APPEAL NO. 990807

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 March 25, 1999. She (hearing officer) determined that the respondent (claimant) sustained a compensable injury on _____, and that she had disability from January 9, 1999, through the date of the CCH. The appellant (carrier) appeals these determinations, contending that they are against the great weight and preponderance of the evidence. The claimant replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The parties stipulated the claimant's average weekly wage (AWW).

DECISION

Affirmed.

The claimant worked the night shift as a waitress. She testified that on _____,[1] she was the only waitress on duty; that, as she was carrying a tray of food, she slipped on some water and twisted herself, but managed to grab onto the counter to keep from falling or spilling food. Shortly thereafter, she said, she began to experience pain in her back, which radiated into her hands and legs, and by quitting time she could hardly walk. She further testified that she reported the injury that night to Ms. M, the manager, and was told not to worry about it. The claimant had been suffering from a serious kidney infection and thought that this maybe was causing her pain. The next day, (the day after the date of injury), she went to Dr. J, but none of his treatment records, only his bills, were in evidence. He took the claimant off work for two to three weeks. The claimant said she gave her off-work slip that day to Ms. A, the day shift manager, who asked her to come to the general meeting of employees on October 11, 1998. The claimant said she went to that meeting and again reported her injury.

The claimant changed treating doctors to Dr. R, D.C., at the suggestion of her attorney. His diagnoses included cervical and lumbar subluxation, carpal tunnel syndrome, and thoracic sprain/strain.[2] Dr. R placed the claimant in an off-work status on January 9, 1999, "due to severe lumbar pain & discomfort." She agreed that by February 5, 1999, her lumbar strain had resolved.

Ms. S, a former manager, testified that she first learned of the claimant's injury on October 9, 1998, at a managers' meeting, and that she had discussed the incident with the

[1]The issue was framed in terms of whether the claimant sustained an injury on _____. Her work hours were from 10:00 p.m. to 6:00 a.m. Although the hearing officer found the injury occurred on _____, it more likely occurred after midnight, that is, on (the day after the date of injury). The carrier has proceeded under this premise in its appeal. No point of error is specifically assigned to the determination of the date of injury.

[2]Extent of injury was not an issue at the CCH. The hearing officer made a finding of a "compensable injury" without further specification, but did comment in her discussion of the evidence that the claimant "injured her mid to low back while lifting a tray of food on _____."

cook who said, according to Ms. S, that he saw the claimant actually fall. Ms. M testified that there was no managers' meeting on (the day after the date of injury), because there were never such meetings on Fridays, and this was her day off. She said she first learned of the claimed injury on October 11, 1998, when she overheard the claimant talking about it. Ms. A also testified that there was no managers' meeting on (the day after the date of injury). She further testified that when the claimant brought her the duty excuse from Dr. J on (the day after the date of injury), the claimant said she did not know what was wrong with her and did not mention an incident at work at this time. According to Ms. A, she too overheard the claimant talking about a workers' compensation injury at the meeting on October 11, 1998.

The claimant had the burden of proving she sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact which could be proved in this case by her testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer commented about the "many inconsistencies" in the testimony and evidence about how the injury occurred, but nonetheless found the claimant credible in her assertion that an injury did occur while lifting the tray of food. In its appeal of this determination, the carrier points out the inconsistencies in the evidence, stressing the claimant's other medical problems, Ms. S's reliance on the report of a cook who, she said, saw the claimant actually fall when the claimant herself denied that she fell, and the two managers' testimony that there was no meeting on Friday, (the day after the date of injury), at which the claimed injury was discussed. The hearing officer, as fact finder, was the sole judge of the weight and credibility of the evidence. Section 410.165(a). We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The claimant's testimony, deemed credible by the hearing officer was sufficient to support her findings of a compensable injury.

The hearing officer found disability from January 9, 1999, through the date of the CCH. In her response to the carrier's appeal of the disability finding, the claimant speaks in terms of a finding of disability from October 10, 1999, and requests affirmance of such a finding. Even were we to construe this to be an appeal of the finding of when disability began, it would be untimely. The carrier appeals the actual finding of disability, calling it "highly questionable in light of the claimant's testimony that her lumbar injury has 'resolved' together with the evidence concerning the claimant's non-work related health problems that apparently remain undiagnosed at this time."

The claimant had the burden of proving disability. This, too, presented a question of fact which could be proved by her testimony alone if found credible. Appeal No. 93560, *supra*. While the claimant did testify that her lumbar strain had resolved as of February 5, 1999, it was by no means clear that this was her only compensable injury. In addition, while the claimant had other health problems, the carrier did not raise a sole cause defense

to disability based on these other problems. We have held that the compensable injury need only be a cause, not the only cause, of the claimant's inability to earn the preinjury AWW. Texas Workers' Compensation Commission Appeal No. 931117, decided January 21, 1994. The claimant's testimony and Dr. R's duty excuse, considered credible by the hearing officer, was sufficient to support the determination of disability.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge