

APPEAL NO. 002256

Following a contested case hearing held on September 7, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the respondent (claimant) had sustained a compensable injury and had disability resulting from the injury. The appellant (carrier) appealed the hearing officer's decision, asserting that the hearing officer had abused her discretion in finding good cause for allowing Mr. R to testify over objection and that the hearing officer's determinations that the claimant had sustained a compensable injury on _____, and had disability resulting from that injury were against the great weight and preponderance of the evidence. The claimant did not file a response to the carrier's appeal.

DECISION

Affirmed.

The claimant worked as a cook for (employer) and testified that she had sustained an injury on the evening of _____, when she turned to go check the front door of the restaurant at closing time. The carrier presented evidence from the claimant's manager, Ms. H, that the claimant was not working at night on the date of the injury. Ms. H testified that she did not work on _____, and was basing her testimony on the schedules drafted for the restaurant for that day. The claimant testified that two employees had been fired on _____, and that the schedule presented into evidence was incorrect. Carrier also presented the testimony of Ms. L. Ms. L testified that when she talked to Ms. H, Ms. H advised her that she had heard through the grapevine that the claimant had been injured, but that the claimant had not reported an injury to her.

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 an injury, 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. 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. In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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 determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). The hearing officer found the claimant's testimony to be more credible than that of Ms. H. Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for hers. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

It is noted that Mr. R was called to testify after the claimant had completed her testimony. Mr. R's testimony confirmed some of the information provided by the claimant, including that he had taken the claimant to work on the afternoon of _____, and had dropped the claimant off at a grocery store near the restaurant in order to avoid a possible confrontation with one of the claimant's coworkers who was also the daughter of Mr. R's former girlfriend. Mr. R had not been timely identified as a person with knowledge, although the claimant knew of him and was aware of the testimony he could provide. The claimant asserted that although Mr. R was known to be a person with knowledge at all times, she only identified Mr. R as a possible witness as soon as she determined that he could appear to testify. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c)(1)(D) (Rule 142.13(c)(1)(D)) requires that the identity of witnesses known to have knowledge of relevant facts be disclosed. We agree that the hearing officer abused her discretion in allowing Mr. R's testimony over the carrier's objection.

To obtain reversal of a decision based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion, and then show that the error was reasonably calculated to cause, and probably did cause, the rendition of an improper decision. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; see *also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Although the hearing officer stated in her decision that the claimant relied on Mr. R's testimony, it is noted that the carrier's witnesses testified that they relied on the schedule in testifying that the claimant would not have been at work on the evening of _____. Neither Ms. H nor Ms. L were present at the restaurant on December 26, nor could either witness affirmatively testify that the schedule was correct. The carrier failed to present any other evidence which tended to establish who worked at the restaurant on December 26, who did not, and what schedules were actually worked on that date. While Mr. R's testimony corroborated the claimant's, the carrier failed to show that the hearing officer's allowance of the testimony was reasonably calculated to cause, and probably did cause, the rendition of an improper decision. This is especially true in light of the hearing officer's determination that the claimant's first-hand evidence regarding her schedule on _____, was more credible than the second-hand information provided by Ms. H and Ms. L.

The determinations of the hearing officer were supported by the evidence presented. We affirm the decision and order of the hearing officer.

Kenneth A. Huchton
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Judy L. Stephens
Appeals Judge