APPEAL NO. 94306

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on February 16, 1994, (hearing officer) presiding as hearing officer. He determined that the respondent (claimant) was injured in the course and scope of her employment on (date of injury), and that she had disability from that date through the date of the hearing. The appellant (carrier) appeals urging that several of the hearing officer's findings of fact are supported by no evidence and that others are against the great weight and preponderance of the evidence and that the hearing officer created reversible error in "instructing [witness] on the content of her testimony." The claimant responds that the evidence supports the hearing officer and asks that the decision be affirmed.

DECISION

Determining that the findings and conclusions based thereon are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, that there is sufficient probative evidence to support the determinations of the hearing officer, and no reversible error, we affirm.

Clearly, there was conflict in the evidence and inconsistency in the testimony of the witnesses at the contested case hearing. While we cannot say that reasonable inference different from those drawn and deemed most reasonable by the hearing officer could not be drawn from the evidence at the hearing, the mere circumstance that a reviewing body might have reached different findings and conclusions does not authorize such reviewing body to substitute its judgment for that of the fact finding hearing officer. *See* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Our review of the record leads us to conclude that there is not only some evidence to support the complained of findings and conclusions of the hearing officer, but that his findings and conclusions are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Employers Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). We find no basis to substitute our judgment for that of the hearing officer under the circumstances. *See* Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994; Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993.

The claimant testified that she sustained a back injury on (date of injury), when a forklift hit a heavy cart of cloth, causing it to "mash" her against a table. This was toward the end of the working day, and she reported the matter to a supervisor as she knew she needed a report to seek medical treatment. Later that evening, she was taken to the emergency room of a hospital in a nearby city. Medical records show that she was seen in the emergency room complaining of pain to her back as a result of the incident, was taken

off work, was subsequently referred to another doctor who diagnosed acute lumbar strain with a question of radiculopathy, had x-rays taken which were normal, and was instructed to undergo physical therapy. She remained off work and was returned to restricted work status effective December 12, 1993. She states that she is still unable to return to full duty status and that to her knowledge the employer did not have a light duty job for her, although she did not ask or advise them she had a restricted return to work. Her job at the time of injury did not fit with the restrictions placed on her by the doctor. She assumed she was terminated after her injury because of the time she was off work. There was no evidence that the employer tendered an offer of light duty. The claimant testified that she obtained part-time employment of 20 hours a week starting in January 1994.

The family friend who took the claimant to the hospital (and who the hearing officer states he found to be credible) stated that she saw the claimant's back in the examination room and that it was red, swollen and bruised, and that she saw a big, red welt. She also stated she took the claimant to the emergency room because the claimant could not drive because of her back. The hearing officer interjected that he did not think bruising in general occurred immediately but only after the passage of time. (The claimant had also indicated bruising in her testimony but referred to it as being red and swollen and later turning blue). There was no objection made to the hearing officer's comment and no objection to the testimony of the family friend. The carrier did mention in closing argument that it did not agree with the observation that a bruise necessarily only shows up at some later time. The hearing officer stated that he would consider all the medical evidence.

The carrier called three coworker witnesses who gave a strikingly different version of the (date of injury) incident and indicated that the claimant was not hit in the back by the cart of cloth but was hit in the ankle area and that she was not pinned against the table. They indicated that the claimant did not say she was injured and that, in their opinion, the blow was not serious enough to cause injury. They also indicated that the claimant had complained previously about back pain resulting from her race car which she had to get into through the window. The claimant testified that she never had any back injury before and the earlier back pain referred to was from a kidney infection which cleared up. She also testified that the witnesses were behind the forklift and not in front to see how the incident occurred.

With the evidence in this state, the hearing officer found an injury in the course and scope of employment and found disability. (He noted in his conclusions that the carrier was entitled to appropriate adjustments in the amount of temporary income benefits (TIBS) in accordance with her post-injury employment). He is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence. Section 410.165(a). He obviously accepted and gave weight to the testimony of the claimant, the medical records introduced by the claimant and the testimony of the family friend who drove her to the emergency room. We do not find a sound basis to declare his determinations to be so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Hutchinson, *supra*. Without objection at the hearing to the comment of the hearing officer concerning bruising (Texas Workers' Compensation Commission Appeal No. 92164, decided June 5, 1992), and the issue first being raised on

appeal, we find no sound basis to declare reversible error. *See* Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92144, decided May 28, 1992; Texas Workers Compensation Commission Appeal No. 91021, decided September 25, 1991.

The decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge