APPEAL NO. 000090

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 December 9, 1999. The issues concerned whether the appellant, who is the claimant, was injured while in the course and scope of employment, and whether she had disability from that injury.

The hearing officer found that claimant was not persuasive in proving that she sustained a compensable injury on _____. Although she found that the claimant was unable to obtain and retain employment equivalent to her preinjury average weekly wage beginning _____, to the present, she held that claimant did not have disability as defined by the 1989 Act because it did not result from a "compensable injury."

The claimant has appealed the determinations against her claim made by the hearing officer. The claimant argues that she hurt her back at work and witnesses against her were not credible. She argues that comments about wishing to be fired to be able to draw unemployment compensation benefits reflected nothing more than this wish, and do not indicate that she was not injured. The claimant argues that medical records in evidence document the harm to her body. The respondent (carrier) responds that the decision is supported by the evidence and that it should be affirmed.

DECISION

We affirm the hearing officer's decision.

The claimant said she was hired to work at (employer) in January 1999 as a "pre-K" teacher. The claimant asserted that she was not hired for other positions, but that when the job was discussed, she did not indicate to the person who hired her that she had any physical limitations regarding lifting. The claimant said that her class "graduated" in May 1999, and she was thereafter put into the baby room for two weeks. Claimant said she did not like this; although under no medically stated limitations, she said she avoided lifting because she did not want to reinjure her back. This concern grew out of a 1997 car accident for which she was treated for head, shoulder, and back injuries, ending November 1998. Claimant said after that date, she gave up her medications and felt perfectly fine. Claimant had also been involved in an automobile accident in 1993, and further stated that she slipped and fell on a boat dock in mid 1998, breaking her wrist, which necessitated surgery. The claimant said she recalled being told she had spurring in her back after her 1997 accident.

The claimant said that she had at one point walked off her job (the time frame was eventually identified as the week of June 7th through 11th) and thereafter was used to fill in for other workers throughout the center when they were on break.

On _____, she said the employer was under the supervision of an acting manager, and employees were more relaxed as a result. Claimant said that she was assigned to the baby room while the principal worker, Ms. W, was gone for two to three hours; her coworker, Ms. C, kept leaving for 30 minutes at a time to talk with workmen in the building. Claimant said she was lifting up a heavy baby (around 25 pounds) to change the diaper, and hurt her neck and back. She nevertheless did not discuss this injury with either Ms. C or Ms. W when they returned. Claimant said she worked the next day, but called in sick on (two days after the date of injury) when the pain was severe. She went to an emergency room for treatment, but no records from the emergency room were put into evidence. The claimant said she called the center on (two days after the date of injury) to report the work-related injury and get insurance information to obtain further medical treatment, and when this was refused, she hired an attorney the next day, and was referred to Dr. F, D.C.

The claimant was questioned about omissions of her complete history of injuries in her interrogatories, and about her dissatisfaction with working in the baby room. While she agreed she had been very dissatisfied when she walked off the job, she denied that she still had dissatisfaction on _____. She denied at first that she had looked for another job in 1999, then conceded that prior to walking off the job, she had "called around." In any case, she denied ever telling any coworkers that she was interviewing with other employers or that she wished she could leave work or be fired in order to collect unemployment benefits.

One coworker, Ms. A testified and gave a written statement as well. She had taken some time off during the summer of 1999, beginning June 3rd. She said she believed she was back at work by _____, prior to the claimant leaving work as of (two days after the date of injury). She said that she talked to claimant on a Tuesday before the 3rd of August. There was another teacher present (who had not given a statement). Ms. A said that claimant was a little bit miffed because she was in the baby room again. Claimant said, according to Ms. A, that if they kept putting her in that baby room, she would stay at home and say her back was hurt, and collect unemployment. Ms. A did not act shocked, she said that she just went "with the flow." She believed this conversation had taken place at the end of July.

The claimant said she had not been able to work due to her injuries from August 6th, the day Dr. F took her off work, until the hearing. Dr. F had not released her nor even discussed a return to work. The claimant said she had an MRI and nerve conduction testing on referral from Dr. F. She had also had an MRI and possibly a CT scan done after her automobile accident in 1997, but no records from this are in evidence. The claimant also agreed she had a seizure disorder, but that it did not result from her automobile accidents. She said that having a seizure left her feeling achy all over afterwards.

Upper extremity nerve conduction testing performed on August 23, 1999, was unremarkable; lower extremity testing was strongly suggestive of L4 nerve root irritation. The MRI of the cervical and lumbar areas was done September 17, 1999; bulging was

reported at several areas of both regions. Claimant was also found to have lumbar dessication and cervical spurring. A partially torn annulus with impingement was found at L4-5. At C5-6, a small spur with a centrally sub-annular protruded disc was reported as indenting on the thecal sac.

A signed statement from Ms. C asserted that claimant was interviewing elsewhere, and that although claimant wanted to quit, claimant said she would prefer to be fired to collect unemployment. Ms. W stated that she was told by claimant that she had an interview, and that claimant had not complained of back pain on the date she was injured and "at no time yesterday." The statement is dated August 8th, which was a Sunday. Ms. A's written statement was consistent with her testimony.

The hearing officer stated that the matter came down to credibility. We note that there was evidence developed of previous injuries and a seizure disorder, which left claimant feeling sore all over when a seizure occurred. Although not specifically stated, the hearing officer could choose to believe that objective findings on MRI were explained by these previous occurrences or degenerative conditions. Further, the hearing officer evidently chose to believe that the claimant had dissatisfaction with her job and had expressed a desire to be off work while collecting unemployment benefits. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). While not required to believe the statements of the coworkers, the hearing officer could choose to do so and give that probative weight when assessing credibility as to the alleged events of _____.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that there is not sufficient support in the evidence for the decision of the hearing officer, and affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge