APPEAL NO. 991526

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 July 1, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease and that she did not have disability within the meaning of the 1989 Act. 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 in March 1997 she was hired by the (museum) as a gallery attendant. She stated that her job duties require her to constantly stand and walk, while she watches the visitors to the museum and the art. The claimant stated that about six months after she began working for the employer, she developed low back pain and that about a month later she began to have pain in her neck and knees in addition to her low back pain. She stated that in late _____, she first connected her pain to her job duties and that she reported her injury to her supervisor on July 15, 1998. The claimant testified that she worked full time prior to July 15, 1998, and that thereafter she began to work part time because she could no longer stand the constant walking and standing due to her pain. She stated that she left her job as a gallery attendant in May 1999 and began to work for another company at the museum, where she cleans and polishes silverware. On cross-examination, the claimant agreed that her job did not require any physical exertion other than standing and walking. In addition, she stated that her job duties did not change when she changed from full time to part time and acknowledged that she never asked her supervisor to change her to a job where she would have been permitted to sit.

On July 27, 1998, the claimant sought medical treatment from Dr. S, a chiropractor. In an Initial Medical Report (TWCC-61), from that visit, and an accompanying narrative, Dr. S diagnosed lumbar facet syndrome, pelvic-hip segmental dysfunction, cervicobrachial syndrome, paravertebral myofascitis, and bilateral knee sprain/strain. In his TWCC-61, Dr. S states that the claimant "has been developing lower back pain, as well as bilateral knee and neck pain from her repetitive job duties . . . ." In his narrative report, Dr. S notes that the claimant "might need to find a different job because the constant standing and walking was really aggravating her condition." The claimant testified that she has had to discontinue treatment with Dr. S because neither her group health carrier nor the workers' compensation carrier, would pay for the treatment.

Ms. H testified that she is an assistant protective service manager with the employer and that she was in charge of the gallery attendants at the time of the claimant's alleged injury. Ms. H stated that the claimant's job duties were not physical in nature, explaining that the claimant was required to stand and walk around in a different gallery each day and

to keep an eye on the people visiting the museum and the collection. Ms. H testified that the claimant never came to her and requested that her job duties change. Ms. H stated that the longest day the claimant would have worked was five and three-quarters hours and that she would have a 15-minute and a 20-minute break in that period. Ms. H stated that the floors on which the claimant was standing and walking were limestone and wood and that they are not uneven. Ms. H also testified that the gallery attendants are not required to climb stairs during their shifts and that they are instructed to wear comfortable black shoes and support stockings. Finally, Ms. H testified that prior to July 15, 1998, she never observed the claimant having problems performing her work and that the claimant also gave no appearance of having been injured thereafter. On cross-examination, Ms. H testified that the gallery attendant's job did not include sitting and that the gallery attendants were advised to wear comfortable shoes and support stockings because "walking and standing for long periods is difficult."

Mr. B testified that he is a gallery attendant supervisor for the employer and that he was the claimant's supervisor at the time of her alleged injury. He stated that her job duties included walking and standing, but did not include sitting. Mr. B further testified that the claimant's job duties did not change after she changed from full time to part time; that the claimant was a good employee; that she never came to him and complained of any physical problems associated with her work duties; and that he never observed her having any difficulty in performing her job duties.

The claimant 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). That question presented the hearing officer with a question of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines 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 that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable repetitive trauma, occupational disease injury. A review of the hearing officer's decision demonstrates that he simply was not persuaded that the claimant presented sufficient evidence to demonstrate the causal connection between her alleged injuries and her work activities as a gallery attendant. The hearing officer specifically noted that the claimant's job duties cannot be characterized as "beyond ordinary standing and walking" and that "[t]here is a lack of objective evidence even to support the fact of injury." Our review of the record does not reveal that the hearing officer's determination that the

claimant did not sustain a repetitive trauma, occupational disease injury in the course and scope of her employment as a gallery attendant is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, no sound basis exists for us to reverse that determination on appeal.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. 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). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Judy L. Stephens
Appeals Judge