APPEAL NO. 001530

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 25, 2000. With regard to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____ or _____ (all dates are 1999 unless otherwise noted), and did not have disability. The claimant appeals, contending that the respondent (carrier) failed to present any medical evidence or testimony "to rebut the **sound** and **credible**" evidence of the claimant and that the hearing officer "took it upon himself to render his **lay, nonprofessional medical version** and **interpretation**" of the evidence over a "professional medical practitioner who "has been in business over thirty (30) years." (Emphasis in the original.) The claimant requests that we reverse the hearing officer's decision and render a decision in her favor. The carrier responds, contending that the hearing officer is the sole judge of the weight and credibility of the evidence, and urges affirmance.

DECISION

Affirmed.

The claimant was employed as a shift supervisor/cook by the employer. The claimant testified that her shift was from about 3:00 a.m. to 11:30 a.m. and that at about 10:00 or 10:30 a.m. on _____, while lifting a heavy (40- to 50-pound) pan up to a table, she felt pain in her right shoulder, neck, and low back. Whether the claimant reported the injury that day is in dispute (however, notice is not an issue because it is undisputed that the claimant reported a work-related injury no later than October 12). The claimant testified that she finished her shift that day, that _____ and ___ were her days off, and that someone took her to (city) to visit friends. The claimant said her neck and shoulder pain continued to get worse and that she went to a hospital emergency room (ER) in (city) on October 11. Although there was testimony regarding the ER visit and alleged treatment, no ER records were offered by either party. The claimant returned to work on October 12 and testified that she worked her shift in pain and that after she got off work she went to see her regular family doctor, Dr. B. As subsequently discussed, Dr. B's report is in evidence. The claimant testified that she was unable to work on October 13 but returned to work on October 14 and continued to work until October 23 when the claimant was apparently suspended and subsequently terminated on October 24 due to an incident unrelated to the claimed injury. During this time, the claimant again drove to Houston on her days off. The claimant testified that she asked around and was referred to Dr. S, and that she saw Dr. S for the first time on October 26.

Dr. B's handwritten progress note of October 12 states:

Muscle spasm in neck. Reaction to meds?

> Patient started having neck pain on Saturday _____. Has worsened. Went to ER on 10-11-99. Received IV + Im medicine. Still c severe neck spasms on right. Heat no help.
>
> Gen NAD
> Neck. Muscle tightness on right side.

The carrier points out that nowhere does this note reference a work-related injury. The claimant received no other medical treatment until October 26, two days after she had been terminated. Dr. S, in his initial report dated October 26, notes the pan-lifting accident but only mentions neck and shoulder pain. Dr. S took the claimant off work on October 26 and has not released her to return to work. The October 26 report changes a social security number and at least one subsequent report has a handwritten change of the date of injury from _____ to _____. Dr. S, who testified at the CCH, had no explanation for the change other than it was a clerical or administrative error. Dr. S diagnosed a right shoulder injury, cervical strain/sprain, myostis/myalgia, and neuritis/neuralgia. Dr. S said that he started the claimant on "physical therapy, including massage, myofacial release, ultra sound and electric stimulation. And spinal manipulation" five days a week and after a month or so reduced treatments to three times a week continuing to the CCH. The claimant said that she continued to have pain and had good and bad days. Dr. S said the claimant was improving but had not reached maximum medical improvement. The carrier has apparently not requested a required medical examination but has paid all, or nearly all, of the medical expenses.

The hearing officer, in the discussion portion of his decision, stated that he did not find Dr. S's opinion "persuasive" because it was predicated on the history provided by the claimant. The hearing officer notes that Dr. S initially "neither referenced nor mentioned Claimant's lower back" but then, in his testimony, Dr. S "attempted to incorporate Claimant's lower back as being part of the alleged injury by stating Claimant reported lower back pain during her initial visit." Both the hearing officer, in the Statement of the Evidence, and the claimant, in her appeal, present a detailed recitation of the testimony and the evidence. The claimant's appeal emphasizes that the carrier presented no other testimony or medical evidence that contradicted the claimant and Dr. S and apparently requests us to reverse the hearing officer on a great weight and preponderance of the evidence basis.

The burden of proof is on the claimant to prove by a preponderance of the evidence that an injury occurred in the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 91028, decided October 23, 1991. While a claimant's testimony alone may be sufficient to prove a claim, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ); Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The hearing officer is not compelled to accept the testimony of the claimant as an interested witness. Lopez v. Associated Employers Insurance Company, 330 S.W.2d 522

(Tex. Civ. App.-San Antonio 1960, writ ref'd). Further, we have many times held that 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 of the weight and credibility that is to be given 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 hearing officer in this case obviously did not find the claimant's testimony persuasive. The hearing officer apparently considered that Dr. B's initial progress note made no mention of a work-related injury and that the claimant continued to work her regular duties until terminated and then sought treatment from Dr. S. The hearing officer found that the claimant had not sustained an injury, as defined in Section 401.011(26), and we have held that a fact finder is not bound by the testimony of a medical witness when the credibility of the testimony is manifestly dependent on the credibility of the information imparted to the witness by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). The hearing officer's decision that the claimant did not sustain a compensable injury is supported by sufficient evidence.

In that we are affirming the hearing officer's decision that the claimant has not sustained a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

Upon review of the record submitted, we find no reversible error. 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:

Alan C. Ernst
Appeals Judge

Philip F. O'Neill
Appeals Judge