APPEAL NO. 931057

This appeal is brought pursuant to 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*.). A contested case hearing was held on September 14, 1993, with the record closing on September 21, 1993, in (city), Texas. (hearing officer)., presided as hearing officer. The hearing officer determined that the appellant (claimant) did not sustain a repetitive trauma injury to her back in the course and scope of her employment, although she did give timely notice of her alleged injury to her employer. The claimant appeals this decision arguing that it is against the great weight of the evidence. The respondent (carrier) urges affirmance and asserts that the decision is clearly supported by the evidence.

DECISION

The decision of the hearing officer is affirmed.

The claimant worked as a phlebotomist at a local blood supply center and was responsible for drawing blood from donors. She testified that she was also responsible for moving couches, or lounge-like chairs, often occupied by blood donors then in the process of giving blood, when necessary to make space for access to equipment.

She began working in September 1991 and first noticed pain in her lower back on a daily basis in (month, year). That month she stated she told her supervisor, (SM), about the pain. SM suggested she see a doctor and offered her a back brace commonly used by employees whose jobs involved lifting. The claimant conceded that she did not then connect her back pain to any activities on the job. Over time, the back pain got worse and extended down her right leg. Because of the pain, she saw (Dr. P), her treating doctor, on March 1, 1993. He noted that she complained of back pain for about one and a half months without any associated trauma. He provided her with a "disability certificate" which indicated that she was "totally incapacitated" from March 1, 1993, to March 2, 1993, with a diagnosis of lumbar strain. Claimant said that when she was asked by Dr. P if she (claimant) had been moving anything, she said she moved couches at work. According to the claimant, Dr. P confirmed for her that this activity caused her back injury. However, Dr. P's records reflect only that claimant attributed her back injury to her moving the couches and do not contain an opinion on causation by Dr. P.

The next day at a meeting the claimant states that she told her supervisors, (JK) and (DD), that as a result of her visit with Dr. P, she believed her back pain and injury resulted from her moving couches at work. They then discussed how they were going to fill out an accident report.

The claimant insists that her conversation with Dr. P on March 1, 1993, marked the first time she recognized her back problem was a job related injury. The progress notes of a follow-on visit with Dr. P on March 4, 1993, state for the first time that the claimant "thinks injury may have been moving chairs at work." An MRI of the lumbosacral spine taken on March 12, 1993, found the vertebrae and discs normal. The final diagnosis of Dr. P in

evidence was given on March 23, 1993, and diagnosed sciatica, which the claimant, according to Dr. P, attributed to "prolonged standing on floors," and which contained an entry indicating the date of injury was (date). Claimant had no idea where Dr. P got this date. This, however, was the same date entered on the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), which was signed by the claimant's attorney who appears to have completed the form.

Ms. DD testified that she first found out that claimant was claiming a work related injury at their meeting on March 2, 1993. At this meeting the claimant could not identify a specific injury or event that hurt her back. Ms. DD estimated the couches to weigh about 50 pounds when unoccupied and said that they were moved by "scooting" them across the smooth concrete floor, not lifting them. She also stated that the couches only had to be moved about six inches and were moved infrequently. She also said that the first time a specific date for the claimant's injury was mentioned was when the parties got into a "contest" over this.

The pertinent findings and conclusions of the hearing officer are:

FINDINGS OF FACT

4.The Claimant sustained an injury to her lower back during the period of (date).

8.Although the Claimant sustained an injury to her back during the period of (date), she did not sustain that injury as a result of moving couches or any other work for the Employer.

CONCLUSIONS OF LAW

2.The Claimant gave timely notice of her alleged injury to the Employer.

3.The Claimant did not sustain a repetitive trauma injury in the course and scope of her employment with the Employer.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The question of whether an injury occurred in the course and scope of employment is one of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided May 21, 1993. 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). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo

1978, no writ). 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). As we observed in Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991, "[i]n reviewing a case, the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deem[s] most reasonable, even though the record contains evidence of or gives equal support to inconsistent references. (Citation Omitted.) Where sufficiency of the evidence is being tested on review, a case should be reversed only if the finding and decision is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. (Citation Omitted.))

We have also held that the existence of an injury can be established by the testimony of the claimant alone, Texas Workers' Compensation Commission Appeal No. 93854, decided November 11, 1993, and that sprains and strains can be compensable injuries. *See* Texas Workers' Compensation Commission Appeal No. 93956, decided December 8, 1993. In this case the claimant failed to persuade the hearing officer that her back injury was causally related to repetitive trauma at work. According to the claimant's own testimony, she did not connect her pain with anything at work until her conversation with Dr. P on March 1, 1993. This led her to the conclusion that her back injury was caused by moving heavy objects and the only heavy objects she moved had been the couches at work. In previous conversations with her supervisors about her back pain she never alleged it was work connected. The claimant also alleged that her pain existed over the previous month and a half and did not know where Dr. P got the date of (date), as the date of her repetitive trauma injury in his diagnosis (Claimant's Exhibit No. 4). MRI testing was normal. While Dr. P's records reflect the claimant's suggestions as to possible causes, they do not reflect Dr. P's opinion. Based on this evidence, the hearing officer determined that the claimant was not injured in the course and scope of her employment.

We do not find the hearing officer's determination to be so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). Consequently there is no sound basis on which to disturb the hearing officer's decision.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge