APPEAL NO. 000945

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 December 15, 1999. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No. 000052, decided February 23, 2000, remanded the case to the hearing officer to allow the appellant (claimant) to present rebuttal evidence. A hearing on remand was held on April 7, 2000. The hearing officer determined that the compensable injury sustained on _____, does not extend to the claimant's right shoulder, cervical spine, and lumbar spine; and that the claimant did not have disability from her injury. The claimant appealed, asserting once again as on the previous appeal that the hearing officer was biased against her. She urges that the decision is against the great weight and preponderance of the evidence. The respondent (carrier) responded that the evidence in the case supports the decision.

DECISION

We affirm the hearing officer's decision.

The facts recited in our previous decision are incorporated herein by reference. The claimant was employed by the (employer) and was assigned to a part-time custodial position at (a high school). The record indicated that on _____, she sustained an injury while transporting some computers on a dolly. A letter from the school nurse, Ms. R, stated that claimant presented at her office on _____ with a contusion on her upper right arm. Ms. R recommended claimant seek medical treatment and she refused. The account of the accident that was given to Ms. R was that the handle of the dolly hit claimant's upper arm. An accident report signed that day by claimant identified the upper right biceps area as injured and gave an account of the dolly hitting her arm but also stated in another part that the boxes fell on the claimant. As recited in our first decision, Ms. R testified similarly at the CCH.

The claimant continued to work, although she said it was light duty. The record indicated that in mid-June 1999 she began seeking a full-time position at the high school with the employer. She said she did so even though she did not feel well. She was not hired for a full-time position but was offered a part-time job on June 24th. She was terminated July 13, 1999, and said she found this out through another source three months after the accident (when she applied for food stamps). Although the claimant testified at the first CCH that she first sought medical attention on July 13th, she indicated on remand that she may have seen another doctor, Dr. T, before she saw Dr. M.

After this, claimant presented an off-work slip from Dr. M taking her off work from July 20th through July 31st for a torn right rotator cuff. An MRI of the right shoulder showed no torn rotator cuff and only mild degenerative changes. Claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on July 26, 1999, asserting that her right and left shoulders and her neck and her back

were injured. Dr. M's July 29, 1999, narrative report lists only the shoulders, although the ICD-9 codes for neck and lumbar strain are also included. The claimant asserted that she had been unable to work since July 13th.

The carrier presented live testimony from Ms. C, who testified at the first session of the CCH by telephone. This was apparently to rebut testimony offered by the claimant that Ms. C had on one occasion spoken sharply to her (although claimant also denied that there was discord between she and Ms. C). She said she was present when claimant was speaking with Ms. R on _____ about her injury. Ms. C said she spoke and understood Spanish as well as English and understood claimant to be reporting an upper arm injury only. (The claimant denied that Ms. C was in attendance during this interview.) Ms. C said that claimant was asked to seek medical treatment and declined, stating that she only had a bruise. Ms. C asserted that she was present because claimant was reporting an injury, and how serious the injury was would not be the reason she would attend.

On rebuttal during the remand, as the attorney for the claimant started to ask questions about the events of the day of the injury, the hearing officer cautioned the claimant that the hearing was convened for rebuttal, not to retry the case. The attorney for the claimant sought a "yes or no" answer to his question as to whether he would be permitted to ask a question as to how the accident happened. A debate ensued over the extent of questions that could be propounded (the time for such likely consuming more time than the questions). The attorney was advised to limit his questions as to the previous testimony of Ms. R. Claimant said she could not recall that testimony. However, she stated that she told Ms. R about all of her injured body parts, which included her chest, her arm, and her lower back. The claimant contended she was hit by the computers on the chest and fell.

We cannot agree with the assertions of bias by the hearing officer. While the hearing officer sought to limit the testimony to true rebuttal, rather than retrial of the matter, and he reacted firmly at times to somewhat combative replies of the claimant's attorney to, for example, a simple request for claimant's response to an objection made by the carrier's attorney, this was more in line with maintaining order in the CCH rather than animus against the claimant. The carrier's attorney was likewise instructed to stay within the parameters of rebuttal rather than retrial of the case in chief. In our assessment, the decision was influenced primarily by facts underlying the timing of the claimant's assertion of more broad injuries, and other evidence supporting a finding of a more limited injury on _____. As far as disability, the hearing officer is supported in his finding that the limited injury did not result in the inability of the claimant to perform work. The hearing officer did not find the claimant credible, and this was within his purview as sole judge of the weight and credibility of the evidence. We cannot agree that the decision he reached is either unsupported or against the great weight and preponderance of the evidence. The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would

support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

We affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge