APPEAL NO. 94283

A contested case hearing was held in (city), Texas, on February 3, 1994, (hearing officer) presiding, to receive the parties' evidence and arguments on the two disputed issues, namely, whether the appellant (claimant) was injured in the course and scope of her employment on (date of injury), and whether on that date she had disability as a result of a compensable injury pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011(16) (1989 Act). The hearing officer made a number of factual findings and resolved both issues adversely to the claimant who here challenges the sufficiency of the evidence to support certain adverse factual findings and seeks reversal. The response filed by the respondent (carrier) urges the sufficiency of the evidence to support the challenged findings and requests our affirmance.

DECISION

Affirmed.

Claimant testified that on (date of injury), she was working as a grader of onions, selecting out the bad ones, when her supervisor, (Mr. V), moved her to a position putting empty onion bags on a "ruleta" (rotating table) from which the onions fell into bags which male employees then tied and placed on pallets. According to the claimant, as a female employee, she was prohibited from picking up sacks of onions which weighed 50 pounds; but when a particular bag on the rotating table "got away," Mr. V, who was standing about five feet away, told her to pick it up and she did so and injured her back. Claimant said she heard her back "pop," told Mr. V about it, and about an hour later went home because of the pain. Claimant further testified that she told coworkers (Ms. H), (Ms. C), and J (Mr. R) about the incident and that Mr. R witnessed it. In his affidavit, Mr. R stated that on (date of injury), after unloading a truck, he was sent into employer's packing shed to tie sacks on a rotating machine, that the machine was moving too fast and a sack got left on the machine, that he heard Mr. V tell claimant to go get the sack off the machine, that he saw claimant attempt to do so and she dropped the sack. He also stated that she then informed him she heard her back "pop" and felt pain in her lower back. In another statement, Mr. R stated that claimant was his godmother.

According to the claimant, she was aware of employer's requirement that she complete an accident report but said she did not do so because she went home. She did state that she called in for several days thereafter and spoke to "M." A transcription of claimant's telephone conversation with an adjuster on April 26, 1993, shows that claimant called the employer seeking authorization to see a doctor for her back pain and claimant said she saw her family doctor, (Dr. C). However, no records of Dr. C were in evidence. A February 1, 1994, report of an independent medical examination by (Dr. K) diagnosed lumbar sprain, "purely muscular with no neurological elements at all. . . ." Claimant also said she has not since looked for work because she has small children at home and is expecting another. Dr. K's report said that claimant should be able to perform light duty during her current pregnancy and should be able to return to work thereafter.

Mr. V testified that he was the supervisor of the onion packing line, that on (date of injury) he moved claimant from sorting small onions to sorting jumbo onions because of her poor performance, that he sensed she was angry about that action, that he did not direct claimant to pick up a sack of onions, that women are prohibited from picking them up, that claimant's location on the onion packing line was not near the rotating table, that he did not see her hurt her back, that she did not report such an injury to him on (date of injury), and that she left at dinner time and never returned. Furthermore, testified Mr. V, no one named "M" worked in the office, any calls from claimant would have been directed to him as the supervisor, and claimant never called in to him. He said that if employees fail to come to work for three days, they are terminated, that that is what happened to the claimant, that she was terminated on April 19th, and that her employment records indicated she called in to report her injury on April 20th. Mr. V also testified that neither Ms. H, Ms. C nor Mr. R reported to him that claimant had sustained a back injury.

Ms. C testified that female employees are not supposed to pick up bags of onions and that claimant never told her she had hurt her back. According to an unsigned, undated transcript of a telephone conversation between an adjuster and Mrs. H, the latter recalled working with claimant but stated that claimant never told her she had hurt herself, showed no pain, and just said she was going home.

The hearing officer found, among other things, that on (date of injury), claimant did not work at the bagging carousel but worked as a grader in a location where she would not have had an occasion to lift a bag of onions; that she did not injure her back while lifting a bag of onions on that date; that she did not report the alleged injury to anyone at work until April 20th after she had been terminated for abandoning her job; and that she was not unable to obtain or retain employment at her pre-injury wages as the result of a compensable injury of that date.

We are satisfied the evidence sufficiently supports the hearing officer's findings and conclusions. Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses and the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact,

even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied.) Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660, 661 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge