94002

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*), a contested case hearing was held in (city), Texas, on November 18, 1993, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) sustained a compensable injury to her lower back on (date of injury), and that she had disability beginning June 21, 1993, and ending July 2, 1993, and beginning August 4, 1993, and ending August 11, 1993. Appellant (carrier) appeals complaining that the hearing officer improperly indicates that a claimant's exhibit was admitted when it had been successfully objected to, that the hearing officer did not consider all of an exhibit entered into evidence, and that the evidence is not sufficient to show any connection between the claimed injury and the employment. Carrier also urges that findings of fact by the hearing officer going to the compensability of the claimed injury were insufficiently supported by the evidence or were against the great weight and preponderance of the evidence. No response has been filed.

DECISION

Determining that there is sufficient evidence to support the findings and conclusions of the hearing officer and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm the decision.

The issues in the case were whether the claimant sustained an injury in the course and scope of her employment on (date of injury), and whether there was any resulting disability. The claimant testified that she was a truck driver and on the date of (date of injury), due to wet conditions, she slipped and fell on her tailbone when she attempted to get into the cab. She stated she experienced pain in her lower back but made one more trip before she reported the injury to a supervisor, (SN), and went to see her doctor, who was not available, and instead saw another doctor (apparently in the same clinic). She also testified that she had gone to her chiropractic doctor, (Dr. S) on June 15, 1993, because of a problem with her neck but that she was not having any problem with her lower back at that time. She did not report this injury to be work related because it happened at home. Medical reports of that date tend to indicate that the complaint centered around "neck pain and left shoulder pain" although in her general description of complaint she wrote "back, neck, and left arm" and did not indicate that it was job related. She saw Dr. S on June 21, 1993. She also testified about sustaining an injury to her shoulder on the job around (date), and an on-the-job injury to her wrist while working for another employer sometime in August 1993.

A report from Dr. S states that the claimant saw him on June 21, 1993, with complaints of full spine pain and bilateral leg numbness and tingling, and notes that the claimant indicated she had fallen two to three feet out of her working vehicle and "landed square on her buttocks." Dr. S took her off work for a week. He also notes that she was again taken off work for another week as of "8-4-93." He also stated that an MRI was ordered which apparently was negative.

The carrier called several witness who testified that one morning in mid-June, when the claimant came in to get her time card prior to starting work, the claimant stated, in response to a question of what was bothering her, that she had fallen at home while moving furniture. They also indicated that the claimant never mentioned to them that she sustained a fall and injury at work. One of the witnesses testified that she worked all of that same day that she stated she had fallen at home. Another of the witnesses, SN, denied the claimant's assertion that she told him about the injury on the day that it happened and stated he was not present at any time that the claimant talked to the other office personnel.

Clearly, there was considerable conflict in the evidence before the hearing officer. His fact finding duties were even more difficult given the situation that the claimant had sustained several different injuries during the short time frame involved in the case. The claimant testified at great length concerning not only the unwitnessed fall on (date of injury), but about her other injuries and her neck and shoulder problem resulting in her visit to the doctor on June 16, 1993. Her testimony was at odds with other office personnel who stated that sometime in mid-June the claimant said that she had fallen at home. The claimant denied that she had ever stated she had fallen at home. The medical records of Dr. S tend to indicate that the claimant had separate, distinct injuries on the (days) of June although the carrier takes a different view and urges that the evidence shows that the back was injured before the claimed injury date of (date of injury). In any event, the credibility of the claimant was the critical matter in this case, and it is apparent the hearing officer deemed her to be a credible witness. And, in assessing the medical evidence, it is apparent the hearing officer determined it was corroborative of the claimed injury occurring in the course and scope of employment. We cannot say that the reports from Dr. S were not probative evidence and did not support the finding and conclusion that a compensable injury occurred.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). And, as the finder of fact, he resolves conflicts and inconsistencies in the evidence and testimony. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. He can believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)) and he can believe all, part or none of the testimony of a given witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). A claimant's testimony is that of an interested party and only raises an issue of fact for the fact finder. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Where there is sufficient evidence, which we find there is here, in support of the hearing officer's determinations, his decision is affirmed. Only were we to find, which we do not, that his determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to

disturb his decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

We do not find merit to the claimed error that the hearing officer inappropriately considered a claimant's exhibit, an objection to which had been sustained by the hearing officer. Although the hearing officer listed (apparently inadvertently) the exhibit in his decision where he listed all parties' exhibits admitted, the exhibit itself clearly is marked in sizeable letters "<not admitted>." Under such circumstances, we do not conclude that the hearing office considered the exhibit in rendering his Decision and Order. The exhibit in question was a statement from Dr. S which indicated that the claimant had been seen by a substitute doctor when she came into the clinic on (date of injury) because of Dr. S's unavailability and that she saw Dr. S on June 21st. In any event, this information was otherwise in evidence and the statement was not, under the circumstances, a critical item in the proof of the matters in issue although it may be considered to have some corroborative value. And, it was not reasonably calculated to cause and probably did not cause the rendition of an improper decision. *See generally*, Texas Workers' Compensation Commission Appeal No. 931004, decided December 14, 1993; Texas Workers' Compensation Commission Appeal No. 91021, decided September 25, 1991. We likewise do not find merit in the carrier's assertion that the hearing officer did not consider all of Hearing Officer's Exhibit No. 3 which included documents exchanged by the carrier. Just because the hearing officer listed this exhibit as "Exchange Letter from Carrier" is no indication that he did not consider all parts of the particular exhibit. Indeed, one of the reports that was a part of the exhibit was discussed and specifically referred to a couple of times during the hearing. Under the circumstances, we find no basis for this assertion of error. The hearing officer, if he makes a statement of the evidence, is not required to mention and discuss every item of evidence in his Decision and Order and only needs to reasonably represent the record of the proceedings. Texas Workers' Compensation Commission Appeal No. 93801, decided October 22, 1993; Texas Workers' Compensation Commission Appeal No. 92691, decided February 8, 1993.

For the reasons set forth above, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz

Appeals Judge

_____

Alan C. Ernst
Appeals Judge