Act, are sufficiently supported by the evidence. Similarly, conclusions of law that reflect these findings are sufficiently supported by the findings and by the evidence.

The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge