APPEAL NO. 000039

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 3, 1999, a contested case hearing (CCH) was held. With regard to the issues before her, the hearing officer determined that appellant (claimant) had not sustained a compensable (back) injury on _____ (all dates are 1999), and because claimant did not have a compensable injury, claimant does not have disability. An issue regarding timely notice to the employer was resolved by stipulation and will be discussed only in the context of the claimed injury.

Claimant appealed, contending that some of the hearing officer's findings were against the great weight and preponderance of the evidence and essentially reiterating her testimony and allegations from the CCH. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds, asserting this is a spite or retaliation claim and urging affirmance.

DECISION

Affirmed.

Claimant was employed by (employer) operating various machines. Claimant testified, through a Spanish-language translator, that at sometime prior to _____, she had been "assaulted" by a coworker, CG, who had thrown a piece of wood at her. Claimant said that she was afraid to work near CG. Claimant testified that on Thursday, _____, she had begun working on a "finger joint" machine but that after a few hours it had run out of glue and she was moved to another machine which required her to "pick up . . . and lift up" heavy wood. Subsequent testimony from JJ developed that the wood consisted of five pieces, 80 inches in length, three quarters of an inch thick, one and one-half inches wide and weighing about eight or nine pounds. Claimant testified that while picking up this wood, she felt pain in her back and heard "a noise like [her back] was broken." Claimant testified that within 15 minutes she reported her injury to her supervisor, JJ, but that JJ refused to take her to the doctor. (JJ denied a report of an injury was ever made to him by claimant.) Claimant continued working on _____ and on Friday, (day after injury). Claimant said that she again reported her injury to JJ on (day after injury), but that he again refused to take her to a doctor. Claimant said that she went to a clinic on (second day after injury) to seek medical attention, but was told by the receptionist it would cost $35.00 to see the doctor and, since she did not have any money, she left without being seen by a doctor. Claimant went to work on Monday and was assigned to work on a machine close to CG and claimant refused to do so because of her problems with CG. Claimant testified that she again complained to JJ that she was not feeling well. JJ denied that claimant said she was not feeling well and said that claimant refused to work at a certain machine because of CG. Because claimant refused to work at the assigned job, JJ took claimant to the office where the situation was discussed with JR, employer's safety director, and MM, apparently

a general manager (referred to as the "big boss"). After some discussion, MM made the decision to terminate claimant and JR informed claimant in Spanish that she had been terminated. JR and JJ both testified that claimant made no mention of a back injury during that meeting. JR testified that claimant became very irate and said "I'll leave. Just give me my unemployment." When told that she probably would not be eligible for unemployment compensation, JR testified claimant said she was going to get a lawyer and "we hadn't heard the last of her." JR and JJ both testified at no point during this meeting did claimant mention a work-related injury (this is disputed by claimant).

Claimant eventually sought medical treatment with Dr. C, on referral from her attorney. Dr. C, in a report dated July 1st, recited the history of feeling "a pop in her lower back" and diagnosed "[l]umbar IVD w/o myelopathy," lumbar radiculitis, myelgia and "myospasm." Dr. C opines that the symptoms "appear to have come on as a result of a work related accident. . . ." Dr. C took claimant off work. Claimant was prescribed a "diversified adjustive technique" and therapy. In an initial consultation, Dr. M had an impression of "cervical and lumbar sacral spine sprains." In evidence are numerous other progress reports from Dr. C through August 10th. Dr. C referred claimant to Dr. N for nerve conduction studies. In studies performed on August 18th, Dr. N concluded:

> This is an abnormal lower extremity nerve conduction velocity study due to the increased right-left difference of the S1 dermatome responses and of the P37 responses of the peroneal nerves. The above finding might suggest mild right L5 and S1 radiculopathies.

The hearing officer summarized the evidence in some detail and noted "some disturbing contradictions in this claim" and that while "the medical evidence does indicate a back injury, based on a totality of the evidence, Claimant did not establish that she sustained an injury. . . ." Claimant, in her appeal, recites her version of the evidence and emphasizes evidence and testimony which might rebut some of the inconsistencies in the evidence cited by the hearing officer. Claimant also asserts, both on appeal and at the CCH, that once the employer had notice of the claim (around July 11th), they did not investigate the claim "to find out the possible dangers of the worksite." Possibly the reason the employer did not investigate the claim was because the employer and carrier made clear that they believed this claim "is a fabrication motivated by spite." In any event, failure by the employer to investigate a claim is not a reversible error and the inferences that it raises are factors for the hearing officer to consider. The burden of proof to establish a work-related injury is on the claimant. Texas Workers' Compensation Commission Appeal No. 982314, decided November 2, 1998. While a claimant's testimony alone, if believed, can establish a compensable injury, the hearing officer is not required to accept the testimony of a claimant or other witness at face value. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Rather, it is for the hearing officer to judge the weight and credibility to be given the testimony and other evidence. Section 410.165(a). Similarly, the hearing officer assesses and gives the weight he or she finds appropriate to medical evidence. Texas Employers Insurance Association

v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Texas Workers' Compensation Commission Appeal No. 990875, decided June 7, 1999. As the fact finder, the hearing officer is responsible for resolving conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer obviously accorded greater weight to the testimony of JJ and JR than to that of the claimant. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

In that we are affirming the hearing officer's decision that claimant had not sustained a compensable injury, claimant cannot, by definition in Section 401.011(16), have disability.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Elaine M. Chaney
Appeals Judge