APPEAL NO. 992086

This appeal arises 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 August 11, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury to her lumbar spine on _____, and whether the claimant had disability. The hearing officer determined that the claimant did sustain a compensable injury to her lumbar spine on _____, and the claimant had disability from April 28, 1999, through the date of the CCH. The appellant (self-insured) appeals, urging that the hearing officer's decision is manifestly wrong and unjust, not in line with prior decisions by the Appeals Panel, not supported by the evidence, and should be reversed. The claimant replies that the overwhelming weight of the credible evidence supports the hearing officer's decision.

DECISION

Affirmed.

The claimant worked for employer as an account representative. Her job duties required her to take telephone calls concerning customer accounts and enter information into a computer. The claimant worked an eight-hour day, from 6:00 a.m. until 2:30 p.m., with 30 minutes for lunch and two 15 minute breaks, one in the morning and one in the afternoon. The claimant testified that on _____, at 1:00 p.m., she pushed her chair back, and when she stood up, she felt a sharp pain in her low back and down her legs. She stated that she went to the restroom, which was located behind her, and returned to her chair because the pain was so severe. Later that day, the claimant sought medical treatment with Dr. L. The claimant testified that she returned to work on April 27, 1999, but the pain was so severe that Dr. L took her off work on April 28, 1999. The claimant subsequently sought medical treatment with Dr. V, who diagnosed a herniated lumbar disc at L5-S1, performed lumbar epidural injections, and recommended physical therapy. According to the claimant, her condition has improved, but she has not been released to return to work.

It was the self-insured's position that the mere act of standing from a sitting position without more, is a normal activity of life, has nothing to do with furthering the business of the employer, and is not compensable. The self-insured relies on Texas Workers' Compensation Commission Appeal No. 972235, decided December 17, 1997, a case involving similar facts, wherein the Appeals Panel reversed and rendered a decision that the claimant had not sustained a compensable injury. The self-insured asserts that the claimant did not have disability because she did not sustain a compensable injury.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). "Course and scope of employment" is defined in Section 401.011(12) as "an activity of any kind or character that has to do with and originates in the work, business,

trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Whether an employee is in the course and scope of employment when injured is ordinarily a question of fact. Injury and disability determinations can be established by the claimant's testimony alone, if believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989).

The hearing officer made the following findings of fact:

FINDINGS OF FACT

3. On _____, Claimant, after working for over an hour after lunch at her work station, stood up from her chair and began turning to the right, when she felt a sharp pain in the lower back.

4. On _____, when Claimant turned and felt pain in her lower back, she was performing her assigned duties at her work station and her activities furthered the affairs of the Employer.

6. [Dr. L] concluded that Claimant's relatively long period of sitting in one position, followed by a sudden turning motion in exiting her work station, caused Claimant's low back problems.

We agree with the self-insured that the claimant's testimony was she stood up from her chair and felt pain in her back, not that she turned and felt pain in her low back. In closing rebuttal argument, the claimant's attorney asserted that the claimant was not just getting up, but was "twisting." Dr. L's medical reports do not indicate that the claimant's low back injury was caused by a sudden turning motion, rather, Dr. L states:

> The causation of her lower back pain is directly attributed to prolonged sitting and the problems associated with lack of change in posture on a regular basis. Getting out of the chair was essentially the last thing in a long period of gradual onset of a condition that caused her to have the sharp severe pain.

Although the above findings are, in part, not supported by the record, we note that the decision of a hearing officer can be affirmed on any reasonable theory supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.- El Paso 1989, writ denied).

In Appeal No. 972235, *supra*, the Appeals Panel reversed the hearing officer's determination that an employee who rolled her chair back from the desk, attempted to stand up out of her chair, and felt excruciating back pain sustained a compensable back injury, stating that "[s]tanding up, without more, from sitting in a chair is the type of activity that is a normal occurrence without regard to the work situation and has nothing to do with

furthering the business of the employer." The decision cited Texas Workers' Compensation Commission Appeal No. 941056, decided September 21, 1994. In Appeal No. 941056, the claimant sneezed while operating a forklift and his back began to hurt. The hearing officer found the back injury compensable and the Appeals Panel reversed and rendered a contrary decision noting that compensability depended on some "instrumentality of the employer such as contact with a floor or parking lot surface," that the evidence simply established a sneeze as the cause of the back injury, and there was no "nexus" between the back injury and the employment. Not cited in Appeal No. 972235, *supra*, was Texas Workers' Compensation Commission Appeal No. 950103, decided March 3, 1995, which involved an injury which occurred when the claimant was in the act of sitting down at his desk. In that case, the Appeals Panel rejected the contention that the hearing officer erred, as a matter of law, in finding that a back injury occurred in the course and scope of employment stating that such is ordinarily a question of fact and that "each case must be determined on its own peculiar facts. [Citation omitted.]" The decision further stated that "we find no intent within the 1989 Act for every discrete activity within the work day to be subject to an analysis that it 'could have' happened on some other premises or during a non-work related action," and, that "[t]o the extent that carrier's argument presupposes that a workplace defect or specific negligence of the employer should be proven in order to prove a 'positional risk,' such argument flies in the face of Section 406.031 which provides that a carrier is liable for compensation for an injury 'without regard to fault or negligence' if 'the injury arises out of the course and scope of employment.'"

We agree that Appeal No. 972235, *supra*, is factually similar to this case; however, after careful consideration, we decline to follow a similar line of reasoning. *See* Texas Workers' Compensation Commission Appeal No. 990896, decided June 14, 1999 (Unpublished), and Texas Workers' Compensation Commission Appeal No. 990252, decided March 25, 1999. In this case, there is a connection, or nexus, between the claimant's work and her injury. The claimant testified, as found by the hearing officer, that she was performing her assigned duties at her work station and her activities furthered the affairs of the employer. The injury took place when the claimant stood up from her chair. This activity was clearly part of her job and furthered the affairs and business of her employer. We do not believe that whether the claimant was twisting, turning, or performing any untoward body motion is determinative of whether the injury is compensable. As stated in Appeal No. 990252, "the requirement of an instrumentality of the employer as an element of compensability has generally come about when a fall results from an underlying, idiopathic physical condition." *See* Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333 (Tex 1948). The facts of this case do not indicate an idiopathic condition, nor was any underlying idiopathic physical condition alleged. *See* Texas Workers' Compensation Commission Appeal No. 980631, decided May 14, 1998, which was based on a determination that no instrumentality of the workplace was involved.

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). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We find the evidence sufficient to support the hearing officer's determination that the claimant sustained a compensable injury to her lumbar spine on _____.

The self-insured appeals the hearing officer's determination that the claimant had disability, asserting that the claimant did not sustain a compensable injury and therefore did not have disability. Given our affirmance of the hearing officer's determination that the claimant sustained a compensable injury on _____, the claimant could establish disability. The claimant testified that she was unable to work beginning April 28, 1999, as a result of her lumbar spine injury. Whether disability exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We find the evidence sufficient to support the hearing officer's finding of disability.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Alan C. Ernst
Appeals Judge

CONCURRING OPINION:

I can concur because the hearing officer makes one finding of fact, Finding of Fact No. 10, that does not emphasize a turning or twisting motion in finding an injury. The record contains no evidence of a turning or twisting motion that I can see. I would remand the case to the hearing officer to identify the evidence that he relied upon or to reconsider his findings of fact in light of the absence of a twisting motion. I do not agree that Texas Workers' Compensation Commission Appeal No. 972235, decided December 17, 1997, is factually similar because that case involved two prior back injuries and referred to the injury as a "severe muscle spasm" occurring as that claimant stood up. That case then added dicta which said, "standing up without more. . . ." Appeal No. 972235 does not control. I agree with the majority's citing of Texas Workers' Compensation Commission Appeal No. 950103, decided March 3, 1995, which provides authority for affirming.

_____
Joe Sebesta
Appeals Judge