APPEAL NO. 001779

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 July 11, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, and did not have disability. The claimant appealed, expressing her disagreement with these determinations. The respondent (carrier) replied that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a cashier at a convenience store. Her normal work hours were from 6:00 p.m. to 2:00 a.m. She testified that on Thursday, _____, shortly after her arrival at work, she was stocking beverages in the walk-in cooler. She said that numerous boxes were on the cooler floor and her job involved moving and lifting the boxes. After about two and one-half hours of this work, she said, she felt low back pain. She continued working her full shift that day. After the manager arrived at the store, she was returned to her normal cashier duties. She worked overtime the next day and was seen at an emergency room the following day. She was eventually diagnosed with lumbar herniation, which, she contends, she sustained as a result of the repetitive trauma of lifting and moving the boxes two days before. The claimant denied any prior history of back pain or injury, even though the records of Dr. H, the treating doctor, reflect complaints of low back pain as early as 1996. Ms. R, the store manager, testified that the shipments for storage in the cooler are only made on Tuesdays and Fridays, with some exceptions. She also said that there is generally very little lifting to do because she does not like to have boxes stacked on the floor. There was evidence from other coworkers that the claimant did not appear to be in pain after the alleged incident. The normal store surveillance videotape was not introduced into evidence, but an adjuster completed an affidavit, which was introduced into evidence without objection from the claimant, that the videotape showed the claimant bending over several times, squatting, and moving about on the day of the claimed injury.

The claimant had the burden of proving she sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so presented a question of fact which could be proved by the testimony of the claimant alone if deemed credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer commented that the claimant's testimony had "so many contradictions and variances with records and objective facts that it became extremely difficult to determine where reality was." Specifically, the hearing officer pointed out that the claimant claimed to be in extreme pain, but the surveillance videotape "gave no indication of this"; that she denied prior back problems, but had record of receiving chiropractic treatment for back problems years before the date of the claimed injury; and

that there was evidence that the store did not receive merchandise for stocking in the amount and quantify indicated by the claimant on the day of the claimed injury.

In her appeal of the determination, the claimant states that the videotape was not exchanged before the CCH and that she has never seen it. The carrier does not dispute this, but notes that the videotape was never offered into evidence. In evidence was an adjuster's affidavit about what was on the videotape. The claimant did not object to the admission of this document. There was no evidence that she asked to see the surveillance videotape either before or at the CCH. Under these circumstances, we perceive no error in the fact that she has not seen the videotape or in the admission of the account of what was contained in the videotape.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. He simply did not find the claimant credible in her assertion of a low back injury on _____, in the face of other evidence. 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.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge