APPEAL NO.990593

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On February 11, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that respondent (claimant) sustained a compensable neck and right shoulder injury on Injury 4 (all dates are 1998), and that claimant had disability beginning on August 27th through the date of the CCH.

Appellant (carrier) appeals, contending that the documentary evidence and testimony of claimant's supervisor established that claimant was not at work on Injury 4 and that claimant had been treated for similar neck and shoulder problems in injury 1, injury 2 and injury 3. Carrier contends that the hearing officer's decision is supported by insufficient evidence and that the hearing officer failed to make any findings that claimant's alleged disability is related to the claimed injury. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds that carrier's appeal merely challenges the hearing officer's weighing of the evidence and urges affirmance.

DECISION

Affirmed.

Claimant was employed as a lab technician by (employer). On August 11th, about a week before claimant's claimed injury, claimant was given a performance review which indicated a below-average performance and there was some discussion regarding a voluntary transfer to another department, the "fleming" DQ department. It is undisputed that claimant told her supervisor, Ms. T, that she would think about it. Claimant subsequently turned down the offered fleming position. However, Ms. T testified that with claimant's indecision on the transfer, the schedule got "messed up" because Ms. T had started making "adjustments immediately." In evidence is employer's lab work schedule, which is a computer printout schedule with the notation that all schedule changes must be approved by Ms. T. That schedule shows claimant working on August 15th; the schedule for August 16th has marked-out and "whited-out" portions, as does the schedule for Injury 4, which has claimant's printed initials, a whited-out computer entry and a handwritten "off." Ms. T testified that those changes had been made by her assistant. A computer-generated timecard report indicates that claimant neither clocked in nor clocked out on Injury 4. Ms. T testified claimant was not at work on Injury 4.

Claimant testified that she did, indeed, work on Injury 4 and that she injured her neck and right shoulder at work pushing a cart loaded with cases of milk up an incline going through a double door. Claimant testified that she had felt a "pull" in her shoulder. Claimant testified that she had come to work on Injury 4 to help train Mr. A. Claimant's shift was approximately 1:00 p.m. to 9:30 p.m. The timecard report of Mr. A showed that he did not arrive at work until shortly after 10:00 p.m. on Injury 4 and claimant had left. However, Mr. C, a maintenance worker in another department, testified that he saw and talked with

claimant at work on Injury 4 and specifically remembers that day because he had been having problems with his car and claimant had asked him why he had come in early. Mr. C said he came in early to get his tools.

Claimant subsequently came to work on August 18th and was taken by Mr. W, the plant manager, to the human resources office and reassigned to a cleaning crew. Mr. W testified that the fleming job was not a demotion, but did involve going from a salaried position to an hourly pay position. Mr. W testified that the fleming job and clean up were "almost the same thing." Claimant was given a video to watch on August 18th and then performed clean-up duties. Claimant testified that her sister died on August 19th and the funeral was August 22nd.

Claimant testified that her shoulder became progressively worse and that she went to a hospital emergency room (ER) on August 24th. The ER record indicates complaints of pain in the "right neck" and right arm. X-rays were essentially normal. At claimant's request, claimant's daughter called the employer from the ER stating that claimant had neck and shoulder pain, but not relating that it was work related. (Notice is not an issue.) Claimant next went to her regular family doctor, Dr. S, on August 27th. In a chart note, Dr. S notes the ER visit, that claimant "works lifting cartons of milk" and diagnoses tendinitis of the right shoulder and hypertension. Dr. S took claimant off work on August 27th and prescribed therapy and medication. Claimant also saw Dr. S on August 28th and 31st and September 2nd. Claimant also went to a clinic where she saw Dr. I on September 2nd. Dr. I records a date of injury of August 24th, although claimant is adamant that she told Dr. I her injury was Injury 4. Claimant gave a history of neck and right shoulder pain "while performing heavy lifting associated with bending and twisting at her job site." Dr. I diagnosed claimant with "cervical strain, right shoulder sprain, right upper extremity neuropathy and posttraumatic cephalgia." (Several other places in clinic reports show August 24th as the date of injury.) Claimant was again taken off work by Dr. I. X-ray studies of September 15th show degenerative changes and a "straightening of the cervical spine, with loss of its normal lordotic curvature," which may be related to muscle spasms. A clinic report of September 23rd states that the reports "report a wrong DOI," which should be Injury 4. Claimant subsequently saw Dr. R, on referral from her attorney. Dr. R's evaluation is similar to that of Dr. I and Dr. R continues claimant off work.

The case mostly revolved around whether claimant was at work on Injury 4 and whether this is a spite claim, as alleged by carrier, for being demoted or transferred to a cleaning position. There was considerable testimony about the accuracy of the time reports, with Ms. T agreeing that sometimes an employee fails to clock in or out, but not both on the same day; that the time clock sends information to a computer but does not make an audible sound that the card has been inserted properly and no notation is made on the card. There was also testimony that claimant was at work on some days that the schedule showed she was not. In summary, the testimony and evidence are conflicting. The hearing officer questioned the claimant, Ms. T and Mr. W regarding those inconsistencies. In his Statement of the Evidence, the hearing officer commented:

Some factors that support Carrier's position are:

- the history of how the injury occurred and the date is incorrect in [Dr. I's] initial records.

- the only history noted by [Dr. S] is "works lifting cartons of milk."

- Claimant delayed reporting the injury to employer

- Claimant did not return to work after her job duties were changed

- Claimant did not like it that her job duties were changed

Factors that support Claimant are:

- She was credible regarding the injury causing incident.

- Her claim is supported by the diagnosed injuries.

The hearing officer made findings that claimant injured her neck and right shoulder in the course and scope of her employment on Injury 4, that claimant was taken off work by Dr. S, Dr. I and Dr. R "[d]ue to the claimed injuries," that none of the doctors have released claimant back to work and that claimant had disability beginning August 27th. Carrier appeals, emphasizing the documentary evidence which indicates that claimant was not at work on Injury 4 and Ms. T's testimony.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. 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). In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of

witnesses or substitute its own judgment for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Carrier also contends that the hearing officer "failed to make any findings that the Claimant's alleged disability was related to the claimed injury." We disagree. The hearing officer made findings of a compensable injury on Injury 4 and that Dr. S, Dr. I and Dr. R had all taken claimant off work and had not released her to return to work and concluded that claimant had disability (as defined in Section 401.011(16)) beginning August 27th. The hearing officer expressly finds in Finding of Fact No. 3 that claimant was taken off work "[d]ue to the claimed injuries."

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, *supra*. We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge