APPEAL NO. 991205

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 May 11, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and that she has not had disability within the meaning of the 1989 Act because she did not have a compensable injury. In her appeal, the claimant asserts that those determinations are against the great weight of the evidence. In addition, the claimant asserts error in the admission of two of the respondent's (carrier) exhibits. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed.

The hearing officer's decision and order contains a factual summary which will not be repeated here. Briefly, the claimant testified that on _____, she was working as a teacher at a child care facility. She stated that she had gone out on the playground with her students and was checking the playscape to make sure one of the children could play safely on it because it had been raining and the ground was wet. She stated that she slipped and fell, injuring her low back, side, right shoulder, right knee and jaw. She stated that she fell forward, hitting her jaw and knee on a pole of the playscape, and then she fell backwards landing initially on her side and ending up on her back. She maintained that she had fallen on the playscape and not on the ground, which was covered with mulch. The claimant testified that she was having trouble breathing after the fall; thus, she called for an ambulance to take her to the hospital. The EMS report identified the claimant's complaints as jaw and left flank pain. In addition, it stated that she denied neck and back pain and that she had "just hit her side." At the emergency room, the claimant was examined by Dr. L. Her discharge diagnosis was "acute lumbar strain, contusion right elbow, right knee, acute contusion mandible."

Ms. T, the education coordinator for the employer, testified that on _____, she came out of her classroom and the claimant asked her if she would watch the claimant's students on the playground while the claimant went inside. Ms. T stated that the claimant told her she had fallen on the playground after she came back outside with a glass of water. Ms. T testified that it was not apparent from the claimant's appearance that the claimant had fallen, the claimant simply told her she had done so. Finally, Ms. T testified that she doubted that the claimant had actually fallen because despite her claims that she was having difficulty breathing, the claimant was able to talk and drink water without difficulty.

Ms. R testified that on _____, Ms. T came to get her to tell her that the claimant had fallen on the playground. Ms. R stated that when she asked the claimant what had happened, the claimant indicated that she had fallen on the ground next to the playscape,

which was covered with wet mulch. The carrier introduced written statements from individuals who saw the claimant shortly after the alleged incident, noting that the claimant's clothes were neither wet, nor dirty as would be expected if she had fallen on the mulch.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained an injury in the course and scope of employment. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer. 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 evidence and judges the weight to be given to the evidence before him. 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. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). 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 Company, 715 S.W.2d 629, 635 (Tex. 1986).

In this instance, the hearing officer determined that "[b]ecause Claimant has not shown by a preponderance of the evidence that she suffered damage to the physical structure of the body in an incident at work on _____, she does not have an injury within the meaning of the Act, and the Carrier is therefore not liable for benefits." In this case it appears that the hearing officer simply did not believe the claimant's testimony that she fell at work on _____. He was free to discredit the claimant's testimony and to accept the evidence from the carrier questioning the existence of the incident. As the fact finder, the hearing officer was permitted to so resolve the conflicts and inconsistencies in the testimony and evidence and to determine what facts had been established. Nothing in our review of the record demonstrates that the hearing officer's determination that the claimant did not sustain a compensable injury is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. As such, no sound basis exists for us to reverse that determination on appeal. Pool, *supra*; Cain, *supra*. Given our affirmance of the injury determination, we likewise affirm the determination that the claimant did not have disability in that the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The claimant also asserts that the hearing officer erred in admitting two of the carrier's exhibits, medical records for prior emergency room visits made by the claimant. The claimant argued that the documents should not have been admitted because they were not timely exchanged. The hearing officer noted that the carrier was only able to obtain the records after the claimant signed a release and determined that the carrier exchanged them within a reasonable time after they became available. We cannot agree that the hearing officer abused his discretion in making that determination. Nonetheless,

we further note that in order to obtain a reversal for the admission of evidence, the claimant must demonstrate that the evidence was actually erroneously admitted and that "the error was reasonably calculated to cause and probably did cause rendition of an improper judgment." Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mut. Ins. Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). In this instance, any error in the admission of Carrier's Exhibit Nos. 1 and 2 simply does not rise to the level of reversible error. The hearing officer was not persuaded by the claimant's testimony that the fall at work occurred. As a result, we cannot agree that the admission of medical records related to treatment the claimant received prior to this alleged injury was reasonably calculated to, and probably did, cause the rendition of an improper judgment. Accordingly, any evidentiary error was harmless and would not provide a basis for reversing the decision and order on appeal.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I write separately to stress that a contusion can be an injury to the physical structure of the body, however, a fact finder is free to determine that such contusion(s) did not result from an injury at work.

_____
Joe Sebesta
Appeals Judge