APPEAL NO. 990865

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 25, 1999. With respect to the issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on or about (alleged date of injury), and that she did not have disability. In her appeal, the claimant argues that those determinations are against the great weight of the evidence. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that on (a day before alleged date of injury), she was working as a clerk in a convenience store and that she was injured when she lifted a case of beer to put it in the cooler. She stated that as she lifted the case, she felt a pop in her left hip. She stated that she was working with Ms. R that evening and that she told Ms. R about her injury. The claimant acknowledged that initially she contended that she had been injured on (alleged date of injury), and that she did not realize that she had actually been injured on (a day before alleged date of injury) until she had a conversation with her husband after the benefit review conference, which refreshed her recollection about the date of injury. The claimant testified that she saw Dr. F on September 5, 1998, that he told her that she had a pulled muscle in her left hip and a low back strain, and that he treated her with pain medication and two months of physical therapy. On cross-examination, the claimant acknowledged that the employer's payroll records reflect that Ms. R did not work on (a day before alleged date of injury), and that the claimant did not work on (two days before alleged date of injury) or (alleged date of injury). Nonetheless, the claimant insisted that she was injured on (a day before alleged date of injury) and that Ms. R was working with her.

Ms. RA, testified that she is the district manager for the employer. She stated that she first learned that the claimant was alleging that she had injured her back on _____, when the claimant brought in a light-duty slip. Ms. RA testified that she asked the claimant how she had injured her back and the claimant responded that she was not sure but she thought she must have done something to it at home. The claimant denied ever telling Ms. RA that she had been injured at home, insisting that she had consistently reported that she injured herself lifting the beer at work. The carrier introduced a recorded statement of Ms. R in which she denies that the claimant told her that she had been injured lifting a case of beer while they were working together. Ms. R maintained that she did not learn that the claimant was alleging a work-related injury until she heard about it from other employees after the claimant stopped coming to work.

A September 1998 radiology report states that x-rays of the claimant's lumbar spine did not reveal any significant abnormalities, although "there is mild splinting . . . suggesting some muscle spasm." The x-ray of the left femur and hip revealed that "no fracture, dislocation, or other acute findings [were] identified . . . ." In a "To Whom it May Concern" letter of October 19, 1998, Dr. F stated:

> [Claimant] first came to [clinic] on 9-5-98 with the complaint of back pain which started while lifting heavy cases of beer at work. She has since been here on _____, 9-15-98, 9-28-98 and is expected to return in the near future. At her last visit, I concluded that her symptoms and complaints and findings of the physical therapist do not fit the natural history of the injury she claims to have had. Therefore, her injury is questionable along with her complaints. It is difficult to give an accurate prognosis and when it comes to returning to work, usually this kind of injury has resolved in 2 weeks or less. I cannot give you an estimated date of return to work due to these inconsistencies at this time.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the testimony and evidence before her and decides what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Generally, an injury can be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the hearing officer is not bound to accept the claimant's testimony; rather, it only presents an issue of fact for her to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). In this instance, the hearing officer determined that the claimant did not sustain her burden of proving that she was injured at work on or about (alleged date of injury). In so doing, the hearing officer noted inconsistencies in the claimant's testimony that she was injured on (a day before alleged date of injury), and that she was working with Ms. R, while the payroll records reflect that Ms. R did not work on (a day before alleged date of injury) and that the "claimant's testimony was inconsistent regarding which body part(s) were injured, namely the left hip area and/or the low back area." The hearing officer further noted that the most telling evidence came from Dr. F, when he opined that the claimant's symptoms and complaints did not fit the natural history of the injury she claimed to have had. The claimant's

credibility was a matter left solely to the hearing officer's discretion as the fact finder. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the testimony and the evidence presented by the claimant was sufficient to prove that she sustained a compensable injury. The hearing officer was acting within her province as the fact finder in so finding. Our review of the record does not demonstrate that the hearing officer's injury determination is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust; accordingly, no sound basis exists for us to reverse that determination on appeal. Pool, *supra*; Cain, *supra*.

In her appeal, the claimant notes that the hearing officer refers to an October 9, 1998, report of Dr. F and medical records of October 29 and October 30, 1998. Based upon her recitation of the contents of Dr. F's letter, it is apparent that there is a typographical error in that the October 19th report is identified as an October 9th report. However, the hearing officer's statement of the content of the report is accurate. In Finding of Fact No. 3 the hearing officer states that the "credible medical evidence dated October 29 and October 30, 1998, established that there was no damage or harm to the physical structure of Claimant's body in low back or left hip areas, as alleged by Claimant." This also appears to be a typographical area. After reviewing the record it is evident that in this finding the hearing officer is referring to the negative x-rays of the claimant's left hip and low back of (two days before alleged date of injury) 9 and September 30, 1998. Despite the existence of these clerical errors, we find no merit in the assertion that the hearing officer confused this case with another case. Her decision accurately reflects the substance of both Dr. F's letter and the x-ray reports; thus, it is clear the hearing officer considered and reviewed the evidence before her and made her credibility determinations based upon that review. We perceive no error.

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm her determination that the claimant did not have disability within the meaning of the 1989 Act. The existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge