APPEAL NO. 931119

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 October 19, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not suffer a repetitive trauma injury to her back in the course and scope of her employment on (date of injury); that the claimant failed to timely notify the employer of the claimed injury; and that the claimant suffered no disability. The claimant appeals this decision as not supported by the evidence and requests that we reverse it. The claimant further requests that she "be found to have suffered a permanent partial disability of 50%."[1] The respondent (carrier) urges that there is sufficient evidence to support the decision and requests that it be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that the date of injury for this repetitive trauma claim was (date of injury). The claimant testified that she worked for the employer, a boat sales and service company, as a cleaning custodian. Her duties were cleaning and polishing boats of various sizes and general warehouse cleaning, which she described as "heavy work." During the last weekend in (month year) the employer displayed boats at a boat show. The claimant cleaned these display boats (which she said were 30 to 35 boats). This involved climbing in and out of boats and cleaning and polishing them from top to bottom. According to the claimant, there were only two ladders available. During the boat show she began to suffer severe pain in her right leg from the hip to the knee and only worked for about one hour on Sunday, (date), the last day of the show.

Claimant said her leg was hurting so much the next morning that her husband had to drive her to work. She stated that she told her supervisor, (BT), that her leg was hurting that day. She worked her normal hours the next three days. On Wednesday, February 3, 1993,[2] she saw (Dr. C), her family doctor. She used her health care insurance to pay for this visit and testified that she borrowed $60.00 from BT in order to pay the deductible portion of the cost. He diagnosed right hip bursitis and characterized her current condition of persistent right hip pain as a continuation of a problem of pain from the right hip to the right foot which he initially treated on November 2, 1992, and diagnosed then as "possible right trochanteric bursitis." (Claimant testified she had fallen in a boat in (month year).) Claimant insisted that she told Dr. C her current leg pain was caused by her work at the boat show. She also said that she told Dr. C she was afraid to make a workers' compensation

[1]The question of impairment rating was not an issue at the contested case hearing and for this reason is not addressed in this appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992.

[2]The claimant testified that she saw Dr. C on Tuesday, February 2, 1993, but Dr. C's records reflect the visit was on February 3.

claim for this injury because she had filed previous claims and was afraid she would be fired if she filed another one. Claimant said BT had mentioned at an employee's meeting that premiums were too high.

The claimant's last day at work was February 3, 1993. She said that she called BT on Thursday, (date) , and told her that she injured her leg at the boat show. She said she called BT regularly over the next month pleading to have her injury considered a workers' compensation matter.

The claimant's daughter and another friend of claimant testified that the claimant suffered severe pain during and after the boat show and that they both overhead the claimant's phone calls made to BT within a week, after she left work, in which claimant asked to receive workers' compensation benefits.

On February 18, 1993, Dr. C referred the claimant to (Dr. CK), an orthopedist who requested an MRI of the lumbar spine which revealed "significant spinal stenosis with probable impingement of the spinal cord at the level of L4-L5-S1." She was next referred by Dr. CK to (Dr. W) who evaluated the claimant on February 25, 1993, and noted that according to the claimant, the onset of pain began about four weeks previous and

> . . . she [claimant] did tell me that she is employed at [employer] and cleans up and does polishing of the boats and so forth and something in this area might have aggravated the pain, but she is not completely sure.

Dr. W diagnosed a herniated lumbar disc, right L4-5, and performed a disc laminotomy and foraminotomy on March 12, 1993. On May 24, 1993, Dr. W reported that the claimant's pre-operative pain was "dramatically improved and it is essentially gone." He released her to light duty effective July 16, 1993, and unrestricted duty on October 12, 1993.

In an office note of the claimant's first postoperative examination on March 19, 1993, she is reported as asking whether her surgery would be covered by workers' compensation insurance. In a letter of September 16, 1993, Dr. W states that "[t]here probably is a reasonable medical probability . . . that the injury was caused by her work but I cannot be 100% sure." He attributes his reservation in part to a "language barrier" and that the claimant herself "even . . . stated she was not completely sure." He concludes that:

> . . . there is a reasonable medical probability that she was injured over a period of time, even though I cannot give an exact date, and that the nature of her work was probably the culprit in this respect.

BT, claimant's supervisor and the officer manager, testified that the day after the boat show the claimant complained to her that her leg hurt, but never mentioned that she hurt her leg at the boat show or that she aggravated a previous injury. BT suggested she see a doctor and loaned her $60.00 to meet her health insurance deductible. BT reported that after the claimant stopped working she called several times to complain about her pain, but

did not mention an injury. The first mention of workers' compensation, according to BT, came in a phone call a week or two before the claimant's operation. In this conversation, the claimant asked BT to report her leg injury as job related so workers' compensation would pay for the operation. BT said she declined to do so because the claimant had not timely reported the injury. Phone records of the claimant were introduced. These showed that the first record of a call to BT at her home (long distance from the claimant's home) was on (date). BT stated that there were only about 10 boats at the boat show that the claimant had to keep clean and that claimant had asked to wear a back brace during the show as a preventive measure against possible back injury. BT also recalled that the claimant complained in November and December 1992 that her leg hurt.

To be compensable, an injury must arise out of and in the course and scope of employment. Section 401.011(10). 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. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and judges the weight to be given to the testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Where there are conflicts and contradictions in the testimony, it is the duty of the hearing officer as fact finder to consider these conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). To this end, the hearing officer 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. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). 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).

The claimant asserts essentially that the evidence proved that her condition after the boat show was "different and much more severe" than what it was the previous November, that her job at the boat show caused a new or aggravated an old injury and that she notified BT of her job-related injury either on (date of injury), or within two weeks thereafter. Furthermore, claimant asserts that, given her pain and inability to drive to work, it was unreasonable for her employer to assume her "pain was not caused by work activities." The evidence in this case could clearly give rise to different inferences and conclusions. It was the responsibility of the hearing officer to weigh the parties' accounts of the alleged injuries, how they arose and when they were reported. Having reviewed the record, we conclude that the hearing officer's findings that the claimant was not injured in the course and scope of her employment on or about (date of injury), and that the claimant failed to notify the employer of the claimed injury until (date), are supported by sufficient evidence.

Having affirmed the decision of the hearing officer that there was no compensable

injury in this case, the hearing officer was correct in finding that no disability, as defined in the 1989 Act, was incurred. *See* Section 401.011(16); Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993.

We note that Finding of Fact No. 15 that the claimant was returned to full duty on "April 12, 1993," contains an obvious typographical error. The unrefuted evidence clearly established that Dr. W returned claimant to unrestricted duty on October 12, 1993. We reform this finding to read October 12, 1993, where it says April 12, 1993.

We affirm the decision of the hearing officer as reformed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge