

APPEAL NO. 000584

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 February 16, 2000. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that the claimant had disability as a result of her compensable injury from August 25, 1999, through the date of the hearing. The appellant (carrier) appeals, contending that those determinations are against the great weight of the evidence. In her response, the claimant urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, she was working as a courier for (employer) and that she had been so employed since April 20, 1999. She stated that her duties including driving a truck and picking up and delivering packages. She testified that on _____ she was driving her regular route, that she had made several pick-ups, that she was stepping into the truck with the packages in her hands, and that she developed burning pain in her right hip, low back pain and her right leg became numb. The claimant stated that she reported her injury to her employer on Monday, August 16th because her pain was getting worse such that she had difficulty completing the double shift she had been assigned to work that day.

The claimant stated that she went to Dr. S, D.C. on August 13th but he was not available to see her, so she received a massage from a massage therapist in his office. She was able to see Dr. S on August 17th at which time Dr. S referred her for a lumbar MRI to determine whether there was herniation. The claimant's August 19, 1999, lumbar MRI revealed a central and right paracentral herniation at L4-5 indenting the thecal sac and pressing on the right nerve root. On August 24, 1999, Dr. S released the claimant to light duty with a 20-pound lifting restriction. On August 24th the claimant returned to work but the employer assigned her to her regular duties, which the claimant maintained were not within her restrictions. The claimant stated that at the end of her shift on August 24th, she was called into the station and advised that the employer did not have a light-duty position for her. She stated that she has not worked since August 24th because of the injury to her back. Dr. S's records reflect that the claimant treated with him before her alleged _____, injury. Specifically, his records state that the claimant saw him on July 30th with complaints of right hip pain. In progress notes of August 3, 1999, Dr. S noted that the claimant "reports that condition resolved shortly after menstrual cycle ended." The claimant testified that the pain after the _____ injury at work was different than the pain she had on _____. She explained that her pain on _____ was in her right hip and that it resolved prior to _____. In addition, she stated that after _____, the pain was in her low back and that it radiated into both legs, right worse than left. On cross-examination, the claimant acknowledged that Dr. S's records do not include a history of her having injured her back at

work on _____. She testified that she told Dr. S about the injury and that she did not know why he did not include the history in his medical records.

The claimant changed treating doctors from Dr. S to Dr. R, D.C., who has diagnosed a "lumbar sprain resulting in radiculoneuropathy and myofascitis associated with muscle spasms, muscle weakness and decreased range of motion." Dr. R took the claimant off work at her August 30th appointment and had not released her to return to work as of the date of the hearing.

The carrier argues that insufficient evidence supports the hearing officer's determination that the claimant sustained a compensable injury on _____. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. 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 evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n 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. Generally, injury may be proven by the testimony of the claimant alone, if it is believed by the hearing officer. Gee v. Liberty Mut. Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). However, the testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Ins. Co. 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 or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier contends that the hearing officer's injury determination is against the great weight and preponderance of the evidence. In so arguing, the carrier stresses that the claimant began treating with Dr. S on July 30, 1999, prior to the alleged injury of _____ and that Dr. S's records do not reflect that the claimant had been injured at work. The carrier emphasized the same factors at the hearing that it emphasizes on appeal; however, the significance, or lack thereof, of those factors was a matter left to the discretion of the hearing officer as the fact finder. Our review of the record does not reveal that the hearing officer's determination that the claimant sustained a compensable injury is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool; Cain.

The carrier's disability argument is premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the hearing officer's injury determination, we likewise affirm her determination that the claimant had disability as a

result of her compensable injury from August 25, 1999, through the date of the hearing, February 16, 2000.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge