

## APPEAL NO. 001900

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 18, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) did not injure her lower back in the course and scope of her employment on \_\_\_\_\_; that due to the claimed injury, the claimant was unable to obtain and retain employment at wages equivalent to her preinjury wages beginning October 16, 1997, and continuing through June 7, 1998; and that since the claimant did not sustain a compensable injury, she did not have disability. The claimant appealed; contended that the hearing officer based her determination that she, the claimant, was not injured in the course and scope of her employment on inaccurate information; urged that the evidence established that she was injured in the course and scope of her employment and had disability; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in her favor. The appellant/cross-respondent (self-insured) appealed the determination that because of the claimed injury the claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage beginning October 16, 1997, and continuing through June 8, 1998; urged that that determination is so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust; and requested that the Appeals Panel reverse that determination. The self-insured responded to the claimant's appeal, urged that the evidence is sufficient to support the determinations that the claimant was not injured in the course and scope of her employment and did not have disability, and requested that they be affirmed.

### DECISION

We reform one finding of fact and affirm the decision and the order of the hearing officer.

The Decision and Order of the hearing officer contains a statement of the evidence. The claimant contended that part of it is inaccurate. The two sentences that the claimant complains about have references to Claimant's Exhibit 2, Carrier's Exhibit 1, and Carrier's Exhibit 7. The two sentences may not be consistent with the testimony of the claimant; however, review of the two sentences and the referenced exhibits does not reveal that the sentences are inaccurate.

Briefly, the claimant contended that she injured her low back on \_\_\_\_\_, when she lifted some trays in a school cafeteria. She acknowledged that she had injured her back several times prior to that date, but stated that she "reaggravated" her back when she lifted the trays. She said that she went to Dr. B on October 20, 1997, and that he prescribed medication. She did not submit any medical records from Dr. B, but did submit three prescription containers with the date of October 20, 1997, on them. She testified that she changed to Dr. W on October 24, 1997, because his office was closer to her residence. On cross-examination she said that one reason she went to Dr. W was because the law firm representing her at the time recommended him. Medical records of Dr. W indicate that the claimant had low back pain radiating into her right leg; that she has

lumbosacral and cervical strain and posttraumatic depression; that she was unable to work; and that he requested an MRI. Some documents that include information about the lifting incident contain information that is not consistent with the testimony of the claimant at the hearing. The claimant testified that her disability from the claimed injury ended on July 8, 1998, because she was involved in another accident the next day.

We first address the determination that the claimant was not injured in the course and scope of her employment on \_\_\_\_\_. The burden 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. The testimony of the claimant alone may be sufficient to satisfy the burden of proof. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. 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). 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. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the 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. 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). In her statement of the evidence in her Decision and Order, the hearing officer stated that she did not find the claimant to be persuasive. An appeals level body is not a fact finder, and it 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). Only were we to conclude, which we do not in this case, that the hearing officer's determination that the claimant was not injured in the course and scope of her employment on \_\_\_\_\_, is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, would there be a sound basis to disturb that determination. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support that determination of the hearing officer, we will not substitute our judgment for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

We next address the determination that the claimant did not have disability. Disability means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id.* Since we have found the evidence to be sufficient to support the determination that the claimant did not sustain a compensable injury, the claimant cannot have disability.

Lastly, we address the determination that due to the claimed injury, the claimant was unable to obtain and retain employment at wages equivalent to her preinjury wages beginning October 16, 1997, and continuing through June 7, 1998. In its appeal, the carrier stated that the claimant's lower back was being treated at the time of the claimed injury, but she was able to work; that the hearing officer found that the claimant was not injured on \_\_\_\_\_, as alleged; and that the evidence does not support a finding that beginning October 16, 1997, and continuing through June 7, 1998, the claimant was unable to obtain and retain employment at wage equivalent to her preinjury wage. A report from Dr. W dated October 24, 1997, states that the claimant had low back pain and spasms and that she had been off work since \_\_\_\_\_. Later records from Dr. W state that the claimant had low back pain and was unable to return to work. The claimant testified that she did not claim disability after June 7, 1998, because she was injured in another accident on \_\_\_\_\_. The claimant did not appeal the finding that her inability to obtain and retain employment at wages equivalent to her preinjury wage ended on June 7, 1998. If injury in the course and scope of employment and disability are issues and a claimant sustained an injury, but a hearing officer determined that the injury was not sustained in the course and scope of employment; the hearing officer is encouraged to make a determination concerning the ability of the claimant to obtain and retain employment at wages equivalent to the preinjury wage because of the claimed injury. In the case before us, the only finding of fact concerning injury is "[t]he claimant did not sustain an injury to her lower back on \_\_\_\_\_, while working in the course and scope of her employment." There is not a finding of fact that specifically addresses whether the claimant was injured on \_\_\_\_\_; however, under the circumstances of the case before us, it appears that the hearing officer determined that the claimant did not injure her low back on that day. If the claimant did not injure her low back on that day, it is not apparent what caused her not to be able to obtain and retain employment at wages equivalent to her preinjury wage beginning October 16, 1997. But Dr. W reported that she was not able to work since \_\_\_\_\_. We have affirmed the determinations that the claimant did not sustain a compensable injury on \_\_\_\_\_, and did not have disability because she did not sustain a compensable injury: we reform the finding that "[d]ue to the claimed injury, the Claimant was unable to obtain and retain employment at wages equivalent to her preinjury wages beginning October 16, 1997 and continuing through June 7, 1998" deleting "[d]ue to the claimed injury" from it.

We affirm the decision and the order of the hearing officer.

---

Tommy W. Lueders  
Appeals Judge

CONCUR:

---

Elaine M. Chaney  
Appeals Judge

---

Kathleen C. Decker  
Appeals Judge