APPEAL NO. 001988

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 August 1, 2000. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that she had disability as a result of her compensable injury from April 28, 2000, through the date of the hearing. In its appeal, the appellant (self-insured) argues that the hearing officer's injury and disability determinations are against the great weight of the evidence. In the alternative, the self-insured contends that the hearing officer erred in resolving a disability issue because disability was not raised as an issue. The appeals file does not contain a response to the self-insured's appeal from the claimant.

DECISION

Affirmed.

Initially, we note, as did the self-insured, that the hearing officer incorrectly listed Findings of Fact Nos. 1.D. and 1.E., which address the issues of compensability and disability, as stipulations rather than as findings of fact, as was clearly intended. The self-insured stated that those errors were in the nature of a clerical error and we agree. Accordingly, Finding of Fact No. 1.D. will be renumbered as Finding of Fact No. 2 and Finding of Fact No. 1.E. will be renumbered as Finding of Fact No. 3.

The self-insured also contends that the hearing officer erred in resolving the disability issue, asserting that a disability issue was not before the hearing officer. This assertion is wholly without merit. While the hearing officer did not list disability as an issue in her decision and order, the benefit review conference (BRC) lists disability as an unresolved issue and the parties agreed at the hearing that both injury and disability were at issue. (Transcript p. 7).

The claimant testified that on _____, she was working as a bakery manager in one of the self-insured's grocery stores. She stated that she went to the freezer to get a pallet of products to bring to the bakery and unload. She stated that she was using a pallet jack to move the pallet; that as she was pulling the jack, the cardboard boxes began to shift and rock on the pallet; and that several boxes fell off of the pallet and struck her forehead and right ankle, knocking her to the ground on the floor of the freezer. The claimant stated that she reported the incident to Mr. A, the manager opening the store that morning, shortly after it happened. On cross-examination, the claimant acknowledged that she had only been back to work for 17 days at the time of her injury following surgery to repair a hernia; that she had already decided to leave her employment with the self-insured before her injury; that she had applied for benefits under the Family Medical Leave Act (FMLA) on March 29, 2000, and had not received those benefits; and that she made another application for FMLA benefits on June 6, 2000, and also did not receive those benefits.

The claimant contends that she sustained lacerations and contusions to her forehead and right ankle in the incident, as well as, injuries to her low back, neck, right hip, and both shoulders. She testified that she sought medical treatment at a clinic on the afternoon following her injury and was referred to the emergency room for treatment. Neither the records from the clinic nor the records from the emergency room were admitted in evidence. On April 28, 2000, the claimant sought medical treatment from Dr. K. Dr. K diagnosed lumbar muscle strain, bilateral shoulder contusions, right hip contusion, head contusion, posttraumatic cephalgia, right ankle contusion, and cervical strain. Dr. K took the claimant off work. The claimant continued to treat with Dr. K until May 4, 2000, and Dr. K continued the claimant in an off-work status. Thereafter the claimant changed treating doctors from Dr. K to Dr. B. On May 9, 2000, the claimant had her initial appointment with Dr. B. Dr. B took the claimant off work at that appointment and has kept her off work through the date of the hearing. Dr. B has diagnosed cervical and lumbar disc injuries, right ankle dysfunction, and right hip dysfunction. On June 1, 2000, the claimant had lumbar and cervical MRIs, which revealed a 2mm posterior central disc herniation at L5-S1 and a 2mm anterior disc herniation at C5-6.

Mr. A testified that the claimant told him that the claimant reported her alleged injury to him; that she told him that it was "no big deal"; that she told him some boxes fell off the pallet and struck her forehead and right ankle; that he saw an abrasion on the claimant's forehead; and that the claimant did not ask to see a doctor following her injury. Finally, Mr. A stated that he spoke to the claimant a couple of weeks after the incident and she said that she would not be in to work because of a migraine headache, which was the result of the _____, incident and that she did not mention that she had injuries to her low back, neck, right ankle, right hip, and both shoulders at that time.

The claimant had the burden to prove that she sustained a compensable injury and that she had disability as a result of her compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Those issues presented questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence, decides what weight to give to the evidence, and determines what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

On appeal, the carrier contends that the hearing officer's injury and disability determinations are against the great weight of the evidence, emphasizing the factors it believes diminish the credibility of the claimant's testimony and the other evidence offered in support of her claim. The carrier emphasized the same factors at the hearing, and the

significance, or lack thereof, of those factors was a matter left to the discretion of the hearing officer. The hearing officer's determinations that the claimant sustained a compensable injury and that she had disability are sufficiently supported by the claimant's testimony and the medical evidence from Dr. K and Dr. B, who both took the claimant off work. Our review of the record does not demonstrate that those determinations are so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse the hearing officer's injury and disability determinations on appeal. Pool; Cain.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge