APPEAL NO. 000021

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 1, 1999, a contested case hearing (CCH) was held. With regard to the issues before him, the hearing officer determined that appellant (claimant) had not sustained an injury (as defined in Section 401.011(26)) and that because claimant does not have a compensable injury, claimant does not have disability.

Claimant appeals, pointing to the testimony of witnesses and medical reports which support her contentions and contending that it is "inconceivable" that some six or seven people would fabricate their statements to support claimant. Claimant requests that we reverse the hearing officer's decision on both issues and render a decision in her favor. Respondent (carrier) responds that the hearing officer's decision is supported by the evidence and urges affirmance.

DECISION

Affirmed.

The hearing officer summarizes the evidence in some detail and we will only comment on that which is germane to our decision. Claimant began working for (employer) on March 22, 1999 (all dates are 1999). Between March 22nd and (date of injury) claimant was verbally counseled at least once (by other accounts, two or three times) for absenteeism. The employer moved offices on or about (date of injury) and, while professional movers did the heavy work, employees, including claimant, assisted in packing and unpacking personal items and smaller items. Claimant testified that Mr. GJ, employer's regional manager, had announced prior to the move that anyone that was injured in the move or complained of a back injury would be fired. Mr. GJ and Ms. BG deny that any such statement was made and no other testimony supports claimant's contention. Claimant testified that she injured her back packing and moving boxes on Friday, (date of injury), but did not have any real pain at that time. Claimant testified that she went home that evening to an apartment she shared with a roommate, Ms. RJ. Claimant testified that the following day, Saturday, (day after injury), she went to work but that her low back pain was getting progressively worse. A coworker, Ms. KG, testified that she worked with claimant until almost noon and claimant made no complaints about her back. Ms. RJ, the roommate, however, supported claimant's testimony that by Saturday evening claimant was complaining of back pain due to moving boxes at work. Claimant, Ms. RJ and claimant's husband (from whom she was separated) testified as to claimant's progressively worsening back pain on Sunday, (second day after injury). Claimant sought treatment from Dr. W, a chiropractor, on Monday, (third day after injury). A handwritten progress note dated (third day after injury) by Dr. W notes "[h]urt low back/hip moving & unpacking boxes at work," prescribed heat compress, massage, etc., and referred claimant to Dr. M, a medical doctor.

Dr. M's records have a handwritten entry dated (third day after injury) indicating severe low back pain "moved last wk then pain began 3 days ago." The next sentence references a business move "last wk then pain." It is undisputed that Sunday and Monday, (second day after injury) and (third day after injury), were claimant's regular days off work.

Claimant's mother testified (and it is undisputed) that she called Ms. BG, claimant's supervisor, on Ms. BG's cell phone on the evening of (third day after injury) and left a message; that Ms. BG called back at 7:30 a.m. on (fourth day after injury); that claimant's mother told Ms. BG that claimant would not be in to work because of low back pain, but did not say that it was work related; that claimant called for Ms. BG on the morning of (fourth day after injury) but that Ms. BG was busy; and that Ms. JB, a coworker that answered the phone, gave Ms. BG the message that claimant had called. In dispute is whether claimant, at that time, mentioned her work-related injury. Ms. BG testified that she was unaware that claimant was alleging a work-related injury at that time; that she received claimant's message from Ms. JB and that she discussed the matter of claimant's absence with Mr. GJ, the regional manager. It is undisputed that Mr. GJ called claimant on (fifth day after injury) and terminated her employment for excessive absenteeism (if Mr. GJ and Ms. BG are believed, they were unaware at that time that claimant was alleging a work-related injury). Claimant was sent written confirmation by a letter dated (fourth day after injury), received May 6th. Claimant formally reported her injury some time after being terminated on (fifth day after injury) to the carrier and Mr. GJ. (Notice is not an issue.)

Dr. W, in a report dated June 16th, confirmed he had seen claimant on (third day after injury) and that claimant had complained of a work-related injury "moving and unpacking boxes" on (date of injury). Dr. W diagnosed a severe sprain/strain injury with disc involvement. Dr. M, in an Initial Medical Report (TWCC-61) of a May 7th office visit, diagnosed acute lumbar strain, and prescribed conservative care. A lumbar MRI performed on June 22nd indicted "[m]ild diffuse bulge superimposed mild posterior left paracentral subligamentous herniations at L4-5, mildly indents the sac." In a report dated November 24th, Dr. W was of the opinion that claimant's injuries were "sustained in a work related accident that occurred on 4-30-99." Dr. W took claimant off work and claimant testified that she has been unable to work and neither doctor has released her to return to work.

Eight witnesses, including the claimant, testified at the CCH, and the statements of another four witnesses are in evidence. The four statements are from friends and acquaintances of claimant, attesting that claimant was complaining of back pain on (second day after injury) and (third day after injury) and that claimant was concerned that she was going to be terminated "for excessive absences." (Statement of (Ms. HW).)

Carrier's contention is that claimant was not doing any work heavy enough to cause an injury; that claimant was aware that she was in a probationary period; that claimant had engaged in some kind of painting over the weekend (denied by claimant and no evidence of that beyond hearsay); that claimant had not seen a doctor prior to being terminated (clearly incorrect as evidenced by (third day after injury) entries in both Dr. W and Dr. M's records);

and that claimant had not made her alleged work-related injury known until after she had been terminated.

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. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgment 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 determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. 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). Although another fact finder could have drawn different inferences from the evidence in the record, which would have supported a different result, that does not provide a basis for us to disturb his decision on appeal. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Given our affirmance of the determination that 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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge