APPEAL NO. 991160

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq*. (1989 Act). A contested case hearing was held on May 10, 1999. With regard to the issues before him, the hearing officer determined that appellant (claimant) had not suffered a compensable cervical injury on _____ (all dates are 1998 unless otherwise noted), and that claimant, by definition, did not have disability.

Claimant appeals, contending that the decision is against the great weight of the evidence and is erroneous. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds urging affirmance.

DECISION

Affirmed.

First, we note that there was a good deal of background noise on the audiotape and during a portion of claimant's testimony. What sounded like a vacuum cleaner was being run and claimant, being soft spoken, was hard to understand. The hearing officer should ensure that background noise is kept to a minimum.

On the merits, much of the evidence is in conflict. Claimant was an "electronic assembler" for the employer software company. Claimant testified that on Sunday, _____ (claimant regularly worked on Sundays), as she was lifting a APC rack, A she felt a sharp pain in her neck and shoulders. How many "boards" were on the rack and how much the rack weighed are in dispute. It is undisputed that claimant did not report an injury that day and that she went in and worked a normal shift on Monday, without reporting the injury. Claimant said she thought the pain would go away. On Tuesday, claimant received a written reprimand for poor work performance. Whether claimant was upset or angry about the reprimand is in dispute, as are alleged statements to coworkers that she was "going to get even" with the employer and that she was going to retaliate by filing a workers' compensation claim. Claimant points to discrepancies between various recorded statements and sworn affidavits of coworkers. After claimant was reprimanded, claimant reported an "arm" injury to her supervisor. The supervisor took claimant to the benefits manager, Ms. S, who made arrangements for claimant to be seen at the (clinic). Claimant did not go to the clinic and instead went to a hospital emergency room (ER) where she was treated and released (when she was released from the ER is also disputed). Claimant then went to see an attorney and, subsequently, still on Tuesday, went to see Dr. P, D.C. Claimant did not go to work or call in on Wednesday, Thursday, or Friday. On Friday, claimant went to the employer's payroll office to get her check, wearing a neck brace and arm sling. Who, if anyone, prescribed the neck brace and arm sling is in dispute, also. Claimant was terminated on Friday, effective Wednesday, for "job abandonment." Claimant testified that she thought Dr. P had notified the employer that he had taken claimant off work. Claimant remained off work until March 9, 1999, when she went to work for another

employer. Claimant testified that she worked three days but was unable to continue because of her injury. Claimant returned to work for another employer on April 1, 1999, at a wage higher than her preinjury wage.

The medical evidence includes the ER record of (two days after date of injury) which indicates complaints of "neck/back pain" "lifting heavy object " work today" with a diagnosis of neck and back strain. Claimant was prescribed medication and released to return to work. The ER record shows claimant was released at A1345" hours. A report dated July 29th from Dr. P indicates a _____ date of injury "lifting computer board," recommended tests to rule out a herniated disc and/or cervical radiculopathy, and referred claimant to an "orthopedic doctor." Dr. P took claimant off work. A consultation of August 21st by pain management consultants gives a working diagnosis of possible mechanical low back pain, cervical sprain/strain, and cervical radiculopathy. An EMG performed on December 18th was "suggestive of nerve root irritation" at the C4-5 and C5-6 levels. A cervical MRI performed on December 23rd showed some posterior protrusions at C3 through C7 and an "anterior herniation at C5-6. 2 mm posterior broad base protrusion mildly indents the sac." Claimant was examined by Dr. W on April 5, 1999, for the carrier and a report dated April 9, 1999, recited a history of claimant feeling "a pop between her shoulder blades" on _____. Dr. W comments on "a herniated disc which is not confirmed either by my visualization nor by the report [of another doctor]," who felt the C5-6 herniation was Anot significant." Dr. W commented that he thought claimant had "sustained a soft tissue injury" and found her at maximum medical improvement with a zero percent impairment rating.

The hearing officer found claimant's testimony "was not credible or persuasive in that by turns it contradicted earlier documented statements, ran counter to fairly well-established facts, or was contrary to ordinary logic." The hearing officer also comments on claimant's "deceptive behavior" and comments that the persuasive medical evidence is summed up in Dr. W's report. The hearing officer concludes that claimant's testimony and behavior are insufficient to sustain her burden on the issues. Claimant appeals that the hearing officer's findings are against the great weight of the evidence.

Clearly, the facts are in conflict and subject to differing interpretations. The hearing officer had the advantage of seeing claimant and Ms. S, observing their demeanor and hearing their testimony firsthand. As we have frequently noted, Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Obviously, the hearing officer did not find claimant's testimony credible. 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). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

In that we are affirming the hearing officer's decision that claimant did not sustain a compensable injury, claimant cannot, by definition in Section 401.011(16), have disability.

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. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge