APPEAL NO. 001556

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 22, 2000. The hearing officer determined that the appellant, who is the claimant, did not sustain a compensable injury on _____, and did not have disability.

The claimant has appealed and argues that the great weight and preponderance of the evidence is against the hearing officer's decision. The respondent (self-insured) responds that the decision is supported by the record. The self-insured recited evidence in favor of the decision.

DECISION

We affirm the hearing officer's decision.

The claimant was employed as a Secretary II by the self-insured. She said that she had been so employed since November 1999. The claimant said that, initially, her supervisor, Ms. H, had been very friendly but then it became apparent, for reasons that the claimant said she could not figure out, that Ms. H simply did not like her.

The claimant said that on _____, she was packing some boxes of client files for storage in a project that was done by the employer once a year. The claimant estimated that the full boxes weighed 100 pounds. She said that she lifted one box to hoist it on top of a stack and felt her back pop. The claimant said she felt a sensation like electricity radiating into her right leg. This was unwitnessed.

The claimant said she looked for Ms. H to report the accident but Ms. H was on the telephone. The claimant said it was around 2:00 p.m. when she reported the accident to Ms. H. Ms. H recommended a certain medical clinic. The claimant left early that day after making an appointment for the clinic, where she was seen the next day.

The claimant said she was seen by Dr. E, who examined her for about five minutes and then diagnosed a lumbar strain. The claimant said she was released back to light duty on February 9 but did not feel ready to return to work. She returned on February 10 and worked all day. She said that her regular job, for the most part, required twisting and bending that she would not be able to do.

The claimant said that she went to a clinic of her own choice on February 13 or 14. She was told that she had a lumbar strain but also leg dysthesia (numbness and altered sensation). She was taken off work entirely.

The claimant testified that she took pain medications and muscle relaxers; however, she agreed that she did not take them as frequently as prescribed due to her fears that she could develop a dependency and because they made her feel funny. The claimant was

asked what bothered her currently and she said that her shoulder and neck felt tight and seized up. This sensation went into her middle and lower back where she also had resulting pain. The claimant, who was 22 years old, maintained that there was no job she could currently perform due to her injury.

The claimant's treating doctor, Dr. R, stated that he had taken over the claimant's care from some colleagues. He said that he was not willing to release her to work or could not pronounce recovery and maximum medical improvement until a recommended myelogram was approved by the self-insured, assuming it showed no further problems. He felt that the cause of her right leg problems had not been fully explored. Dr. R agreed that EMG/nerve conduction testing and an MRI of the lumbar spine were both normal. His diagnosis was cervical, thoracic, and lumbar strain.

When asked by the hearing officer what the typical length of time would be for the effects of a strain, he was nonresponsive and would state only that in patients whose care he had handled and managed aggressively from the beginning, he would typically find recovery within six to eight weeks. Dr. R said that the claimant could not work at even a sedentary desk job. Dr. R said that the claimant was treated primarily with pain medication and physical therapy.

Two coworkers testified that on January 25, 2000, the claimant complained of neck and shoulder pain and said that she might require surgery "after all." The claimant explained that she complained of neck and back pain, never mentioned surgery, and later that day developed a fever that was subsequently diagnosed as the flu. The records of the claimant's family doctor, Dr. B, indicate that she was diagnosed with influenza on January 4, 2000.

The claimant denied any prior problems with her back, except for some pregnancy-related back pain in 1997. She said that a motor vehicle accident in a parking lot in mid-January did not result in any injury, just property damage. A signed statement from a friend who was the passenger in the car when the claimant had the accident said that there was no way that the collision could have caused injury to the claimant. The friend also stated that the claimant was currently "bedridden" due to the injury of February 7 and that her activities were curtailed.

Records of Dr. B from May 25, 1999, noted that the claimant "recently" had problems with right leg sciatica. The claimant denied that she had discussed anything other than her pregnancy-related symptoms and said that Dr. B would have to be asked about his definition of "recently." The claimant said that she had been prescribed a TENS unit for pain relief but this was denied by the self-insured. The claimant had joint custody of her three-year-old son with her ex-husband and she said she could not pick him up or care for him as she used to before the accident.

Ms. H testified that the claimant's job performance was poor and that she had listed 10 areas that required improvement. She said that the claimant and she met on January 10, 2000, to review these areas and she made it clear to the claimant that she would recommend termination unless there was improved performance. She said that some things were improved after this conference. The counseling sheet in evidence shows that the claimant refused to sign it. The claimant filed a complaint about Ms. H after the conference, asserting that the evaluation was unfair and that Ms. H was engaged in employee abuse.

The work performance deficits indicated on the counseling form had to do with rudeness toward staff and clients, a lack of phone skills, increased loss of faxed items to the main office, inconsistency in being on the job (late to work, early leaving for home, long lunches), unable to prioritize tasks, leaving tasks undone, reformatting forms although not asked to do so, or neglect of filling out leave slips. More specific examples, including names of persons complaining, are set forth in Ms. H's response to the complaint made against her.

Ms. H testified that the claimant had been instructed to pack files in boxes but under no circumstances to lift boxes. Ms. H stated that she did not believe that the claimant had been injured.

This case obviously presented conflicting evidence for the hearing officer to resolve and reconcile. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Tommy W. Lueders
Appeals Judge