APPEAL NO. 931039

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On October 12, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon at the CCH were:

1.Was the Claimant, (claimant), injured in the course and scope of her employment on (date of injury)?

2.Has the Claimant suffered disability as a result of her (date of injury), injury and if so, for what of period of time?

3.Whether the Carrier is liable for payment of medical expenses?

The hearing officer determined that the claimant sustained a back injury which arose out of and in the course and scope of her employment on (date of injury), that claimant had disability beginning on July 6, 1993, and that claimant is entitled to medical benefits attributable to her compensable back injury.

Appellant, a self-insured governmental entity, employer herein, contends that the hearing officer's findings and conclusions are insufficiently supported by the evidence and/or are so contrary to the great weight and preponderance of the evidence as to be manifestly unjust and to require reversal. The employer requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified she was employed by the employer as a "special services trainer" (who trained the handicapped). On (date) and (date of injury) (all dated are 1993 unless otherwise noted), employer was conducting a Prevention and Management of Aggressive Behavior (or "progressive management of aggressive behavior," abbreviated as PMAB) training session. On (date of injury), the exercises grew progressively more physically demanding throughout the afternoon. Claimant testified that on one of the last exercises, entitled "protection on the ground," the claimant, as a participant, was required to throw or push the instructor, who was simulating an aggressive client, off of her as she was on the ground (or actually a mat on the floor). In pushing the instructor, who claimant testified outweighed claimant by 40 or 45 pounds, off of her, claimant testified she felt a sharp pain in her lower back to her neck. Claimant stated she "grabbed . . . [her] lower back," sat down a few minutes and then excused herself and then "went down to see my coordinator and supervisor," (Ms. PN). It is undisputed that Ms. PN was not in, but that (Ms. AF), the supervisor's assistant, was in the office. Claimant testified she told Ms. AF, "L, I have hurt

my back in PMAB, I don't know if it is really serious or not, but I have comp time coming. [Ms. PN] know as soon as she comes in that I have done that." Ms. AF testified at the CCH, however, her recollection of the conversation was that claimant said, "L, my back is hurting real bad, I cannot go on like this. I have half an hour coming to me from the other day, so I'm going home." Ms. AF testified that at no time did claimant state she had just hurt her back in the PMAB exercise.

Notice is not an issue, but even here there is some contradiction in the testimony. Claimant states she went home and rested over the weekend ((date of injury) was a Friday) and on Monday, May 10th, Ms. PN and (Ms. Mc) approached her at another site and discussed the incident. Ms. PN testified however, that claimant called her on Monday May 10th, told her of the incident and Ms. PN, in turn, reported it to Ms. Mc and the forms for incident reporting were obtained. Ms. PN and Ms. Mc state they approached claimant on May 12th, when the incident report was completed. The incident report is dated May 12th.

Claimant testified she saw a massage therapist for her back the week after the PMAB incident and continued work until May 28th, when the pain in her back became so bad that she "collapsed" at her home and was taken to the hospital emergency room where she saw (Dr. B). Dr. B in a June 1st hospital note records "[m]usculoskeletal complaints. Etiology at this time unclear." Apparently Dr. B in this note is more concerned about abdominal problems. In a June 4th follow up, Dr. B notes "[p]robable fibrositis." A June 9th note makes an assessment of "Fibrositis possibly secondary to recent exposure to Epstein Barr virus." Dr. B notes weight gain and "white urine." A June 22nd note questions hepatitis causing fibrositis. Subsequent follow up notes deal with a variety of complaints unrelated to the back.

Claimant, apparently on June 28th saw (Dr. M), a chiropractor. Dr. M noted cervical compression and "a continuing musculoskeletal disorder in the neck." Claimant began treating with Dr. M on a three times a week basis. Dr. M in various notes records that claimant is responding to treatment. By "Disability Certificate" dated 07-06-93, Dr. M indicates claimant is "totally incapacitated." In a note on (S&W) letterhead dated July 2nd, the writer states "I am still at a loss to explain the symptomology." Claimant continued treatment with Dr. M until August 4th. In an outpatient note dated September 27th from , (Dr. C) records "diminished pinprick over most of her body" and indicates he wishes to do a "nerve conduction test because of the paresthesia." In a follow-up note of October 1st, Dr. C notes "Dx: Fibromyalgia."

Carrier strenuously disputed the injury occurred as claimant alleges. Carrier presented testimony from (Ms. LP), the instructor claimant was working with at the time of the alleged injury. Ms. LP testified her records of the PMAB training indicated that claimant had declined to participate in the "protection of the ground" exercise and that the records made at the time indicate that claimant had only observed this exercise. Ms. LP testified claimant had declined to participate in this exercise at the beginning of class.

(Mr. ET) testified he is the employer's executive director and he was in the PMAB

class with the claimant and it is his recollection that claimant did not participate in the particular exercise although he was "not absolutely sure."

Several other participants in the PMAB training, and employees of the employer, submitted statements to the effect that to the best of their knowledge claimant "did not participate in the physical part of the training. However, I cannot be 100% positive of this fact." Another employee attendee stated he did not observe claimant complain of pain or other physical ailments. Claimant (through counsel) dismissed these statements in that the statements were by current employees who were influenced to testify against the claimant. Claimant in closing argument stated the witnesses who testified against claimant were "nervous." The employer countered that such a conspiracy argument is "offensive and ludicrous."

As previously indicated the hearing officer determined that claimant injured her back as she alleged on (date of injury), that claimant's "medical records established a causal connection" between the employment and the injury and that claimant has continuing disability. The employer appealed contending that six witnesses and documentary evidence supported its position that the hearing officer's decision is insufficiently supported by the evidence or, in the alternative, is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust.

The employer, in its request for review, concedes that the case depends largely on the credibility of the various witnesses and that questions of credibility are within the province of the hearing officer. We affirm that proposition by noting Section 410.165(a) provides that the hearing officer is the sole judge of the relevance, materiality, weight and credibility to be given to the evidence. The hearing officer as the trier of fact, may believe all, part, or none of the testimony of any witness, including claimant, and may give credence to testimony even where there are discrepancies. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve any inconsistencies and conflicts in the evidence, Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), and is within the fact finder's province to believe one witness and disbelieve another or to believe part of the testimony of a witness and disbelieve any other port. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). Clearly the hearing officer believed claimant's version of her injury and found support for that testimony in the medical records and the testimony of Ms. AF. Claimant further argues that employer's witnesses were still employed by the employer and that might influence their testimony and that two of the witnesses appeared "nervous." The hearing officer saw the witnesses, was able to observe their demeanor and heard the testimony. We note that different inferences might reasonably be drawn from the evidence but this is not sufficient basis to reverse a decision where there is some probative evidence sufficient to sustain a decision. Texas Workers' Compensation Commission Appeal No. 92253, decided July 29, 1992; Texas Workers' Compensation Commission Appeal No. 92172, decided June 19, 1992; Texas Workers' Compensation Commission Appeal No. 92158, decided June 5, 1992.

Employer has not appealed or commented on the finding of disability on July 6th, or claimant's entitlement to medical benefits. At the beginning of the CCH when the issues were announced, the employer commented that the issue of medical benefits was subsumed in the issue of injury in the course and scope of employment, but employer had no objection to having it as an issue. We agree that the payment of medical benefits is included in the course and scope issue. In any event the employer has requested review on only the injury in the course and scope, therefore we need not specifically address the issues of disability or medical benefits.

An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We cannot so find and accordingly the decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Susan M. Kelley
Appeals Judge