APPEAL NO. 93999

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.) (1989 Act). A contested case hearing was held on October 6, 1993, in (city), Texas, to determine the single issue of whether the claimant has disability as a result of her workers' compensation injury sustained on (date of injury). The carrier, who is the appellant in this action, seeks this panel's review of the decision of hearing officer (hearing officer) that as of January 25, 1993, the claimant has been unable to obtain and retain employment at wages equivalent to her pre-injury wage because of a compensable injury. No response was filed by the claimant.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who testified through an Arabic interpreter, was employed by (employer) in a position which required care of 12 infants. It was not contested that on (date of injury), the claimant was injured in the course and scope of her employment when she slipped and fell. She sought treatment from a chiropractor, (Dr. H), the same day, and continued seeing Dr. H for six visits, until January of 1992. The claimant said she stopped seeing Dr. H because she could no longer afford his treatment, for which she was paying herself despite the fact that she had told her employer about the injury at work. An undated letter from Dr. H stated that x-rays taken on (date), revealed subluxation complex of the lumbar spine.

The claimant said the next doctors she saw were (Dr. L) and (Dr. Q). In a letter dated July 26, 1993, Dr. L said he first saw claimant on November 4, 1992, and that she complained about low back pain radiating down the back of her right leg for about six months; she also stated that she had seen a chiropractor but had not experienced any relief. Dr. L stated that the claimant did not report a history of trauma but that claimant's brother, who spoke English, furnished information about a job-related injury in 1991 (Dr. L also notes that this information "was lost at that time and is therefore not reflected in my office notes"). Dr. L prescribed medication, but noted that after a second visit on November 18, 1993 (sic; should probably read 1992), "I understand she is now under the care of [Dr. Q]."

In a letter dated September 27, 1993, Dr. Q stated that the claimant had been under her care since (month) of (year) "when I found her in severe, excruciating pain, hip and right lower extermity (sic)." Dr. Q said she advised claimant to report the incident to her employer and said she could "only treat her [claimant] officially, if her work referred her to me." Dr. Q further stated that she provided claimant with medication for symptomatic relief and continued to see claimant throughout 1992 although "without making an office call or charging her anything knowing her very limited resources." Dr. Q said that claimant finally came to her office on January 14, 1993, crying and in severe distress. At that point, she said, she contacted claimant's brother, got consent to examine claimant, and told him claimant needed to contact her employer for authorization to treat the claimant. Similar

letters from Dr. Q, dated May 25 and 27, 1993, were also in the record, although the May 25th letter said Dr. Q first saw claimant on October 19, 1991, and the May 27th letter said she first saw her on November 19, 1991. A February 2, 1993 letter from Dr. Q said claimant had been under her care since December 22, 1992 (the date appears to have been altered by hand), and an April 1, 1993, letter said she had been under her care since January 14, 1993. On July 17, 1993, Dr. Q wrote that she had seen claimant for a back injury on (date of injury), but that claimant had stayed symptom free until December 1992, when she reported with acute exacerbation of her backache with radiculopathy. Also admitted into evidence as one of the carrier's exhibits was a billing statement from Dr. Q which showed an initial office visit (new patient) of November 19, 1991, and subsequent visits and consultations on November 20 and 21, 1991; December 10, 1991; March 1, 1992; April 9, 1992; and July 10, 1992; and another new patient visit on January 14, 1991, with other visits subsequent to that. The visits during 1991 were billed but the 1992 visits reflected no charge.

In addition, on cross-examination, the claimant was asked about records from Dr. Q for September and October of 1991 which showed chemistry and hematology procedures, and a chest x-ray. While claimant originally denied seeing Dr. Q for anything but her back injury, she later said she had gone to Dr. Q because of a cold.

On January 15, 1993, claimant went to an emergency room. The report of that date states she presented with three to four days of low back pain, and that she had had a one year history of back injury. An x-ray showed mild wedging of L-1, as well as calcification of a disk between T-12 and L-1. (Dr. P), who claimant next saw, ordered an MRI scan on January 22, 1993, which revealed a large central and right-sided disk herniation at the L-5/S-1 level, and a mild bulge at the L-4 level. Dr. P felt the size of the herniation merited surgery; a second opinion doctor, (Dr. S), concurred with the need for surgery.

The claimant had been involved in an accident in (month) of (year) in which her car ran over a curb and hit a light pole. The claimant, along with her brother, testified that this incident did not injure her back that she and did not seek any medical treatment.

(Ms. J), the director of employer's facility where claimant worked, testified that claimant's duties included feeding, changing, and lifting children whose ages ranged from six weeks to one year. She said claimant had been working part time (four to four and one-half hours per day), but that she had sought additional hours and had gone to full-time status (more than 30 hours per week) in either December 1992 or January 1993. Ms. J said she did not observe claimant in any physical pain, but that claimant said she wanted to work more hours in order to get medical insurance. Ms. J acknowledged that claimant had told her about the injury of (month/year), and said that claimant brought in spinal x-rays and told Ms. J she was seeing a doctor. In early January of 1993 Ms. J said claimant came in to work but said she had to leave because her legs were weak; Ms. J said she assumed claimant had the flu like some other employees.

In its appeal the carrier takes issue with the following findings of fact and conclusion

of law:

FINDINGS OF FACT

6.Claimant, although continuing to seek medical treatment for her injuries, continued her work until January 25, 1993, when she was taken off work by her doctor.

10.As of January 25, 1993, Claimant has been unable to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury.

CONCLUSIONS OF LAW

2.As of January 25, 1993, Claimant has disability as a result of her compensable workers' compensation injury of (date of injury).

More specifically, carrier contests that portion of Finding of Fact No. 6 which states that claimant continued to seek medical treatment for her injuries after her initial treatment with Dr. H. (It apparently does not contest the finding that claimant was taken off work by her doctor on January 25, 1993.) The basis for carrier's appeal concerns the credibility of claimant's testimony and that of Dr. Q, in particular Dr. Q's September 27, 1993, letter. The carrier contends that this letter, written shortly before the contested case hearing, contravenes the same doctor's previous five narratives which the carrier says were written closer in time to claimant's injury. It also notes that there are no contemporaneous records of treatment by Dr. Q for claimant's back prior to January of 1993. Carrier also challenges the claimant's credibility, noting inconsistent statements about her early treatment with Dr. Q, and the fact that claimant continued to work after her injury, apparently exhibiting no problems. Carrier contends that the evidence to support claimant's claim is so contradictory as to be totally questionable and an insufficient basis upon which to make a finding of disability. It says that the facts show that the hearing officer's findings and conclusions are manifestly wrong, or that her decision was influenced by bias, passion, or prejudice which merits reversal.

Clearly, this case is one which turns on credibility, most notably that of Dr. Q's reports and letters. Under the 1989 Act, the responsibility to judge credibility belongs to the hearing officer. Section 410.165(a). As the carrier's appeal indicates, absent some showing of passion, bias, or prejudice, which influenced the fact finder's finding, or a determination that the finding is manifestly wrong, a reviewing body will not invade the providence of the fact finder with regard to credibility of witnesses. Genzer v. City of Mission, 666 S.W.2d 116 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). To the extent that the record in this case contains evidence which is in conflict, the fact finder resolves conflicts and inconsistencies in the testimony of any one witness as well as different witnesses, and may believe one witness and disbelieve another, or may believe part of the testimony of a witness and disbelieve any other part. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi

1983, writ ref'd n.r.e.).

Our review of the record and the hearing officer's decision does not indicate that such decision was influenced by bias, passion, or prejudice. The carrier takes issue with one statement in the hearing officer's discussion of the evidence, wherein she noted that Carrier's Exhibit No. 2, which was Dr. Q's billing statement, "seems to be a listing by [Dr. Q] as to the workers' comp visits, which [claimant's attorney] noted for the record is quite often done with workers' comp injuries. Carrier did not offer any rebuttal evidence with regard to claimant's attorney's remarks." We would agree with carrier that such remarks by claimant's attorney do not constitute evidence and as such did not call for rebuttal evidence by carrier. However, we believe this statement is harmless error to the extent that the record contains other evidence which, if credited by the hearing officer, would support her decision.

The Appeals Panel will not set aside a decision on appeal because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel would deem most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). This we decline to do.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge