APPEAL NO. 990197

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 12, 1999, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer determined that respondent (claimant) sustained a compensable shoulder and back injury on _____ (all dates are 1998), and that claimant had disability from August 23rd through September 16th.

Appellant (carrier) appeals, contending that claimant's testimony was not credible, that claimant had failed to go to the medical facility that the employer wanted him to go to, but went to "a claimant-oriented clinic," and that claimant had filed "a claim in retaliation" for being suspended and ultimately terminated. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

Claimant was employed as a home delivery driver for a large retailer. Claimant testified that on _____ he and a coworker were delivering a large, 30 cubic foot side-by-side refrigerator and, as they were taking the refrigerator up some steps, he lost his footing and felt pain in his shoulder and low back. (Claimant demonstrated to the hearing officer how the injury occurred.) Claimant testified that he and the coworker finished the delivery and, on the way back to the employer's premises, he complained of the injury to the coworker. (Neither party submitted evidence from the coworker.) Claimant testified that when he returned to the place of employment, he reported the injury to DC, the dispatcher. A handwritten statement dated August 28th by DC stated: "[t]here was no conversation about an injury of any kind . . . ." (Some representations were made at the CCH that DC, at the benefit review conference, had said that claimant could have told him about the injury but that he, DC, "did not hear it over the roar of the diesel truck engine.") Claimant testified that upon returning to the yard he was questioned by employer's security guard about some thefts that had taken place. Claimant denied any knowledge or involvement in the thefts and was never questioned by the police department, who, apparently, arrested three other individuals for the thefts. In a letter dated August 27th, AH, the employer's location manager, confirmed that claimant had been suspended without pay on _____ pending the outcome of the theft investigation. It is undisputed that claimant called AH on August 25th to ask about the status of his suspension, and reported his injury to AH. AH, in a written statement, said that claimant came in on August 27th, an injury report was filled out and arrangements were made for claimant to be seen at "our [_____] Clinic," but that he "never arrived there; he went instead to a clinic of his own called [Clinic]."

Claimant was seen at the Clinic on August 25th, where he was diagnosed with having sprains to the neck, lumbar and thoracic regions. The narrative gave a history of

pushing/pulling a refrigerator, a resolved 1997 low back injury and a treatment plan of therapy and medication. Claimant was taken off work that day. X-ray studies were essentially normal. Claimant said that he was released to return to work on September 16th. (A Specific and Subsequent Medical Report (TWCC-64), dated December 2nd, from the Clinic releases claimant to full duty on "11/3/98.") Claimant has not returned to work as of the date of the CCH (there is some testimony from claimant that he was terminated when he spoke with AH on August 25th).

The hearing officer stated that she found claimant "a credible witness" and accepted his version of the events. Carrier's appeal contends that claimant did not report his injury until after he was suspended on _____, that claimant's testimony "was inconsistent in reporting how the injury happened" and that claimant had failed to go to the employer's clinic for treatment. Although there is some conflict in the testimony when claimant reported his injury, before or after his suspension, that determination and the credibility of claimant's testimony lies solely with the hearing officer. We have frequently noted that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer believed claimant's testimony and those determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. *See* Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Carrier also contends that the Clinic is "a claimant-oriented clinic which not only provides medical treatment, but legal assistance as well to Workers' Compensation claimants." First, we will note this allegation was not raised at the CCH and is not part of the record and, therefore, we decline to consider it. We do note that the hearing officer's decision shows that claimant is "assisted by [Ms. R] of [Clinic]." The transcript of the proceedings shows Ms. R as claimant's representative. There was no discussion, much less evidence, of whether or not Ms. R is an attorney and in what capacity she was assisting the claimant. In any event, this allegation was not raised below and we decline to assign any error based on carrier's unsupported allegation.

Accordingly, the hearing officer's decision and order are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Judy L. Stephens
Appeals Judge