APPEAL NO. 990359

On January 27, 1999, a contested case hearing (CCH) was held. The CCH was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq* (1989 Act). The issues at the CCH were: (1) whether appellant (claimant) sustained an injury in the course and scope of her employment; and (2) whether claimant has had disability. Claimant requests reversal of the hearing officer's decision that: (1) claimant did not sustain an injury in the course and scope of her employment on _____; and (2) claimant does not have disability. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

Claimant testified that on _____, she had worked for the employer as a meat packer for about three and one-half years. She said that she worked eight to 10 hours a day. She said that the luncheon meat would come to her in packages on a conveyor line; that she would reach overhead and get an empty box; that she would reach with both hands to get the packages off the conveyor line; that she would put 24 packages in a box; that a box of packages weighs from 10 to 15 pounds; that she would tape the box shut when full; that she would lift the box up; that she would turn, twist, and bend with the box and put it on a pallet; and that she did that work throughout every day she worked for the employer. She said that she had to work very fast to keep the packages from piling up on the line. Claimant said that after working for about four hours on _____, on one particular turn she made she started hurting real bad and mentioned her neck and shoulders, that she kept working until the pain became unbearable, that her back was hurting, that she asked for her supervisor, that she was unable to continue working, and that she went to a hospital emergency room (ER). Claimant said that the hospital referred her to Dr. G, a "company doctor"; that Dr. G told her she had arthritis, referred her to an arthritis specialist, and put her on light duty; that the light duty the employer offered her was not really light duty and she was unable to perform the work because of her pain; that she then treated with Dr. K; that she was then treated by Dr. KE; and that Dr. KE referred her to Dr. R, an orthopedic specialist. Claimant claimed at the CCH that she sustained a work-related injury to her cervical, thoracic, and lumbar spine on _____, as a result of lifting and twisting while carrying boxes.

Claimant further testified that she had a prior work-related back injury while working for a restaurant in 1991, that that injury was a back strain, that she was off work for less than one month due to that injury, and that she recovered from that injury and returned to work. A medical report states that the date of that injury was (prior date of injury), and that Dr. RE certified that claimant reached maximum medical improvement on October 21, 1991, with a zero percent impairment rating for that injury. Claimant testified that about two

months prior to her claimed injury of _____, she went to the hospital ER for back pain; that she had that pain after working overtime for the employer; that she had had back and neck pain for two months prior to her injury of _____; that her pain prior to _____, was off and on pain that usually occurred after working and was not continuous pain; that that pain would go away overnight; that she did not miss work due to pain prior to _____; and that the pain she had on _____, at work has not gone away.

The hospital ER report of June 30, 1998, states that claimant's chief complaint was back pain that she had had for two months, that her injury occurred at work while packing meat, that the diagnosis on June 30th was a lumbar strain, that claimant should return to work doing sedentary work, and that claimant was referred to Dr. G. On July 2, 1998, Dr. G gave a diagnosis of myofascial pain syndrome and noted that claimant could return to work with limitations of no repetitive reaching or pulling forward. On July 20, 1998, Dr. G wrote that he believed that claimant's problems are related to fibromyalgia or a rheumatologic condition, that she is intolerant of any repetitive motion work, that he recommended that claimant stay off work, and that he referred her to Dr. GA, a rheumatologic specialist. Dr. G noted that claimant's condition is probably not work related.

Claimant began treating with Dr. K on July 30, 1998, and Dr. K diagnosed her as having cervical, thoracic, and lumbosacral sprains/strains. Dr. K noted a date of injury of _____, and wrote in the history section of his initial report that claimant was lifting and twisting with boxes and felt pain in her neck and back. Dr. K recommended x-rays and an MRI to rule out herniated discs. Dr. L, reported that x-rays done on July 30, 1998, showed spondylolisthesis of the thoracic and lumbar spine.

Claimant began treating with Dr. KE in September 1998 and in a report dated September 2, 1998, for a date of visit of September 2, 1998, he diagnosed claimant as having cervical, thoracic, and lumbosacral sprains/strains and referred claimant to Dr. R. In the September 2, 1998, report, Dr. KE wrote that a cervical MRI showed a herniation at C6-7 and that a lumbar MRI showed a herniation at L5-S1 with disc desiccation at that level and spondylolisthesis at L4-5. Dr. KE did not give the dates the MRIs were done. Dr. KO reported that nerve conduction studies done on September 2, 1998, showed right L5 radiculopathy.

In reports dated September 10, 1998, Dr. M wrote that Dr. K had referred claimant to him for cervical and lumbar MRIs, that the cervical MRI showed a disc herniation at C6-7 and disc protrusions at C3-4 and C4-5, and that the lumbar MRI showed a disc herniation at L5-S1 and disc desiccation at that level.

On September 17, 1998, Dr. R, an orthopedic surgeon, reported that claimant told him that on _____, she experienced pain in her cervical and lumbar spine when she was turning, lifting, and twisting while working as a meat packer. Dr. R noted that claimant denied any prior injury to her cervical or lumbar spine; that MRIs of the cervical

and lumbar spines were "obtained" on September 10, 1998; that he reviewed the MRI films "dated September 10, 1998"; that the lumbar MRI showed a disc herniation at L5-S1 with mild dehydration; and that the cervical MRI showed disc herniations at C3-4, C4-5, and C6-7. Dr. R diagnosed claimant as having herniations at the disc levels shown on the MRI films dated September 10, 1998, and diagnosed claimant as having post-traumatic instability of the cervical and lumbar spinal joints.

Since Dr. KE had referenced cervical and lumbar MRIs in his report of September 2, 1998, which he indicated showed herniations at C6-7 and L5-S1, and since Dr. M's cervical and lumbar MRI reports are dated September 10, 1998, and Dr. R referenced cervical and lumbar MRI films dated September 10, 1998, a question arose as to whether Dr. KE was referring to MRIs done before September 10, 1998, in his report of September 2, 1998. When claimant was asked if prior to September 1998 she had had an MRI of her neck or low back done, she said that she did not remember, and when she was asked if prior to September 1998 she had been diagnosed with herniated discs in her neck or low back, she said that could have been done when she went to the ER and was x-rayed, but when asked when she was x-rayed in an ER for neck or low back problems prior to September 1998 she said that she did not know.

On August 12, 1998, Dr. GA reported that claimant has polyarthralgia, that she had a positive rheumatoid factor, but that clinically there was no evidence of rheumatoid arthritis. Dr. GA did further testing and reported on August 17, 1998, that claimant has polyarthraigia with no active synovitis, a low positive rheumatoid factor, and that suspicion for rheumatoid arthritis was not very high as there was no clinical evidence of rheumatoid arthritis.

The carrier requested the Texas Workers' Compensation Commission (Commission) to order claimant to be examined by Dr. J, the Commission issued an order approving that request on September 16, 1998, and claimant was examined by Dr. J on October 12, 1998. In his report of October 12, 1998, Dr. J noted that he examined claimant, reviewed the MRI reports of September 10, 1998, and reviewed other medical reports. Dr. J diagnosed claimant as having degenerative disc disease of the cervical, dorsal, and lumbar spine and wrote that he doubted that claimant's condition is work related.

On January 12, 1999, Dr. R wrote that claimant sustained an injury on _____, as a result of her employment, that that injury resulted in disc herniations in her cervical and lumbar spine, that imaging studies did not reveal the presence of a disease process but showed the results of a traumatic injury, that claimant presented no history of any spinal disease or prior trauma to the spine requiring medical care, and that her present condition is the direct result of her work-related injury.

On January 25, 1999, Dr. J wrote that he had reviewed a record dated September 17, 1998, and that he finds it unlikely that claimant had disc herniations in her cervical and lumbar spine occurring on the same day from what he described as minor trauma and that he thinks it is more likely that her condition is degenerative in nature.

The hearing officer found that claimant did not sustain an injury traceable to a date, time, and place certain while at work for the employer; that claimant did not sustain a repetitive trauma injury while working for the employer; and that claimant had preexisting neck and back problems which were not aggravated by her employment with the employer. The hearing officer concluded that claimant did not sustain an injury in the course and scope of her employment on _____.

The claimant contends that the hearing officer's decision that she did not sustain an injury in the course and scope of her employment is contrary to the great weight and preponderance of the evidence. There is conflicting evidence regarding whether claimant sustained an injury in the course and scope of her employment. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. The hearing officer notes in his decision that he did not find all of claimant's testimony to be credible. It has been held that a fact finder is not bound by the testimony of a medical witness where the credibility of that testimony is manifestly dependent upon the credibility of the information imparted to him by the claimant. Rowland v. Standard Fire Ins. Co. 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. Appeal No. 950084. We conclude that the hearing officer's findings and decision on the issue of whether claimant sustained an injury in the course and scope of her employment are supported by sufficient evidence and are not contrary to the great weight and preponderance of the evidence. Without a compensable injury, claimant would not have disability as defined by Section 401.011(16), thus we find no error in the hearing officer's decision that claimant does not have disability.

Claimant contends that the hearing officer used a wrong legal standard in his determination on whether claimant sustained an injury in the course and scope of her employment, because at the CCH carrier "asserted a sole cause defense to compensability." At the CCH, the carrier argued that claimant had preexisting back and neck problems, that she did not sustain any physical injury to her body while working for the employer, and that any inability to work is solely due to preexisting problems. At the CCH, the hearing officer placed the burden on claimant to prove by a preponderance of the evidence that she sustained an injury in the course and scope of her employment and that she has had disability, which were the two disputed issues before the hearing officer. However, when the carrier replied in the affirmative to the hearing officer's question whether carrier believed that the sole cause of claimant's disability, if any, was a preexisting condition, the hearing officer placed the burden of proof on what he termed the sole cause issue on the carrier. In Texas Workers' Compensation Commission Appeal No. 971727, decided October 17, 1997, the Appeals Panel stated that once a claimant has made out a

prima facie case that the current condition is a result of the original compensable injury, the burden to prove that a preexisting condition or unrelated injury was the sole cause of the current condition or problem falls on the carrier.

Claimant contends that her evidence was sufficient to establish that a producing cause of her injury was the work injury on _____, and to shift the burden to carrier to prove that her condition was solely caused by a prior back problem and that carrier failed to prove sole cause. Claimant's contention assumes that she did sustain an injury at work on _____; however, whether she sustained an injury in the course and scope of her employment was the issue before the hearing officer. The claimant had the burden to prove that she was injured in the course and scope of her employment. Johnson v. Employers' Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In Martinez v. Travelers Insurance Company, 543 S.W.2d 911, (Tex. Civ. App.-Waco 1976, no writ), the court stated that in a workers' compensation case, as in any other case, plaintiff has the burden of proving elements of her asserted claim by a preponderance of the evidence. Whether claimant sustained an injury in the course and scope of her employment on _____, as claimed by claimant, was a fact issue to be determined by the hearing officer as the finder of fact. Before deciding the disability issue, it first had to be determined whether claimant sustained an injury in the course and scope of her employment. We do not find that the hearing officer used a wrong legal standard as contended by claimant.

Claimant asserts that the hearing officer abused his discretion in admitting into evidence Carrier's Exhibit No. 11 over her objection of untimely exchange. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) provides that no later than 15 days after the benefit review conference (BRC) parties shall exchange with one another, among other things, all medical reports; that thereafter parties shall exchange additional documentary evidence as it becomes available; and that parties shall bring all documentary evidence not previously exchanged to the hearing in sufficient copies for exchange and the hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing.

The BRC was held on September 22, 1998. The CCH was originally set for November 18, 1998, but since the claimant did not appear in time for that CCH, it was reset for January 27, 1999. The hearing officer found good cause for claimant's failure to appear at the November 18th CCH. The claimant's attorney gave an opening statement at the November 18th CCH but no evidence was presented at that CCH. All the evidence was presented at the January 27, 1999, CCH. Carrier's Exhibit No. 11 consists of two documents; the October 12, 1998, report of Dr. J and the January 25, 1999, report of Dr. J. Claimant's appeal addresses only the facts surrounding the admission of the October 12th report. The October 12, 1998, report of Dr. J was written more than 15 days after the date of the BRC and so could not have been exchanged within the 15-day period. Dr. J did not examine claimant until October 12th so his report of that examination could not have been

written prior to October 12th. According to a date stamp on the October 12th report, carrier received the report on October 27, 1998. It is undisputed that carrier exchanged the report with claimant on November 11, 1998. As noted, the CCH was reset to January 27, 1999, and it was at that setting that evidence was presented. We conclude that claimant has not shown that the hearing officer abused his discretion in admitting into evidence Dr. J's report of October 12, 1998. While claimant's appeal does not directly mention Dr. J's report of January 25, 1999, we note that there is evidence that that report was received by the carrier on January 26, 1999, and that it was sent by facsimile transmission to claimant's attorney on that day, although claimant's attorney said that she did not receive a copy of that report until the day of the CCH, January 27, 1999. We cannot conclude that claimant has shown that the hearing officer abused his discretion in admitting into evidence Dr. J's report of January 25, 1999. The claimant also states that carrier did not disclose Dr. J as a possible witness or as a person with relevant knowledge in its "initial exchange" of September 25, 1998; however, Dr. J had not examined claimant as of that date.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge