APPEAL NO. 001413

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 May 11, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury and had disability. The appellant (carrier) appealed, urging that the determinations of the hearing officer were against the great weight and preponderance of the evidence, and, in the alternative, that the claimant had not established the connection or nexus between the claimant's work and her injury. The carrier requested that the Appeals Panel reverse the determinations of the hearing officer. The claimant responded that the hearing officer's decision was supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant testified that she had just begun training as an employee accounts/customer service representative for the employer on _____. She had previously worked in another division. The claimant related that she was assembled around a desk with her trainer and another trainee and that she needed to be closer to the computer screen so she moved her chair nearer to the other women which made for very tight quarters. She explained that the chair had wheels and the back of the chair leaned backwards and that when she sat back down the chair moved out from underneath her and she had to catch herself with her hands. When this movement occurred she heard her back "pop." The claimant testified that she reported her injury the same day, was sent to human resources to take care of the paperwork and then subsequently sought medical treatment with her family physician, Dr. M, who told her that he was unable to treat her until she obtained a claim number. The claimant stated that since Dr. M could not treat her she sought medical treatment with Dr. B.

Medical records from Dr. B's office reflect that the claimant presented on December 1, 1999, with complaints of lower back pain which occurred as the claimant "was getting situated in a chair when the chair went back and she went forward." A lumbar strain was diagnosed and an MRI performed on March 20, 2000, was interpreted by Dr. C as a 2-3 mm disc bulge at L4-5 and a 4 mm herniation touching the thecal sac but not causing spinal stenosis at L5-S1. The claimant was off duty until January 18, 2000, when she was returned to a four-hour workday by Dr. B with restrictions as to no lifting, bending, constant grasping, pulling, or pushing. The claimant testified that she returned to her regular duties and began a four-hour workday because sitting for eight hours hurt her back. The claimant was terminated on March 23, 2000, and she testified that she subsequently went back to work for four hours at a part-time job for another employer and was working the reduced hours per instruction of her treating doctor as of the date of the CCH. The claimant asserted she had disability from December 1, 1999, through the date of the CCH.

The carrier offered Ms. K as a witness who testified that she and the claimant were working together on _____, when she noticed out of the corner of her eye that the claimant had bent over in her chair to pick something off the ground. Ms. K stated that she turned her full attention to the computer screen and did not see what the claimant picked up from the floor but that she heard the claimant's back make a pop or the sound one makes when "you crack your knuckles" or are "twisting your back." Ms. K testified that she did not say anything to the claimant about what she heard until about 10 minutes later when the claimant told her that her back was hurting. Ms. K replied that she had heard the claimant's back make a popping sound. Ms. K expressed the opinion that the claimant was not happy about being transferred to the new job position.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained an 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 1989 Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). A claimant may meet her burden to establish an injury through the claimant's own testimony, if the hearing officer finds the testimony credible. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. The fact that an injury occurs on the employer's premises does not automatically mean that it is a compensable injury. Director, State Employees Workers' Comp. Div. v. Bush, 667 S.W.559 (Tex. App.-Dallas 1983, no writ).

The carrier asserts that the hearing officer erred in finding that the claimant sustained a compensable lower back injury on _____, because the facts fail to show the requisite nexus between the claimant's employment and her back injury, and because she fails to meet the requirements of the "positional risk" test.

Section 401.011(12) defines "course and scope of employment" to mean "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." We have previously rejected the argument that an injury arising from an activity that could also be experienced outside of work is, per se, noncompensable based on that fact alone. As we stated in Texas Workers' Compensation Commission Appeal No. 951736, decided December 7, 1995:

> In many, if not most, instances an accident could either occur at work or away from work, and, as a result, the fact that an accident could have occurred at some other location does not mean that an on-the-job injury becomes noncompensable under the positional risk test. In addition, the use of the word "would" by the Bratcher [Employers' Casualty Company v. Bratcher, 823 S.W. 2d 719 (Tex. App.-El Paso 1992, writ denied)] court in describing the "but for" test is indicative of the inevitability of the injury as opposed to the possibility that it could occur elsewhere. The purpose of the

> positional risk test is to ensure that there is some connection between the work and the risk of injury. That connection is present in this instance because claimant was at his regular duty station performing his work duties at the time of his injury. That is, the "employment brought the employee in contact with the risk that in fact caused his injuries." Bratcher, 823 S.W. 2d at 722 (citing Walters. v. American States Ins. Co., 654 S.W. 2d 423 (Tex. 1983)). Accordingly, we dismiss carrier's assertion that claimant's injury is noncompensable under the positional risk doctrine.

In this case, there is a connection, or nexus, between the claimant's work and her injury. Both the claimant and Ms. K testified that the claimant's injury occurred either while attempting to sit in a chair or while bending over in the chair trying to pick up something from the floor. The hearing officer chose to believe Ms. K that claimant was injured while sitting in a chair picking up the item. It was for the hearing officer to determine whether the activity that took place was part of the job and furthered the affairs and business of the employer to do so. Some activity occurred and the claimant was not merely "sitting in a chair" when the injury occurred.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994.

We do not conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We find the evidence sufficient to support the determination of the hearing officer that the claimant sustained a compensable injury on _____,

The carrier appeals the hearing officer's determination that the claimant had disability, asserting that the claimant did not sustain a compensable injury or establish that she was unable to obtain and retain employment at wages equivalent to her pre-injury wage. Given our affirmance of the hearing officer's determination that the claimant sustained a compensable injury on _____, the claimant could establish disability. The claimant testified that she was unable to work a full-time, eight-hour shift because it hurt to do so. Whether disability exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93560, decided August

19, 1993. We find the evidence sufficient to support the hearing officer's finding of disability.

The decision and order of the hearing officer are affirmed.

Kathleen C. Decker
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Robert W. Potts
Appeals Judge