

APPEAL NO. 000919

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 April 6, 2000. With regard to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable back injury on _____ (all dates are 1999 unless otherwise noted), and that the claimant had disability from November 18th through December 5th. The appellant (carrier) appealed, challenging claimant's credibility and asserting that circumstances at the doctor's office and testimony that claimant injured himself moving furniture show that claimant had not sustained a work-related injury. Carrier also contends that the hearing officer erred by not allowing carrier to call a witness or grant a continuance to obtain certain witnesses' statements. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

Claimant was employed at (employer) where he did about everything except the baking. Claimant testified that on _____, a very busy day, he moved a large, heavy bucket (described as a five-gallon bucket) of icing out of the way of foot traffic and, as he did so, he felt a twinge in his back. Claimant said he thought "it was no big deal" and continued his work without mentioning the incident to the employer. Claimant said that he went home and his back proceeded to get progressively worse. Claimant testified that the next day, _____, he called his supervisor, Ms. DM, and told her he had hurt his back the previous day and that he was going to the doctor.

Claimant saw Dr. O on November 18th. Exactly what happened and the inferences drawn therefrom are subject to differing interpretations. Claimant testified that he told ("argued with") Dr. O that he had already told his employer about the injury, that he would pay for the doctor's visit, that Dr. O did not need to contact the employer, and that Dr. O found it unnecessary to document the visit "as an on-the-job injury." Claimant was later referred to a specialist but was unable to obtain treatment because he could not afford to pay for it.

The hearing officer's Statement of the Evidence has a detailed summary of the parties' argument and witnesses' testimony. In short, there were allegations that claimant had injured his back the prior week helping a friend (or roommate) move from (city) (claimant said he only drove a U-Haul truck and did no lifting). There was also testimony about an overheard conversation and testimony from a coworker that claimant admitted he injured his back while helping move. There was also conflicting testimony whether claimant was working the day or evening shift on _____. Very clearly this case revolved around the credibility of claimant and the various witnesses.

The medical evidence includes notations by Dr. O for a visit on November 18th where Dr. O diagnosed “low back strains” and prescribed Darvoset and pain medication (without mention of a work-related injury), notation of a follow-up visit on November 24th where Dr. O noted the Darvoset was not working and claimant refused x-rays, notation that claimant called on December 2nd “and stated it’s [the injury] work related,” and a prescription called in to the pharmacy on December 9th. In a separate note, Dr. O stated that claimant had been seen on November 18th and 24th, that claimant had been “advised see specialist,” and that “at no time did patient state that this was work related.” Claimant testified that he returned to work for another employer at a higher rate of pay on December 6th.

The hearing officer, in a discussion section, explained her reasoning in some detail. In part, that discussion stated:

Although it is somewhat incongruous for [Dr. O’s] records not to include a reference to the source of Claimant’s back injury, there is no reason not to accept Claimant’s explanation of this discrepancy, since, as noted above, Claimant gave credible testimony regarding the other matters relevant to this case.

* * * *

Since it appears that Claimant did sustain the compensable injury alleged, and since it further appears that such injury prevented Claimant from obtaining and retaining employment at wages equivalent to his preinjury wage for the time frame of November 18 to December 5, 1999, it is appropriate to decide in Claimant’s favor with respect to both issues presented for resolution in this case.

Carrier’s appeal emphasizes the “incongruity” regarding Dr. O’s records and the fact that Dr. O did not mention a work-related incident on either November 18th or 24th, testimony regarding claimant injuring his back moving furniture and generally attacks claimant’s credibility. Carrier also complains that it was denied a continuance and was prevented from contacting (via telephone) two witnesses who had given statements favorable to the claimant.

Two former coworker witnesses had given longhand statements generally favorable to claimant. Carrier requested that the proceedings be continued so that carrier could contact those witnesses. The hearing officer asked what carrier hoped to accomplish and carrier’s representative said that he wanted to ask the witnesses about their statements (*i.e.*, cross-examine them). The hearing officer replied that she believed that any such testimony would be cumulative and denied carrier’s request. We note that carrier apparently made no effort to obtain the telephone number and/or address prior to the CCH (by way of interrogatories, for example). We review the hearing officer’s ruling on an abuse

of discretion standard and, in this case, hold that the hearing officer had not abused her discretion.

As previously stated, this case revolves around the credibility of the witnesses and the inferences to be given to that testimony. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

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.

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:

Dorian E. Ramirez
Appeals Judge

Robert W. Potts
Appeals Judge