APPEAL NO. 980104

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 17, 1997. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that she had disability as a result of her compensable injury from _____, through the date of the hearing. In its appeal, the appellant (carrier) argues that those determinations are against the great weight and preponderance of the evidence and requests that we enter a new decision in its favor. In her response, the claimant urges affirmance.

DECISION

Affirmed.

The hearing officer's decision and order contains a detailed factual summary which will not be repeated herein. Briefly, the claimant testified that on _____, she was lifting jugs of cleaning solution when she felt a sharp pain in her low back. She paged her supervisor, (Ms. B), who answered the page and took the claimant to the emergency room. The claimant acknowledged that on September 30, 1997, she had a conversation with Ms. B and (Mr. A). Mr. A was responding to a complaint by the client company for whom the employer provided cleaning services that the floors in the area where the claimant cleaned were not being stripped and waxed. At that meeting, it was determined that the claimant, who did not know how to operate the machine used for stripping and waxing, would attend training. The claimant testified that on October 1, 1997, she had a conversation with Ms. B where Ms. B requested that the claimant obtain a release from her doctor to perform the stripping and waxing because of the claimant's prior back injury. The claimant stated that she contacted her doctor and was told that it would cost $40 for the appointment where the doctor would examine her for the release. She stated that on the morning of _____, she called Mr. A and left a message on his voice mail that she needed to reschedule the stripping and waxing training for personal reasons and to tell him that it was going to cost $40 for her to go to the doctor for a release and she thought the employer should pay for the appointment. She further testified that later in the afternoon on _____ she hurt her back lifting the jugs. She stated that she has not worked since her date of injury because of pain and that her treating doctor has not released her to return to work. In a letter dated October 10, 1997, the employer advised the claimant that her employment would be terminated as of October 14, 1997, if she did not return to work with a full-duty release.

Mr. A testified that he was not aware that the claimant had had a prior back injury in 1988. He stated that at the September 30th meeting with Ms. B and the claimant, he told Ms. B that the claimant should be stripping and waxing the floors and Ms. B told him that the claimant did not know how to do it. He stated that he told Ms. B to schedule training for the claimant. He stated that the claimant agreed that she would go to the training and that she would do the stripping and waxing thereafter but he testified that based upon her body language and the way she was responding to his questions, he could tell that she did not

want to take on those duties. He stated that no one contacted him on October 1st to tell him that the claimant was going to seek a doctor's release and that he did not request that she obtain a release, noting that he did not know whether Ms. B had requested a release. Finally, he stated that he did not believe that the claimant had sustained an injury; rather, he believed that she did not want to do the stripping and waxing and this was her way of getting out of it.

In her recorded statement, Ms. B stated that the claimant spoke to her after the meeting where the claimant learned that she was going to have to start stripping and waxing the floors and indicated that she would like to get her doctor's approval before doing that type of work. Ms. B stated that she told the claimant to go ahead and do so because she did not want the claimant to injure her back. In addition, Ms. B stated that she took the claimant to the emergency room after the lifting incident of _____ and that it looked to her like the claimant was in pain. Finally, Ms. B also stated that the claimant was a good worker and that she believed that the claimant's claim was legitimate and not a spite claim. In response to questioning from the hearing officer, Mr. A stated that Ms. B is still employed by the employer and that no adverse action was taken against her as a result of the claimant's alleged injury.

Under the 1989 Act, the claimant has the burden of proving that she sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Whether claimant suffered a compensable injury is generally a fact question to be resolved by the hearing officer. The hearing officer is the sole judge of the weight, credibility, relevance and materiality of the evidence. Section 410.165(a). As the fact finder, the hearing officer is charged with the responsibility for resolving the conflicts in the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness and could properly decide what weight she would assign to the other evidence before her. *Id*. We will not substitute our judgment for that of the hearing officer where her determinations are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this case, the hearing officer determined that claimant sustained a compensable injury on _____. In so doing, the hearing officer rejected the carrier's theory that the claimant was pursuing a spite claim because she did not want to perform the duties of stripping and waxing the floors. The hearing officer, who is the sole judge of the weight and credibility of the evidence under Section 410.165, resolved the conflicts and inconsistencies in the testimony and evidence in favor of the claimant. She was acting within her province as the fact finder in so doing. Campos, *supra*. Nothing in our review of the record indicates that the hearing officer's determination that claimant sustained a compensable injury is so contrary to the great weight and preponderance of the evidence

as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for disturbing it on appeal. Pool, *supra*; Cain, *supra*. The carrier asserts that "[c]learly passion, bias, and prejudice influenced the Hearing Officer to discount and disregard the testimony of [Mr. A] with regard to the evidence elicited that was uncontroverted by any other witness." After reviewing the record, we find no evidence to support the allegations of bias and prejudice on the part of the hearing officer; therefore, we reject this argument as wholly without merit.

With respect to disability, the carrier contends that "there was not the great weight of the medical evidence to indicate that the Claimant was unable to obtain and retain employment at wages equivalent to her pre-injury wage and thus she is not entitled to any disability benefits as a result of said injury." It is well settled that in most instances "issues of injury and disability may be established by testimony of the claimant alone and the trier of fact may accept or reject such testimony, in whole or in part, and may accept lay testimony over that of medical experts." Texas Workers' Compensation Commission Appeal No. 931002, decided December 13, 1993 (*citing* Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 495 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.)); *see also* Appeal No. 94248, *supra*. The hearing officer's disability determination is supported by the claimant's testimony and is not so against the great weight and preponderance of the evidence as to compel reversal on appeal. Pool, *supra*; Cain, *supra*.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Christopher L. Rhodes
Appeals Judge