APPEAL NO. 990322

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 27, 1999. The issues at the CCH were whether the respondent, who is the claimant, sustained a compensable injury on _____, and whether she had disability from her injury.

The hearing officer found that claimant was injured and had disability from January 20 through May 26, 1998.

The appellant (carrier) has appealed, arguing that the credible evidence refutes the findings of the hearing officer. The carrier points out that there is medical evidence which cannot confirm an objective injury. The carrier asserts that the only witness was a friend of claimant's, who also happened to take pictures at the time.

DECISION

Affirmed.

The decision does not fully set out the facts and we will re-summarize them here. Claimant stated that as she and her assistant manager, Ms. B, were sitting down to lunch on _____, the rolling stool/chair slipped out from under her and she fell backwards on the floor, hitting her head and body. Claimant said that Ms. B came up to her, laughing, but when Ms. B saw that claimant could not get up and was hurt, she first tried to call the supervisor, Ms. BL, but when the call was not returned, Ms. B called "911." An ambulance came and took claimant to the hospital.

Claimant agreed that she was reprimanded that morning, but minimized this; she said she had been reprimanded several times in 19 years of apartment management, and in any case, three reprimands over the course of employment would be required by employer before she could be terminated. Claimant had rented an apartment to her daughter, and said she was unaware that she violated company policy. On cross-examination, claimant clarified her testimony in two respects: she said that she and Ms. B were not actually sitting down to eat lunch, that they were sitting down to talk during their lunch hour and there was no food in the office at that time; she also said she was aware that one was not supposed to rent to relatives.

It turned out that while claimant was lying on the floor, after the ambulance came, Ms. B took pictures. Claimant said that taking pictures of occurrences was Ms. B's job, according to "HUD" policy, and this is why Ms. B had a camera and took her picture.

Ms. BL was not listed in the decision as a witness, but she testified at the CCH. Ms. BL said that the apartments in question were to be rented out according to a waiting list, which could not, according to HUD regulations, be manipulated. She said that when she

was reviewing a list of new tenants, she saw a tenant listed who had claimant's last name and faxed an inquiry to her, asking whether this woman was a relative. No response was received. Ms. BL said she further investigated and found that the tenant was related and was an unsuitable tenant according to other regulations. Ms. BL said her investigation also revealed that some tenants who moved in had also paid money to claimant, another policy violation. On _____, at about 9:00 a.m., Ms. BL delivered a written remand to claimant and she signed it without comment. The written notice informed claimant that a further management review would be conducted and that termination could result if further violations were found. Ms. BL confirmed that later that day she received a page on her pager from this apartment complex, but could not return the call because she was not around a functional telephone. Ms. B said that claimant was terminated on February 7, 1998, and the termination notice indicated that the cause was due to the additional management review.

A transcribed statement from Ms. B stated that the couch on which she (Ms. B) sat was in front of the desk. She did not actually see the fall happen, because her view was blocked by the desk, but suddenly saw claimant's feet in the air. Ms. B went around the desk, laughing, but when she realized claimant was hurt, she summoned help.

The hospital emergency room discharge sheet contains information regarding a closed head injury and back strain. She was treated and released. On January 27, 1998, a report from Dr. K, found muscle spasms, decreased range of motion, and tenderness in the cervical, thoracic, and lumbar spine. Claimant was taken off work for several periods of time by Dr. K's clinic.

A doctor who examined claimant for the carrier, Dr. B, certified that claimant reached maximum medical improvement on May 27, 1998, the date of his examination, with a zero percent impairment rating. Claimant had full range of motion and no pain in the cervical area. He found exaggerated symptomology in the lumbar area on percussion but essentially none on movement, which was normal laterally. Dr. B characterized his examination as completely normal. He stated that during this examination, claimant had no objective findings and exhibited secondary gain behavior. Dr. B said she could return to work without restrictions.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Clearly, different inferences could have been drawn. However, the carrier's argument that there was no objective evidence of injury is with reference to Dr. B's examination four months after the injury. The trier of fact did not have to take this report and assume that it would accurately describe claimant's situation on _____. The decision of the hearing officer will be set aside only if the

evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We do not agree that this was the case here, and affirm the decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge