APPEAL NO. 000195

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 January 11, 2000. The issues at the CCH were whether the alleged horseplay of the respondent (claimant) was a producing cause of the injury, relieving the appellant (carrier) of liability for compensation and whether the claimant had disability. The hearing officer determined that the claimant sustained a compensable injury to her low back on _____; that Section 406.032(2) is not applicable in this case since claimant was not a voluntary participant in any horseplay; and that claimant had disability from _____, to the date of the CCH. The carrier appeals the hearing officer's determinations and the claimant responds, urging affirmance. Carrier also appeals the exclusion of testimony from the employer's assistant manager.

DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant was not a voluntary participant in any horseplay engaged in by Mr. H. Section 406.032(2) provides that a carrier is not liable for compensation if "the employee's horseplay was a producing cause of the injury." To be relieved of liability, a carrier must show not only the occurrence of horseplay, but that the claimant was a voluntary participant in the horseplay which was a producing cause of the injury. Texas Workers' Compensation Commission Appeal No. 971594, decided September 26, 1997. Whether claimant engaged in horseplay was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 992855, decided February 3, 2000.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of 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 or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

In this case, claimant testified that she was merely performing her job duties when Mr. H picked her up off the ground and twisted her back. In a written statement, Mr. H stated that he and claimant had been "playing around," that claimant had been pinching him, that he picked claimant up for just a moment, and that nothing was said when he put her down. Ms. K, who was an assistant manager, said that other employees told her about the incident and that claimant participated in "playing around" to pass the time. She said the employees said claimant told Mr. H to "stop it" and to put her down, but that claimant was laughing at the time. The hearing officer found the claimant credible in her assertions

that she did not willingly engage in horseplay with Mr. H. We conclude that the hearing officer's factual determination regarding horseplay is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain.

Carrier contends the hearing officer erred in excluding the testimony of Mr. H, which concerned whether claimant was injured and whether she participated in any horseplay. We have reviewed the record to ascertain whether any error in excluding this evidence was reasonably calculated to cause and probably did cause the rendition of an improper decision in this case. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ). Mr. H's testimony was preserved in a tape recorded bill of exceptions, and he did testify in this regard in front of the hearing officer. Having reviewed his testimony in response to the carrier's assertion of error, we conclude that a good portion of this testimony was cumulative of his written statement which was in evidence and that the exclusion of his testimony was not reasonably calculated to cause, and probably did not cause, the rendition of an improper decision.

Carrier contends the hearing officer erred in determining that claimant sustained a compensable low back injury. Carrier asserts that claimant was not credible and that she was not honest about prior back injuries. Claimant testified that she had gone to a doctor in April 1999 for back pain, but that she was treated for bowel dysfunction. She said the back pain she had after the incident with Mr. H is different than the back pain she was treated for in April 1999. An MRI report states that claimant has annular bulges at L3-4, L4-5, and L5-S1. We conclude that the hearing officer's determination that claimant sustained a compensable back injury is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain.

Carrier next challenges the sufficiency of the evidence to support the hearing officer's disability determination. The hearing officer determined that claimant had disability from _____, to the date of the CCH. The applicable standard of review and the law regarding disability are set forth in Texas Workers' Compensation Commission Appeal No. 950264, decided April 3, 1995. Claimant said that after her _____, injury, she had back pain and had difficulty working, and that her hours were cut back. She said the last day she tried to work was June 1, 1999. Claimant said she is unable to work and has not worked since because of back pain. In a June 2, 1999, medical report, Dr. S stated that claimant had decreased lumbar range of motion, decreased sensation and strength, that she needed therapy, and that her anticipated return to limited work was unknown. In a July 1999 functional capacity evaluation report, Dr. S stated that claimant is not capable of returning to the medium-duty work she had been doing and that she needs therapy. Claimant's testimony and the reports from Dr. S support the hearing officer's disability determination in this case. We will not substitute our judgment for the hearing officer's because her disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra.*

We affirm the hearing officer's decision and order.

Judy L. Stephens
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge