

APPEAL NO. 990159

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 5, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____, or whether her current condition was a result of a (prior date of injury), compensable injury; whether the respondent (carrier) was relieved of liability because the claimant failed to give timely notice; whether the claimant had disability resulting from an injury sustained on _____; and whether the carrier waived the right to contest compensability of the claimed injury by not contesting compensability within 60 days of being notified of the injury. The hearing officer determined that the claimant did not sustain a compensable injury on _____; that her current condition is a continuation of her (prior date of injury), compensable injury; that the carrier was relieved of liability for the alleged _____, injury because of the claimant's failure to give timely notice of injury; and that the carrier did not contest the compensability of the claimed injury within 60 days of being notified of the injury; however, the carrier did not waive the right to contest compensability because claimant did not sustain an injury on _____. This latter determination by the hearing officer has not been appealed by either party and only those issues appealed are addressed (Section 410.204(a)). See Texas Workers' Compensation Commission Appeal No. 990155, decided March 10, 1999. The claimant appeals the first three issues, citing evidence that she argues establishes that she sustained a new aggravation injury on _____; that she did report the injury within minutes of its occurrence; that she did not file an injury report until August 1997 because she had been in contact with the Texas Workers' Compensation Commission (Commission) earlier; that she did not voluntarily resign from the employer in October 1996; and that she did look for employment from October 1996 to September 1997, but found it very painful to sit, stand, walk, concentrate, and drive. The carrier responds that there is sufficient evidence to support the findings and conclusion of the hearing officer and asks that the decision be affirmed.

DECISION

Affirmed.

The Decision and Order of the hearing officer sets forth fairly and adequately the evidence in this case and it will only be summarized here. The claimant asserts that she sustained a new injury to her neck, thoracic, and lower back on _____, when a coworker gave her a "bear hug" and that she screamed out and then told her supervisor, Ms. WJ immediately. She also stated that she did not work on September 11th or 12th, and that she went to her doctor, Dr. H, on September 13, 1996, and was returned to work. X-rays were compared to prior ones and no new findings were noted, mild scoliosis was noted, and the results were indicated as otherwise unremarkable. It was undisputed that the claimant had sustained a compensable injury to her neck and lower back on (prior date

of injury), had been off work until March 11, 1996, had reached maximum medical improvement and was assessed a three percent impairment rating (IR). There was also evidence that the claimant sustained a previous whiplash injury in 1994 in an automobile accident. Although the claimant testified that she was 100% over her (prior date of injury) injury and not under treatment, medical records show that she had two appointments in June 1996 with her then-treating doctor, Dr. H, with complaints of neck pain and stiffness radiating to her left arm and that Dr. H noted in his report "cervical strain-exacerbation-recurrence." She also had two other appointments that she did not keep.

The carrier called the supervisor, Ms. WJ, who testified that claimant never reported an injury to her concerning a _____, incident, that the first she was aware of a claimed new injury caused by a "bear hug" was August 1998, that the claimant worked during the last half of September 1996 and resigned in October after getting a bad performance evaluation. Ms. WJ testified, contrary to the claimant's testimony that she was forced to resign, that the claimant resigned on her own accord subsequent to the performance rating which was based on recurrent incidents of less than satisfactory performance. The claimant testified that she did not work after leaving the employer because of her injury and that she did not find a job until September 1997.

The employee who the claimant asserts gave her the "bear hug" resulting in the claimed _____, injury, AD, denied the incident of a "bear hug" or that the claimant screamed out, and stated that she is 5 feet 3 inches tall and weighs 105 pounds, has back problems and could not and would not lift the claimant off the ground by hugging her. She acknowledged she had hugged the claimant on occasion in the past. She stated that the claimant had complained several times before _____, that she was having back pain, apparently from the (prior date of injury).

According to the medical records, the claimant did not return to Dr. H until December 12, 1996, and that she was referred to a chiropractor, who, in a December 20, 1996, report, reflects that the claimant had continued to experience cervical symptoms since (prior date of injury). Claimant did not seek any medical treatment again for her back or neck until April 23, 1997, and she continued to treat with Dr. H until she requested a change in treating doctors on August 7, 1997, to another chiropractor, who she first saw in September 1997, and who subsequently rendered an IR of 30%. The hearing officer indicates that she did not find the report persuasive.

The carrier's adjuster testified that she received written notice of a possible injury of _____, on April 24, 1998, and called the Commission for confirmation, but did not receive a return call. The file was apparently set aside and, in August 1998, when the carrier received a letter of representation from claimant's attorney, filed a dispute of any _____, injury. The adjuster also stated that the carrier had received a request for change of treating doctors on September 2, 1997, which indicated a date of injury of September 11, 1996.

As indicated, the hearing officer found no injury on _____, that the claimant's condition was a continuation of the (prior date of injury), that the claimant did not give timely notice of an injury of _____, and that the claimant did not have disability. She also found that the carrier did not contest the compensability until after 60 days from the change of treating doctors request which indicated a date of injury of September 11, 1996, but that it did not waive the right to contest compensability because the claimant did not sustain any injury on _____. The claimant's appeal generally reargues the evidence before the hearing officer, claims that the carrier's witnesses did not tell the truth, explains that some missed appointments were because of fears of work ramifications, points out that she was forced to resign, that she did not obtain other employment because of her new injury on _____, and that the delay in filing an injury report with the Commission was because she had talked to someone earlier regarding a claim number. From our review of the evidence, and the reasonable inference that can be drawn therefrom, there is sufficient evidence to support the findings and conclusions of the hearing officer. We cannot conclude that her findings are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). It was for the hearing officer to resolve any conflict in the evidence and testimony before her. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In weighing the testimony, the hearing officer does not have to accept the testimony of a claimant at face value and can believe all, part, or none of the testimony of any witness. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.); Section 410.165(a). Here there was evidence, both medical and testimonial, to support a continuing back condition

emanating from the compensable injury of (prior date of injury), testimony that the incident claimed by the claimant did not occur and that an injury was not reported, and that the claimant continued to work until her resignation in October 1996. The hearing officer could reasonably conclude from the evidence that the claimant did not sustain an injury on _____, that she did not give timely notice, and that she did not have disability. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge