APPEAL NO. 93191

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on February 17, 1993, in (city), Texas, before (hearing officer). The appellant, hereinafter claimant, appeals the hearing officer's determination that she did not injure her right shoulder and lower back performing any services for her employer on (date of injury). The carrier filed no response.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was 66 years old at the time of the hearing, testified that she had worked for (employer) for approximately ten years. She was the assistant business manager in the administrative office on September 16, 1991, when she was told by Mr S, employer's business manager, and Ms M, employer's administrator, that she would have to transfer to central supply. The claimant transferred unwillingly, and believed she was being transferred because employer was trying to get rid of her. Mr. S testified, however, that claimant was being sent to central supply to replace a pregnant employee who was on leave, and that she would be required to do computer work and other paperwork. Claimant disputed that the work was light, and she introduced into evidence a job description for a central supply inventory accountant, which called for "a great deal of physical exertion and stamina."

The claimant said that on Friday, (date of injury), she had done stocking work with another person in central supply, Mr W, but after lunch he was called away to do patient transfer. Thereafter, she said, she continued to load buggies which would be used in stocking the areas. She said that when she picked up a case of liquid dietary supplement she felt a sharp pain in her right shoulder, by her shoulder blade. She said she later felt pain in her lower back, but that that pain became more prominent a week or so later. Nevertheless, she kept working and later she and another coworker pulled the buggies and delivered the supplies. She said she looked for Mr. S and Ms. M but that they were not around; however, she also said when she left she told Mr. W that she felt "sick" but that she didn't "want to give them the pleasure that they've done this to me." The claimant attributed her pain to the lifting incident, but said also that the repetitive physical activities of her new job assignment also contributed to her problem.

Claimant said when she got home that evening certain members of her family were there for her birthday celebration. At that time, she said she was crying from the pain, and her birthday dinner was called off. Several of claimant's relatives, including her brother and sister-in-law who were present that night, gave written and signed statements to this effect.

Earlier in the same week the claimant had been told she could not renew her driver's license until an eye problem, which she said was congenital, was corrected so she could

pass the eye exam. She saw her eye doctor, Dr. R who scheduled her for surgery on September 24th. The claimant said the Sunday following her injury, which was September 22nd, she was in pain and knew she would not be able to go to work on Monday; in addition, she knew about the upcoming eye surgery. She said she went into the office, cleaned out her desk, and left her keys and a note to the secretary saying she was leaving. She acknowledged that she did not mention an on-the-job injury in the note. She subsequently had the surgery and stayed off work on sick leave; she said she was not able to go back to work after her sick leave ran out.

The claimant filled out an employer's incident report on October 16th; that report stated, "[w]as ordered to manual labor job from office work. Heavy lifting, pushing and pulling caused severe muscle problems neck, arms, thighs, and lower lumbar. Anxiety, hypertension, and depression due to continued harassment." The report also said "[t]his is not a claim for workman comp. but I was advised to fill out an incident report." At the hearing the claimant said she believed she could not claim workers' compensation at the same time she was on sick leave from her eye surgery.

Also on October 16th, she saw Dr. B. His progress notes of that date reported claimant's complaints of stress and pressure, as well as "terrible muscle pain," and he diagnosed myalgia and depression. He also prescribed various medications. On December 6th, Dr. Bs notes reported that "things at work are horrible," and that claimant's sleep was troubled; back and shoulder problems were not mentioned but claimant was prescribed medication for high blood pressure. Dr. B also took the claimant off work for an indefinite period. On February 26, 1992, Dr. B reported back and right shoulder pain and diagnosed muscle spasm and anxiety. He stated that the claimant could not do heavy lifting, bending, or stooping, and he advised her to seek employment elsewhere.

At some point the claimant began seeing Dr. R J, although no medical reports from that doctor are in evidence. Dr. J apparently referred her to Dr. R, a neurosurgeon who had in 1990 treated claimant for cervical stenosis at C4-6 and had performed a cervical decompressive laminectomy. (Regarding that surgery, the claimant testified that she did not know how she had hurt her neck; that she had fallen at work, but did not report it as a workers' compensation claim.)

On December 16, 1992, Dr. R reported the claimant's complaints of neck, shoulder and arm pain with radiation into her right arm more than the left; she also complained of low back pain with radiation into the legs, and weakness, numbness and tingling in her right ring and little fingers. Dr. R noted right arm pain on the hyperabduction maneuver, and stated that she could not completely extend her arms above her head. He reviewed the claimant's cervical spine series and MRI scan, and said she has had a satisfactory decompression of the cervical spine and "although she may have some osteoarthritic changes with ridging, these do not appear to be placing significant pressure on the nerve roots or dural sac." He

recommended a complete cervical spine series, a right shoulder x-ray and screening blood tests, although the record does not reflect whether these were performed. He also recommended physical therapy. At the time of the hearing, the claimant had had three physical therapy sessions.

Mr S, employer's business manager, testified that the claimant had been transferred to central supply to cover a personnel shortage created by an employee going on maternity leave. He denied, as asserted by claimant, that he had told her, "[y]ou're history," when transferring her. He said neither he, nor anyone else he knew of, were aware claimant had suffered an injury until she filled out the October 16th incident report, although he acknowledged that the supply area did contain cases of dietary supplement. He also said he delivered claimant's check to her home following her eye surgery, and that she mentioned no injury at that time. A signed, written statement from Mr W, claimant's coworker, says the claimant did assist him in putting up daily orders and deliveries, but he also said he could not recall any specific incidents, dates, or times.

In reviewing the sufficiency of the evidence to support the hearing officer's determination that the claimant did not sustain an injury to her back and shoulder in the course and scope of her employment, we are mindful of the hearing officer's role as sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). In this case there was copious testimony, both from the claimant and in the form of her written statements which had been appended to her exhibits, concerning the events between September 16, 1991, when she was transferred to central supply, and September 22nd, when she turned in her keys. She testified regarding her activities on the job, the mental and physical stress she suffered, and a lifting incident on September 20th which she said resulted in severe pain and discomfort. Much of the claimant's testimony and written statements concerned whether the new job required lifting, stocking, and other heavy work versus her employer's contention that the job was one involving computer work and paperwork. The job requirements, however, have little if any relevance to whether the claimant actually suffered an injury in the course and scope of her employment.

This case, like many workers' compensation cases, hinged upon the matter of credibility, a responsibility which falls on the shoulders of the hearing officer. Texas Workers' Compensation Commission Appeal No. 91025, decided October 11, 1991. The claimant had the burden to prove by a preponderance of the evidence that she sustained a compensable injury, and the burden was not on the carrier to prove the injury did not occur as claimant contended. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.- Texarkana 1961, no writ). The testimony of a witness who is an interested party raises issues of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). To this end, the fact finder may believe all, part or none of the testimony of one witness; he may also resolve any conflicts and inconsistencies in testimony.

The Texas courts have frequently described the nature of the discretion given the fact finders in their evaluation and acceptance or rejection of evidence. In Aetna Ins. Co. v. English, 204 S.W.2d 850, 855-856 (Tex. Civ. App.-Dallas 1947, no writ), the following general rules were stated:

> Jurors may accept some parts of a witness' testimony and reject other parts, when the testimony given is inconsistent, contradictory, contrary to established physical facts, or from the manner and demeanor of the witness creating a doubt of its truthfulness, or because of the interest the witness has in the fact sought to be established or discloses a prejudice or bias on his part prompting what he has said. In such instance the jury may form its verdict upon the part accepted along with any other testimony of probative value tending to support the same fact.

The hearing officer in this case may have found conflict in the claimant's testimony regarding immediate, sharp pain and her subsequent failure to mention such injury to her employer at the time she turned in her keys and left her job. Claimant's testimony regarding immediate debilitation and illness is also at odds with the testimony of Mr. S that she mentioned no back or shoulder problems to him when he delivered her check. In addition, the claimant's testimony, and the medical reports of doctors who treated her, is replete with references to job dissatisfaction, and conflicts in the work place. The hearing officer may have determined that claimant's physical complaints were colored by her extreme dissatisfaction and that insufficient evidence existed to causally link a diagnosis of myalgia (defined in Dorland's Medical Dictionary, 27th Ed., as muscle pain) with a specific, untoward lifting event, versus an anxiety-based reaction. Despite references to a back and shoulder injury in the reports of Drs. B and R, the recitation of the history of an injury as reported by a claimant, although admissible to show the basis of the doctors' opinions as to the cause of the problem, is not competent evidence that an injury in fact occurred on the date alleged. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). *See* Texas Workers' Compensation Commission Appeal Nos. 92062, decided April 3, 1992, and 92067, decided April 3, 1992.

When a factual insufficiency challenge is brought, the reviewing panel must first examine all of the evidence; and after considering and weighing all the evidence it may set aside the finding 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 (Tex. 1986). Since an appellate court is not a fact finder, it may not pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Co. v. Soto, 819 S.W.2d 619 (Civ. App.-El Paso 1991 writ denied).

Upon our review of the record, we cannot say that the hearing officer's decision that the claimant failed to prove she had sustained a compensable injury was against the great weight and preponderance of the evidence. We accordingly affirm.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Gary L. Kilgore
Appeals Judge