APPEAL NO. 94139

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. On December 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) was not injured in the course and scope of employment on (date of injury). Claimant asserts that he was injured and states that the decision was incorrect; he adds that the hearing officer talked to the employer's representative and did not admit certain medical records. Respondent (carrier) replies that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for the (employer) in a custodial position for two months when he states that he was injured on (date of injury). Claimant stated that just after coming to work, he noticed (CT) slumped over the bar; he looked back to see what CT was doing and tripped over a chair that was in a doorway for some reason. He said that CT looked up and saw him, claimant, getting up from falling forward with his chest and stomach down but turned toward the left. He said that (SM) was coming through a door at the time he was getting up. Claimant said he noticed that his lower back was hurting then.

Claimant first saw (Dr. T) on (date of injury). Dr. T recorded that claimant fell over a chair while carrying a trash can at work. Dr. T recorded that his examination was consistent with "facet embarrassment, abnormal weight bearing, sciatic neuralgia, and myospasm." No indications of bruising were made. Claimant decided to see another doctor, and on August 26, 1993, saw (Dr. L). Dr. L notes that claimant reported looking back to hear what someone said causing him to fall over a chair at work. Dr. L reported that claimant complained of pain, was tender, and had limited range of motion. Claimant saw (Dr. F) on November 9, 1993, for a medical examination specified by the carrier. Dr. F reports that claimant had a back injury in (year). He found a lumbar strain and said claimant was not ready to return to full work. (Dr. L also mentioned claimant having a back injury in (year); Dr. T did not refer to any prior injury to the back.)

SM testified that he is a cook for employer. SM was coming through the door from the kitchen when he saw claimant getting up from the floor. Claimant was said to be several feet from any furniture and SM said that no furniture was moved. SM testified that claimant, when getting up, said he fell over a table; later claimant told him he fell over a chair. SM heard no sounds of a fall. (RM) testified that he is the dining room manager, but was not present on (date of injury). He stated that claimant was hired to work for only about two months while another employee was on a leave of absence. He told claimant on Monday, (date), that in two weeks he would be let go. (Claimant denied being told this.) CT testified that he is a kitchen helper for employer. On (date of injury), he had just clocked in, and when he turned to go in the kitchen, saw claimant getting up off the floor. He heard no noise. He said that as claimant was getting up, his back was toward the floor. He saw SM walking nearby at that time and asked claimant if he were alright. To which claimant replied that he was. He saw no limping or indication of injury. (KB), manager for employer was

called to testify as to the position of various furniture, doors, and identifiable areas in the room where claimant said he fell.

The claimant asserts that medical reports of Dr. F, Dr. L, and Dr. T were not admitted. The record indicates that the hearing officer did admit them. The hearing officer's decision shows that each was admitted. This assertion on appeal is without merit.

Claimant states, also, that he saw the hearing officer talking to KB. Claimant added, "[t]he hearing officer told her he was going to rule for her and not me." Claimant does not state that this happened before the hearing was over. Carrier points out that it was at the hearing in close proximity to KB and never saw or heard the hearing officer talking to her. (We note that the record indicates that hearing officer did ask a few questions of KB when she testified; otherwise it shows no exchange with KB. In addition, the record does not indicate that the hearing officer acted unfairly to either party.) Section 410.167 prohibits *ex parte* contact by a hearing officer with a party outside the hearing with some provisos that are not applicable here. The Appeals Panel stresses that this statutory provision should be followed to assure fairness to both parties and to prevent the misconstruing of such communications. Section 410.168 then calls for the hearing officer to issue a written decision. Again, a written decision should serve to minimize errors of communication that could occur with a decision rendered orally at the conclusion of the hearing. The first section referred to certainly seeks to avoid private conversations, but it is directed at parties--KB is not a party; on the other hand, Tex. W.C. Comm'n, TEX. ADMIN. CODE § 142.3 (Rule 142.3) seeks to prevent any person from contacting the hearing officer about facts, issues, or the applicable law in private until both the administrative and judicial process are over. Administrative penalties are provided for violations of this rule, but the thrust of the rule is not against the hearing officer. Section 410.168 requires a written decision, but does not limit the communication of such decision to the written form. A written decision was provided in this case and was a significant part of what the Appeals Panel reviewed. *See* Section 410.203(a). Transcending these observations is the role of the Appeals Panel which does not include fact finding. Unlike allegations of bias growing out of comments or rulings made by the hearing officer on the record, which can be reviewed, there is no record of what was said in this instance. Evidence not considered at the hearing can only be considered if the case is remanded. With no assertion made that a private conversation indicated that the hearing officer had made his decision before all the evidence was considered, no action is necessary. Even if such a conversation as is asserted by the claimant took place after the hearing was closed, such a finding on remand would "probably not change the outcome of the hearing." *See* Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993, and Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas, no writ. The claimant's assertion, if true, would not constitute reversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. The hearing officer could consider that claimant was an interested witness and therefore not accept his testimony as to how his injury occurred. *See* Presley

v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). He could conclude that claimant was injured but not in the manner claimant described. *See* Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer could give more weight to the testimony of SM and CT, who heard no noise of a fall, but were nearby even though their testimony was in conflict with that of the claimant. *See* Ashcraft v. United Supermarkets, Inc, 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). While not major, the hearing officer could also consider the inconsistencies in the medical evidence provided by claimant which showed some variance as to how the accident happened. He could infer that if claimant fell over a chair in the doorway, a chair should be near that doorway; SM testified that no furniture was moved. The hearing officer could also question claimant's testimony that he was on his stomach while on the floor, when CT said claimant was getting up with his back to the floor.

The evidence was sufficient to support the decision of the hearing officer that claimant did not show that he was injured in the course and scope of employment. Unless the evidence is against the great weight and preponderance of the evidence in a decision based on factual findings, the Appeals Panel will not reverse that decision. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In this case the great weight and preponderance of the evidence is not against the decision and order and they are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge