APPEAL NO. 991319

This appeal is brought 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 May 20, 1999. She (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury on _____, and that she did not have disability. The claimant appealed, summarized evidence favorable to her position, said that the ombudsman that assisted her at the CCH was not the ombudsman who was scheduled to help her, and stated that she believed that the sudden change of ombudsman was a contributing factor in denial of benefits. The respondent (carrier) replied, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed.

DECISION

We affirm.

The claimant, who worked for a motor vehicle rental company, contended that she injured her back helping another worker put a rear seat in a van. The carrier contended that she did not. The Decision and Order of the hearing officer contains a statement of the evidence and only a brief summary of the evidence will be included in this decision. The claimant testified she was a manager trainee and was required to have a neat appearance; that on _____, she helped another worker place a rear seat in a van; that she held the seat away from her body so as not to harm the appearance of her clothes; that she felt a sharp pain on the left side of her back; that the pain really did not stay, but that she was sore; that she worked the next three days with a little soreness; that on the weekend she took her husband's truck to help Ms. B, her supervisor, move from a house to an apartment; that most of the things had been loaded into another truck before she arrived; that she only carried three or four light items of clothing and a teddy bear; and that she did not hurt herself helping Ms. B move. The claimant said that on May 4, 1998, she woke up with horrible pain in the same place that she had when she moved the van seat; that she went to her family doctor, Dr. D; that at the time, she did not relate the pain to the seat incident; that she was more concerned with the severe pain; that Dr. D referred her to Dr. C, an orthopedic surgeon; that x-rays and blood tests were normal; that an MRI did not show a herniated disc; and that Dr. C diagnosed a lumbar strain, took her off work, and prescribed medication, physical therapy, and home exercises. She said that she advised Ms. B every time that she went to a doctor.

Ms. B testified that the claimant helped her move on May 2 and 3, 1998; that the claimant carried clothes, boxes that contained plates and dishes, a crock pot, and a deep fryer; and that the claimant did not appear to have, nor did she complain about, back problems. Ms. B said that on May 4, 1998, the claimant called and said that she was not coming to work, that she was real sore and her back hurt, and that she did not attribute her problems to work.

Notes from Dr. D dated May 4 and 11, 1998, state that the claimant said that she woke up with low back pain, and report on the examination of the claimant and the results of tests, but do not contain comments on what caused the low back pain. In a report dated May 11, 1998, Dr. C said that the claimant had back pain off and on and that she should continue on her medication and have physical therapy. On May 22, 1998, Dr. C stated that the claimant reported a shortage of employees, that she had to clean up for about two hours and had to do a lot of bending, that the next day she had soreness in her back, and that two days later she had horrible back pain. Dr. C reported that an MRI did not show a disc herniation or stenosis and prescribed a brace, medication, and physical therapy.

We first address the claimant's complaint concerning the change of ombudsman. At the CCH, the hearing officer asked if the claimant had at least 15 minutes with the ombudsman as required by the 1989 Act. Both the claimant and the ombudsman responded yes. The hearing officer asked if there were any other preliminary matters, and both the ombudsman and the claimant responded no. In her appeal, the claimant said that before the CCH, the ombudsman who assisted her at the CCH led her to believe that it was out of the question to request a continuance so that the other ombudsman could assist her. As a general rule, the Appeals Panel does not consider matters raised for the first time on appeal. A review of the record does not reveal that the claimant did not receive adequate ombudsman assistance at the CCH. There is no reason to reverse the decision of the hearing officer and remand for another CCH with the assistance of the ombudsman that first assisted the claimant.

We next address the sufficiency of the evidence to support the decision of the hearing officer. 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. In the discussion section of her Decision and Order the hearing officer wrote that the claimant's testimony and evidence was too inconsistent to be credible. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement 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 determination that the claimant did not sustain a compensable injury is so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb that determination. 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 that determination of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id*. Since we have found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury, the claimant cannot have disability.

We affirm the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Gary L. Kilgore
Appeals Judge