

APPEAL NO. 000207

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 January 3, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury on \_\_\_\_\_ (all dates are 1999 unless otherwise stated), and, because the claimant did not sustain a compensable injury, she did not have disability. The claimant appeals, urging that she met the burden of proving that she did sustain a compensable injury and that she has disability resulting from that injury. The respondent/cross-appellant (carrier) appealed, requesting that Finding of Fact No. 5 be rewritten and, subsequently, filed a response to claimant's appeal, stating that the hearing officer's decision is correct and should be affirmed.

DECISION

Affirmed as written.

Claimant was employed by (employer) and was assigned to assist in performing cleaning services in (store). Claimant normally worked from around 6:00 a.m. to 10:00 a.m. at the store performing various cleaning functions. Claimant testified that at about 7:30 or 8:00 a.m. on \_\_\_\_\_ she was cleaning the outside edge of an escalator with a dust mop. There was considerable testimony regarding how claimant was leaning over the rubber rail on her right side, dusting the outside of the escalator a few steps from the bottom when Mr. M, the store manager, turned on the escalator. Exactly what happened then is unclear. Claimant testified that when Mr. M turned on the escalator, it "threw [her] to the bottom [of the escalator]," that she was very shocked and surprised and that the next thing she remembered was that she was standing at the bottom of the escalator. Claimant contended that she was in severe pain, that "everything was hurting," that she injured her left leg, left hip, back, right shoulder, right arm, neck and right side of her body. It is unclear whether claimant fell on the floor or on the steps of the escalator or how she got to the bottom of the escalator. Both claimant and Mr. M agree that the escalator had glass sides. Mr. M, in a transcribed statement, said that he turned on the escalator that day at about 7:30 or 8:00 a.m. "with a key which is right next to the . . . down . . . escalator"; that he did not see claimant on the escalator before turning it on; that after turning the escalator on, he saw claimant; that he asked claimant "are you okay?"; and that claimant replied "yea, you turned the escalator on. I was right there." Mr. M, in the statement, said that he again asked claimant later in the day if she was okay and claimant said "I'm fine." Mr. M said that he would have seen claimant if she had been bent over the rail when he turned the escalator on because the escalator is "transparent." Mr. M said that claimant did not fall and that he was not aware that claimant was injured. Claimant testified that she was in severe pain at the time, that a coworker (whose statement was excluded as not having been exchanged) took her to the break room, gave her two aspirin and that she laid down on the sofa to calm herself. Claimant testified that she finished her shift lying down on the sofa; that she came to work the next day, \_\_\_\_\_, but was only able to do very light

work because of the severe pain; and that she came to work on \_\_\_\_\_, but was unable to finish work that day because of pain. Claimant said that she saw a neighborhood doctor a few days later, but no records or even that doctor's name is in evidence. Claimant subsequently sought treatment at a community health center (center) on August 25th.

A center record dated August 25th is in longhand and difficult to read, notes complaints of "pain in her lower abd area all the way to the back," that the escalator "threw her to the floor" and that claimant was "in obvious distress." X-rays taken on August 26th were unremarkable. Claimant was prescribed medication and she said that she was taken off work. Claimant subsequently began treating with Dr. N, who, in a report dated August 31st, recited the escalator incident which caused "her to fall 6-7 steps" and that claimant has had severe pain. Dr. N diagnosed a cervical sprain/strain, right shoulder internal derangement, right supraspinatous strain and "lumbar strain versus lumbar herniated nucleus pulposus." Dr. N took claimant off work and prescribed physical therapy (PT) three times a week. In a follow-up report dated September 28th, Dr. N notes continuing symptomatology but that claimant's neck pain and headaches "seem to be resolving." The diagnosis was the same as the August 31st report except that the "cervical strain [is] resolving." Claimant's PT program was to be continued. In a report dated November 10th, Dr. N requested an MRI to rule out lumbar disc herniation.

The hearing officer, in her Statement of the Evidence, summarized the claimant's testimony, carrier's contention, medical evidence and the differences between claimant's testimony and Mr. M's statement. The hearing officer commented:

Unfortunately, Claimant was an extremely poor historian and could give very few details of what happened and how the injury occurred. Claimant could not recall if she landed on the ground, but indicated that she recalls being on her feet. It is difficult to visualize how the speed of the escalator would be such that she would have been violently tossed. Claimant told Mr. M, at a meeting within several days, that was she jerked and her arm was hurt. There was insufficient evidence that Claimant could have been jerked so much as to lose consciousness or be so shook that she could not even mention that she was in severe pain. Claimant's testimony was not credible. The medical lacks credibility as well as it is based on Claimant's history of being thrown down, which does not appear to have happened. Claimant did not establish that she sustained any injury in the incident of \_\_\_\_\_.

Claimant, in her appeal, asserts that she "more than adequately described her body position at the critical time" and that she should be "commended for her honesty . . . that she does not recall how she got to the bottom of the escalator." Claimant contends that her testimony is supported by Mr. M's prompt inquiry whether she was okay and that she should not be required "to give biomechanical expert testimony of her physical motions." We have frequently noted that the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance

Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight 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). In this case, different inferences could be drawn from the evidence and the hearing officer, as the sole judge of the weight and credibility to be given the evidence, did not find claimant's testimony credible.

On the issue of disability, the hearing officer found that because claimant did not have a compensable injury, claimant by definition in Section 401.011(16) cannot have disability. In that we are affirming the hearing officer's decision that claimant did not sustain a compensable injury, we also affirm the finding of no disability.

Carrier appeals the hearing officer's Finding of Fact No. 5 as not "coinciding with her statements and conclusion that claimant did not have a compensable injury and therefore does not have disability." Finding of Fact No. 5 states:

5. Due to the claimed injury, Claimant was unable to obtain and retain employment at wages equivalent to Claimant's pre-injury wage beginning on August 25, 1999 through the date of the hearing.

The hearing officer found that the escalator incident had "scared" and "jerked" claimant, but that claimant had not sustained a compensable injury. The hearing officer goes on to find that because of the "claimed [noncompensable] injury" claimant was unable to obtain and retain employment at her preinjury wage. We find that statement correct, supported by the evidence and not inconsistent with the rest of the hearing officer's decision. We see no need to rewrite that finding "to coincide with the decision."

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Judy L. Stephens  
Appeals Judge

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Dorian E. Ramirez  
Appeals Judge