APPEAL NO. 931162

After taking evidence at a contested case hearing in (city), Texas, on August 24, 1993, the hearing officer, (hearing officer), made a number of factual findings and concluded that the appellant (claimant) was not injured in the course and scope of her employment von (date of injury), and that she did not have disability as the result of any such injury consistent with the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011(16) (1989 Act) (formerly V.A.C.S., Article 8308-1.03(16)). In her request for review the claimant asserts that the evidence is insufficient to support these adverse determinations. The response of the respondent (carrier) sets forth various items of evidence which it asserts contradict or conflict with claimant's testimony and argues that the evidence supports the hearing officer's not crediting claimant's testimony and deciding the issues against her.

DECISION

Finding the evidence sufficient to support the challenged determinations, we affirm.

Claimant testified that she commenced employment at a boot store (store) in October 1992 performing bookkeeping duties. Claimant said that on Saturday, (date of injury), on her way back to the store from the bank, she purchased five two-liter bottles of Coca Cola and two bags of ice at the direction of the store manager, (Mr. L). Upon arriving back at the store at approximately 1:30 p.m., claimant said she carried the bags to the break room at the rear of the store, sat them down on the floor in front of the refrigerator, and immediately felt pain in her lower back. According to the claimant, Mr. L was in the vicinity of the refrigerator when the incident occurred and she told him her back hurt and that she needed to see a doctor. She said she left work about 3:00 p.m., went to an emergency clinic for treatment, and there provided a history of the incident. The clinic record of that visit, signed by the treating doctor, stated the diagnosis as "chronic back pain" and contained no reference to the incident at work. Claimant further testified that on the following day she called the store, spoke to (Mr. M), an assistant manager, and advised him of the incident and that she could not come to work. However, claimant also stated she did not work on Sundays. She further stated that on the day following the day she called Mr. M, she returned to work but that after a few hours she had to stop working because of the pain. Claimant also said she has not since worked nor sought work because of the pain.

Claimant testified that she saw (Dr. H) for her back pain, provided him with a history of the incident, and that he wanted to do some testing but was unable to because the carrier would not pay for it. Dr. H's record of claimant's December 18, 1992, visit stated a history of claimant's carrying bags of ice and beverages and experiencing the sudden onset of back pain, Dr. H's impression was "[c]ervical and lumbar syndrome with possible radiculopathies from a herniated disc." The report also stated that claimant "denied any prior injury or filing any report of past work-related injuries." The claimant, however, acknowledged having had a prior back injury in April (year) which was the subject of a workers' compensation claim and which she settled in 1988, and she conceded that in a prior recorded statement she had denied having any previous workers' compensations claims or back problems. She offered

no explanation for such inconsistency. Claimant also repeatedly denied having been treated for back pain in 1991 and 1992 stating she took medication only for depression.

Mr. L, the store manager, said that on (date of injury) claimant approached him at the cash register, stated that her back was hurting, and indicated she needed to see a doctor. He had no recollection of being back by the refrigerator which claimant as she testified. On direct examination by claimant Mr. L, as an adverse witness, testified that claimant told him she hurt her back setting down the Coca Cola in the break room and that he suggested she seek professional help. On cross-examination, Mr. l recanted that testimony saying he did not recall such a conversation. Mr. L further testified that earlier on (date of injury), claimant had asked him if he would "walk on her back" and "pop" it as her son did for her. He said he declined advising her of his weight. He was also unaware of claimant's having prior back problems.

(Ms. C), a coworker of the claimant, testified that on (date of injury) when claimant came back to the store at about 1:30 p.m., she was accompanied by her son, that claimant then showed her son various belt buckles and in so doing bent up and down, even looking at buckles on the bottom of the rack. Ms. C said she then went back to the break room to eat her lunch and that while there claimant came back with her son stating that her son was going to "pop" her back. She said the two of them entered an adjoining office and that while she did not see the son "pop" claimant's back, she could hear them and "figured he was pulling on her back." When they re-entered the break room, Ms. C said that claimant was stretching her back and saying that it felt better. Ms. C said she had no idea claimant had hurt her back that Saturday until a later date when she heard Mr. M tell another employee that claimant had said she hurt her back at work.

According to the recorded statement of former coworker, (Ms. S), claimant was hired to replace her as a cashier-bookkeeper and Ms. S last saw claimant on December 8, 1992. Ms. S stated that during the time she worked with and trained claimant, the latter often complained of back pain and once left work to see a doctor about it but indicated she was unable to obtain an appointment.

Claimant's medical records indicated that she hurt her back on (date of injury), while at work at another store lifting a 20-pound bag of potting soil and that she was thereafter treated conservatively. She was admitted to a hospital on August 18, (year), for a myelogram and her discharge diagnosis was "chronic muscle and ligament strain, lumbar spine." The myelogram was normal and a prior MRI was interpreted as normal though her treating physician felt it showed bulging at the L5-S1 and L4-5 levels. A prior CT scan was also normal. Claimant's records further show that she was seen at the outpatient clinic of a hospital on November 19, 1991, complaining of chronic low back pain from a prior injury and was given medications.

The hearing officer's findings included findings that claimant sustained a work-related injury to her lower back on (date of injury), that she sought treatment for chronic low back pain on November 19, 1991, that after being hired by employer she continued to have low

back pain from her (year) injury, that she did not injure her back while carrying, lifting, or moving groceries for employers on (date of injury), and that she may have aggravated her chronic low back condition when she had her son attempt to "adjust" her back during the afternoon of (date of injury). The hearing officer further found that any inability of claimant to obtain or retain employment was attributable to her prior back condition.

The claimant in a workers' 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 July 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 observe 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 given equal support to inconsistent inferences. (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 do not find the hearing officer's determinations to be so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re Kings' Estate, 1540 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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge