APPEAL NO. 93222

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On January 22, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be determined were: "Did CLAIMANT have an accident on (date of injury), in the course and scope of her employment at (employer).? Is CLAIMANT currently suffering disability as a result of any injury on (date of injury), or was her inability to obtain and retain employment due to her pregnancy?" The hearing officer determined that the respondent (claimant) was injured in the course and scope of her employment on (date of injury), but failed to establish that her disability was due to the injuries sustained on (date of injury). Appellant, carrier, contends that the evidence in support of the findings and conclusions are so against the great weight and preponderance of the evidence as to be manifestly erroneous and so unjust as to require reversal by the Appeals Panel. Claimant did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that she was initially hired by the employer, as a "home health aid" in May 1992. Claimant stated she became aware that she was pregnant some time in June 1992. She further testified that she had had two prior miscarriages before and that the doctor imposed a five pound lifting limitation on her. Claimant and employer witnesses all testified that claimant was initially laid off because of the lifting limitation but was rehired or reinstated on June 30, 1992, as a clerk. Claimant testified that she spent most of her time in employer's medical records office. Claimant shared the office, or room, with (J) another clerk. Claimant testified that on (date of injury), as she came into the office, she tripped over a telephone cord which had been stretched over to a filing cabinet, fell and hit her left side, and/or abdomen and back on an open filing cabinet. Claimant states she also injured her left ring finger and bent her ring in the fall or in attempting to get up. It was claimant's testimony that J may have had her back to her at the time of the fall but came towards claimant after the fall and asked "[a]re you okay?" Claimant states she answered that she thought she was. According to claimant, this occurred about 10:00 or 11:00 a.m. and that claimant continued working that day, Friday, (date of injury). Claimant states that on Monday, August 17th, as she was driving to work she experienced a severe pain in her left side. She states that she called (Ms J) and told her she would not be in that day and that she was going to the local hospital ER. Claimant states she went home to have her husband take her to the ER. While at home, according to claimant, (Ms. SB), employer's owner called, and that Ms. SB was "upset because I wasn't going to work . . . ." Claimant stated that she was unable to be seen at the local hospital ER on August 17th because her medical records were not there and her doctor was in another town. Claimant states she went back home and called her regular doctor who was unable to see her on August 17th but scheduled her for August 18th. Claimant states she saw a doctor with her doctor's group on August 18th at a medical center and that he thought she would be alright but that

she should not be working. Claimant states she saw her doctor the following week on August 24th and that he gave her a note which stated "[i]t is recommended that [claimant] discontinue work at this time due to her pregnancy." Claimant testified that she called Ms. SB to see if she could have her job back if the doctor would give her a release and that Ms. SB replied "we're not going to need you anymore." Claimant agrees she went to the employer's premises on September 11th to pick up a mileage check and gave a statement saying she had tripped on (date of injury), "hit left side of abdomen, scratched the top of her left hand and that "(Ms J) witnessed the injury."

Claimant called (Ms J) as a hostile witness. J denied seeing the accident, denied having the telephone cord stretched to the cabinet, denied receiving a call from claimant an August 17th and contradicted most of claimant's testimony. After claimant rested, carrier called (Ms. H), employer's clerical supervisor who testified that she, rather than J, was claimant's supervisor, that she was the person who would give claimant permission to be absent, that claimant never reported an accident or injury to her, that the telephone cord would not stretch to the cabinet as claimant had testified, that she had asked for a longer cord for that telephone so J could file and talk on the phone at the same time but that this request had been denied by Ms. SB for safety reasons. There was some inconsistent testimony as to how much time claimant spent in the medical records office. Carrier called (Ms. P) who was an administrative secretary and worked for Ms. SB. Ms. P testified that claimant's last day at work was August 21st, that according to her records claimant was at work on August 17th, had a regular doctor's appointment on August 18th and worked August 19, 20, and 21. Ms. P was one of the persons claimant spoke with on September 11th, when claimant came to pick up her mileage check. Ms. P states that claimant said she hit the side of her abdomen in the fall but never mentioned her back. Ms. P testified she is related to claimant by marriage, but thinks claimant is lying about this claim. (Ms. A), employer's assistant personnel director, testified in rebuttal to claimant's testimony that Ms. A had also tripped on the telephone cord and denied she had ever tripped over the telephone cord in the medical records office as claimant had stated. Ms. SB, employer's owner, testified she had created the clerk position for claimant because claimant needed the job after claimant found out she was pregnant. Ms. SB agreed she did speak with claimant on August 17th, but disputed claimant's version of that conversation. Ms. SB also testified she was aware of the doctor's 8-24-92 note recommending claimant discontinue work "due to her pregnancy" and understood it to mean claimant could not work because she was pregnant. Ms. SB testified she was not aware that claimant was claiming a work-related injury until September 11th when she was apparently contacted by the insurance carrier.

The only medical evidence consists of the medical center prenatal progress notes and the doctor's "off work" slip dated 8-24-92, quoted above. The prenatal progress notes of August 18, 1992 state: "Sent to hospital . . . complained of lightheadedness, advised to increase fluid intake." An entry for 8/19/92 states: "Needs 3°gTT (three-hour glucose tolerance test), unable to get by phone, card sent." No mention is made of a fall, or a bump

to the abdomen.

The hearing officer in essence found that claimant sustained an injury in the course and scope of her employment on (date of injury), but that her subsequent disability was due to her pregnancy rather than the injury from the fall on (date of injury). The carrier appeals the findings and conclusions dealing with the fall being in the course and scope, arguing that the fall did not occur as alleged and that the hearing officer's decision on this point is against the great weight and preponderance of the evidence. Claimant did not appeal and therefore the issue of disability is not before us on appeal.

Carrier, in its request for review in section II Applicable Case Law, recites, with citations of the case law and statute, basic precepts of workers' compensation law. This includes propositions that the hearing officer is the sole judge of the weight of the evidence and the credibility to be given the evidence. Article 8308-6.34(e); that it is within the province of the hearing officer to resolve conflicts and inconsistencies in the testimony; that the hearing officer may believe the witnesses of one party and disbelieve those of the other; that the hearing officer ". . . may accept some parts of a witness' testimony and reject other parts of that testimony where the testimony is inconsistent, contradicted, or contrary to established physical factor or the manner or demeanor of the witness created doubt concerning its truthfulness. Aetna Insurance Company v. English, 204 S.W.2d 550 (Tex. App. - Corpus Christi (1983), writ ref'd n.r.e.)" that the hearing officer is free to reject the claimant's testimony, when the claimant's testimony is not so clear, direct, and not lacking in circumstances to discredit it; and that the challenged findings will be upheld unless the Appeals Panel determined that the evidence is so weak or that the findings are so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. We agree with all of these concepts and have cited many, if not most, of the cases referenced by carrier.

After reciting the applicable case law, carrier reviews the evidence in its appeal. One of carrier's key points appears to be the testimony of (Ms J) and Ms. H that the telephone cord would not stretch across the room as described by claimant. Although there is a rough diagram of the medical records office in evidence and it is helpful to some degree, testimony such as: "Q. On the wall? Would it be this wall or this wall? A. I believe it was this wall over here" is not particularly enlightening to the reviewer. The hearing officer was present and could see where on the diagram the witness was pointing as well as being able to observe the demeanor of the witnesses. We must defer to the hearing officer regarding credibility of the witnesses and being in a much better position to judge the quality of the testimony in reference to measurements (i.e. the medical records office was half the side of the hearing room). Carrier argues "[i]t is clear from a complete review of the transcript the claimant's testimony is so full of lies and inconsistencies as to be so incredible that the findings of fact and conclusions finding an injury in the course and scope of employment are manifestly unjust. There is absolutely no evidence the claimant sustained

an ‘injury,’ pursuant to Article 8308, 1.03 (27), ..." (Emphasis added). We do not agree that there is "no evidence." The claimant testified that she tripped and fell against an open filing cabinet and, if nothing else, sustained a scratched left hand. This constitutes some evidence. In reviewing a "no evidence" allegation of error, we examine the record for evidence that supports the finding while ignoring all evidence to the contrary. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App. - Houston [1st Dist.] 1988, no writ). Whether to believe claimant's version of the fall or carrier's witnesses is a factual determination for the hearing officer to resolve under the propositions of law cited by carrier. We note that the claimant's testimony is that of an interested party and as such only raises issues of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). Although not obligated to accept the testimony of a claimant, as an interested party, at face value (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, not writ) issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992 and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. The hearing officer resolved the issue by believing claimant's version that she tripped, fell against an open filing cabinet and at a minimum, sustained a scratched left hand injury (within the meaning of Article 8308-1.03(27)), thereby causing damage or harm to the physical structure of the body. Although there was evidence to the contrary, that the fall did not occur as claimant described, we cannot say that such evidence to the contrary was against the great weight and preponderance of the evidence as to be manifestly unjust and require reversal of the hearing officer's decision. Although not an issue in this appeal we note that the hearing officer found that claimant's inability to obtain or retain employment was due to her pregnancy rather than the compensable injury.

While we may not necessarily agree with the hearing officer's inferences, or had we been the trier of fact we may not have made the same findings, it is an basic proposition of law that where there is some evidence of a substantial and probative character to support the trier of fact's findings, they are controlling upon the reviewer and will not be disturbed, even though we might have reached a different conclusion. Commercial Union Assurance Company v. Foster, 379 S.W. 2d 320, 322 (Tex. 1964). In this case we cannot find that the determination of the hearing officer was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust so

as to warrant setting aside the decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951) and Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision is affirmed.

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Thomas A Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge