

APPEAL NO. 93639

On June 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Sec. 401.001 *et seq.* (1989 Act). The issues at the hearing were: 1) whether the appellant (claimant) sustained an injury to her back at work on (date of injury); and 2) whether the claimant has disability. The hearing officer determined that the claimant did not sustain a compensable injury on (date of injury), and that the claimant had no period of disability. The hearing officer decided that the respondent (carrier) is not liable to the claimant for workers' compensation benefits. The claimant contends that the great weight of the evidence shows that she sustained a compensable injury and has disability and the claimant requests that we reverse the hearing officer's decision. The carrier responds that the evidence supports the decision of the hearing officer and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The hearing officer's Statement of the Evidence is a fair summary of the evidence and is adopted. Briefly, on (date of injury), the claimant was working for the employer, (employer), as a cashier. She testified that on that day her back was injured at work when a coworker, (Mr. L), greeted her by squeezing her around the waist from behind and lifting her off the ground. Mr. L testified that he did not give the claimant a bear hug or grab her or lift her off the ground. He testified that he greeted the claimant by tapping her on the shoulder to say hello. Mr. L further stated that sometime later that day the claimant told him he had hurt her. Another coworker, Ms. C, who worked at the register next to the claimant, testified at the hearing and gave a recorded statement to the effect that Mr. L very gently poked the claimant in the side. A third coworker, Ms. L, testified that prior to the claimed incident of (date of injury), the claimant had been complaining of back pain at work. It was undisputed that the claimant had sustained a work-related back injury in April 1992; that on (date of injury), she was taking medication for her prior injury; and that she was still suffering symptoms from her prior injury. About nine days after the alleged incident, another coworker, Ms. P, testified that she saw the claimant lifting grocery bags containing canned goods, milk, and other items at another store and that the claimant did not appear to be in any pain, which testimony contradicted the claimant's testimony to the effect that her back bothered her to the point where she could not lift grocery bags containing heavy items.

A medical report showed that the claimant was seen at a hospital on (date of injury), and was prescribed more pain medication. On January 29, 1993, the claimant was examined by (Dr. M), who had treated her for her prior back injury. The report recites that the claimant was seen because of an incident nine days earlier when she allegedly was grabbed from behind by a coworker and squeezed. Dr. M reported that no further work up

was needed for "the incident" and that "it falls into the strain category involving lumbar and/or cervical spine." On February 26, 1993, Dr. M wrote that "I don't feel that [claimant] suffered an identifiable injury other than something that would be classified as a strain." On April 30, 1993, Dr. M wrote that on physical examination he could not document "additional injury." He also wrote: "[s]ymptoms are worse allegedly than before this bear hug at work. No objective findings that are new." Dr. M also stated that the bear hug scenario could have caused absolutely no injury or it could have caused major injury. He further stated that "the tap on the shoulder probably wouldn't have caused any kind of injury or problem whatsoever."

In a contested case hearing the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). In this case, there were conflicts and contradictions in the testimony, and it was the duty of the hearing officer to consider these conflicts and contradictions and determine what facts had been established. See 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.). We have examined the evidence and find it sufficient to support the hearing officer's finding that the claimant was not injured in the course and scope of her employment and her conclusion that the claimant did not sustain a compensable injury on (date of injury). We further conclude that the finding and conclusion are not against the great weight and preponderance of the evidence. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App. - Texarkana 1961, no writ); Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App. - Waco 1980, no writ).

Pursuant to Section 401.011(16), "disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Consequently, without a compensable injury, there can not be disability as defined by the 1989 Act.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge