APPEAL NO. 000843

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 March 9, 2000. The record was held open until March 17, 2000. With regard to the issues before her, the hearing officer determined that the appellant (claimant) had not sustained a compensable injury on _____ (all dates are 1999 unless otherwise noted), and that claimant has not had disability.

The claimant appealed, contending that the hearing officer's recitation of the evidence was "distorted," repeating her explanation regarding her license and other testimony and contending that a witness' testimony "was prejudiced" and that the witness "does not have a clue about the physical aspects of the job." Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The appeals file does not contain a response from the respondent (carrier).

DECISION

Affirmed.

Many of the facts are in dispute and the parties, at the CCH, generally agreed that the case turned on the credibility of the witnesses. Claimant had been employed as a licensed vocational nurse (LVN) at employer's health care facility. Whether claimant was employed full time, as she testified, or PRN (as needed) as an employer witness testified, is in dispute, as is exactly how long claimant had been working. Claimant testified that she was working the "graveyard shift" (from 10:00 or 11:00 p.m. one day to 6:00 or 7:00 a.m. the next day) in the early morning hours of _____ and was assisting the charge nurse, Ms. M as a nurse's aide. Claimant testified that a large male patient (6' 2" tall, weighing 250 pounds) had soiled himself (from head to foot) and that she injured her low back lifting or assisting the patient out of bed. Ms. M testified that although claimant was working the shift as she claimed, the patient had not soiled himself as claimant testified, that the patient only required minimal assistance in getting into and out of bed and that she did not see claimant do any heavy lifting or injure herself. It is undisputed that claimant finished her shift. Whether claimant worked the next day or not is in dispute. In any event, claimant testified that she treated herself at home and that on the evening of_____, there was some sort of communication between claimant's husband and Ms. F, employer's then assistant director of nursing. Exactly what was said is in dispute but undisputed was the fact that claimant had asked to get off work that evening and that Ms. F communicated to claimant that it was too late to change the schedule and claimant would have to come in to work. Claimant testified that she did work on _____ but that she was still in pain and that she mentioned her injury to a coworker who helped her. (Neither party called the coworker.) The parties agree that claimant called in on Monday, November 1st and asked if she was scheduled to work that week and when she was told that she was not, claimant

reported her back injury. It was not clear whether this was in one telephone call or whether claimant was told she was not scheduled to work and then claimant called back a few minutes later to report her injury as carrier alleged. A friend of claimant testified that she was staying with claimant over the weekend in question, that claimant told her about lifting the large patient, that the friend loaned claimant the friend's TENS unit because of the back injury and the friend saw bruising on claimant's back caused by the back strain.

After claimant reported her injury, she was sent to Dr. W. Dr. W's handwritten progress notes of November 1st are largely illegible; however, a history of "helping a large unsteady resident" is noted with what appears to be a diagnosis of "acute lumbar strain." X-rays were essentially normal. Dr. W took claimant off work; however, Dr. W did not prescribe physical therapy as claimant requested and claimant subsequently began seeing Dr. D. In an undated "Initial Report" Dr. D recites the heavy patient lifting incident, the TENS unit therapy (provided by claimant's friend) and Dr. W's treatment. Dr. D diagnosed a lumbosacral strain/sprain and lumbar nerve root compression. Dr. D continued claimant off work. Chart notes beginning on November 16th through February 14, 2000, indicate continued complaints of low back pain, therapy three times a week, with some improvement noted on February 11 and 14, 2000.

The hearing officer, in her Summary of the Testimony, gives a detailed recitation of the testimony and in her Discussion comments:

> Since the evidence which supports Claimant's allegations in this case has come either directly from Claimant, herself, in the form that [sic] Claimant's testimony, or has come indirectly from Claimant in the form of her statements to other persons, including health care providers, Claimant's reliability as a witness in her own behalf is of paramount importance in determining which party should prevail in this case. Regrettably, Claimant failed to present herself as a sufficiently credible witness to support a decision in her favor, and it therefore appears appropriate to determine both issues presented for resolution in this Decision in Carrier's favor.
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> . . . . Furthermore, the Hearing Officer is not of the opinion that the evidence which supports Claimant's inability to work is reliable, since it necessarily was based, in large part, on Claimant's subjective complaints, which, as noted above, do not appear to constitute a reliable basis for a decision.

Claimant, in her appeal, basically reiterates her testimony at the CCH, seeks to explain what her friend said in her testimony, and argues her testimony is more credible than that of Ms. M and Ms. F. Claimant also gives further information which was not presented at the CCH and will not be considered here for the first time. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence

that he 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). 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 did not have a compensable injury, claimant cannot by definition have disability. Section 401.011(16).

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.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge