APPEAL NO. 94032
FILED FEBRUARY 22, 1994

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing (CCH) was held in (City), Texas, on October 20, and December 1, 1993, (Hearing Officer) presiding as hearing officer. She determined that the respondent (claimant) suffered a compensable back injury on (date of injury), and timely reported her injury to her employer. Appellant (carrier) asserts the hearing officer committed reversible error in admitting evidence of an earlier sexual harassment complaint by the claimant, by admitting a hearsay and unauthenticated statement of claimant's husband and "voluminous" hospital records, and in allowing testimony regarding claimant's hospital diary. Carrier also disputes the hearing officer's findings and conclusions that the claimant sustained a compensable injury and that she gave timely notice urging that the great weight and preponderance of the evidence is against such findings and conclusions. Claimant urges that the hearing officer did not commit any reversible error and that there is sufficient evidence to support her decision.

DECISION

Determining that error serious enough to require reversal was not committed and that the findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The issues agreed upon at this CCH were whether the claimant sustained a compensable injury in the course and scope of her employment on (date of injury), and whether she timely reported such injury. The case is replete with conflicts and inconsistencies in the evidence, a matter that falls within the responsibility of the fact finding hearing officer to resolve. Section 410.168(a); Garza v. Commercial Insurance Co. of Newark, New, Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). And, it is apparent that the claimant at least perceived that she had a somewhat tumultuous relationship with some employees over the course of her employment. This tends to explain the receipt into evidence of matters offered at various time by both sides that appear to be irrelevant to the issues in this case or at most of limited and tangential value. Although not dwelled on at any length, there was evidence that the claimant, apparently a very emotional person, had filed several grievances with her employer over the course of her employment involving changes in work schedules, complaints of sexual harassment and conflicts with other employees. While generally irrelevant to the issues, such evidence was allegedly offered to show the emotional state of the claimant, either to explain her confusion or possible failure to give timely notice or, as the carrier could argue, to show that she was claiming a back injury because her real problem, mental stress, was not compensable. In any event, the hearing officer, after objection by the carrier on the matter of the sexual harassment complaint, stated that it was not an issue, and that she would only allow counsel to explore it "briefly to show what you need to show, but as I said, it's not an issue and any testimony about it will be considered for what it's worth" and that "I

don't see where you really need to go into that any further." It was also brought out that the assertions were still under inquiry through another agency and that no determinations or conclusions had been made. In our opinion, the hearing officer was indicating the very limited, if any, value of this evidence and we can not conclude that it unduly influenced her decision in this case requiring reversal. In Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992, we stated:

> . . . to obtain reversal of a decision based upon error in the admission of evidence, the appellant must first show that the hearing officer's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. App.-San Antonio 1981, writ denied). Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. *See* Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The carrier also complains that the hearing officer allowed in evidence a written signed statement of the claimant's husband because it was not sworn or timely exchanged. Signed statements to be admissible in a CCH do not have to be sworn. *See* Texas Workers' Compensation Commission Appeal No. 92577, decided December 3, 1992. The carrier also objects to the admission of this statement and the other evidence because they were not timely exchanged. The hearing officer inquired into the matter and apparently accepted the explanation for the untimely exchange; the late receipt of the evidentiary items by the claimant's counsel and her expeditious delivery of copies to the carrier's counsel once received. The hearing officer found good cause for the late exchange under the circumstances. Although the good cause showing was minimal, we do not find an abuse of discretion by the hearing officer in admitting the evidence requiring corrective action. We will not overturn the determination of the hearing officer in absence of an abuse of discretion. In Texas Workers' Compensation Commission Appeal No. 93552, decided August 19, 1993, citing Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1992, we refused to disturb the hearing officer's determination of good cause where the party exchanged documents as soon as they received them. We also do not find merit to the assertion of error for permitting the claimant to refresh her recollection by referring to diary entries she made during the course of her hospitalization. Conformity to the legal rules of evidence is not necessary at the CCH, Section 410.165(a). However, they do provide some guidance for a proper and orderly proceeding. *See* Texas Workers' Compensation Commission Appeal No. 92040, decided March 16, 1992.

Concerning the back injury, the claimant testified that she had to sweep and lift some heavy boxes of trash on (date of injury). She felt low back pain and tingling in her leg that evening and went to her doctor the next day. Because she was in a very emotional state (for various matters concerning her employment), the doctor she saw (her doctor apparently was not available) referred her to a psychiatrist who had her admitted to a

hospital, (Hospital). The earlier medical records are concerned with her mental condition; however, her back complaint was ultimately addressed and a report of an MRI performed on "03/12/93" gave the impression:

> Degenerative disc disease at the level of L5-S1 with an associated with focal posterolateral herniated disc causing posterior displacement of the right S1 nerve roots.

The statement from the claimant's husband indicates that the claimant had back pain when she got home from work on (date of injury), that he had to help her out of her car and that she had trouble sleeping that night although she was asleep when he left the following morning. He next saw her in the hospital that evening and stated that she was in a very unstable emotional condition. He stated that he asked his brother-in-law to call the employer to advise them of the claimant's injury and that he was with him when he made the call on February 27th. He stated his wife did not have any problems with her back before (date of injury). The brother-in-law testified and stated he had been requested to call the employer and had done so. He stated that he called and reported a back injury where the claimant worked. The claimant's sister also testified and stated that she called the employer on March 1, 1993, to report the claimant's injury on the last day of her work but was told that claimant had to report it herself. She called again the next day and was not given a chance to report anything but was told again the claimant had to call herself. A (RR), a social worker at the hospital, testified that the claimant came to her office on March 26th and called the employer to report her workers' compensation claim and injury but was told she had to come in person to the employer. (Mr. A), the union president, testified that he tried several times to notify the employer about the claimant's back injury but that the employer's human resources director would not accept any notice. Mr. A filed a grievance on claimant's behalf on March 26, 1993, including a claimed back injury, although Mr. A could not pinpoint when he was advised about the back injury. There was an Employer's First Report of Injury (TWCC Form 1) dated "3-9-93" which listed under nature of injury "alleged back injury."

The carrier presented several witnesses whose testimony was in direct conflict with that of the claimant and her witnesses. However, one consistency that seemed to run through all the testimony was that the claimant was an emotional person and was under considerable stress which she felt was work related. In any event, two witnesses, one the claimant's supervisor, at the place of work on (date of injury), the day of the asserted back injury, indicated that the claimant did very little cleaning up and that they did not see any indication that claimant was hurt or in pain that day. They both indicated that the claimant did not report any injury or problem with her back that day but that the claimant had received a reprimand that day resulting from a customer complaint and that she was very upset and crying. A working foreman for employer testified that he talked to the claimant's husband who called to say the claimant would not be coming in to work because she was ill and did not say anything about a back injury or that the illness was work related. The Director of Human Resources testified the claimant never called him to report an injury, that he received a couple of calls from unidentified persons in early March to report that

claimant would not be reporting for work because she was sick, and that when Mr. A talked to him about the claimant Mr. A indicated her work related injury was for stress. The Director testified that when he told Mr. A that stress is not compensable, Mr. A said "how about a back injury." The Director asked how the accident happened and Mr. A mentioned an injury that occurred the year before and then mentioned an injury in (month). Mr. A did not mention a specific date or how it happened.

With the evidence in this posture, the hearing officer determined that the claimant sustained a work related back injury on (date of injury), and that the injury was timely reported by family members acting on claimant's behalf. *See* Section 409.001. As indicated, the evidence was replete with conflicts and inconsistencies. However, this is precisely the function of a fact finder; to resolve inconsistencies and conflicts and find the facts in the case. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Garza, *supra*. When presented with conflicting evidence, the hearing officer may believe one witness and disbelieve others and resolve inconsistencies in the testimony of every witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). That the evidence may reasonably give rise to inferences different from those determined most reasonable by the fact finder and although a different conclusion might well have been reached by a reviewing body, does not authorize an appellate or reviewing body to substitute its judgment for that of the fact finder. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). We have held that we will not substitute our judgment for that of the hearing officer where there is sufficient evidence to support his or her findings and conclusions. Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993. The hearing officer apparently gave considerable weight to the testimony of the claimant and her family members and, in this regard, the hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). We can not say that the hearing officer's findings and conclusions are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Finding no reversible error and evidence sufficient to support the hearing officer, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge