

APPEAL NO. 040713
FILED MAY 24, 2004

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 March 1, 2004. The hearing officer determined that the respondent (claimant) sustained a compensable low back injury on _____, and that the claimant had disability from January 17 through February 16, 2003, and from March 26 through April 17, 2003. The periods of disability have not been appealed.

The appellant (referred to as the self-insured or employer as appropriate) appeals, contending that the claimant was not in the course and scope of his employment (Section 401.011(12)) at the time he sustained his injury, that the bookstore (where the claimant was injured) was independent from the employer, and that the claimant had not been directed by the employer's administrative assistant, Ms. O, to assist in setting up the bookstore with whatever was needed. Attached to the self-insured's appeal as Exhibit A is an affidavit from Ms. O. The claimant responds, urging affirmance and that the self-insured's Exhibit A should not be considered.

DECISION

Affirmed.

First in dealing with the affidavit attached with the self-insured's appeal, the Appeals Panel has long held that we generally do not consider evidence raised for the first time on appeal citing the standard set out in Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We are cognizant that it is the self-insured's position that the affidavit was newly discovered evidence in that the claimant for the first time at the CCH asserted that he had been directed to assist in the bookstore by Ms. O, a fact Ms. O denies in her affidavit. We further note that Ms. O, in her affidavit refers to the bookstore as "the [Community College] Bookstore . . . at the [Community College]." Under the circumstances we cannot agree that this affidavit is so material that it would probably produce a different result, which would require a remand. Therefore we decline to consider Ms. O's affidavit or order a remand.

On the merits, the claimant, a custodian at the employer's facility, testified and an exhibit confirms, that he was directed to assist "to set up the room that our bookstore uses to serve our students" (Carrier's Exhibit No. 8, a statement from the employer's coordinator). The claimant believed that direction included loading/unloading boxes of books from a dolly. The claimant injured his back moving a box of books. It is the self-insured's position that "to set up the room" was limited to setting up tables and cleaning the area. The hearing officer commented that "the question of whether Claimant was directed [to help load/unload the books] is a question of fact" and that the "credible evidence established that Claimant was so directed to assist the bookstore personnel and that moving boxes of books was reasonably understood to be included in the

assistance to be rendered.” The hearing officer’s determinations are supported by the evidence.

Conflicting evidence was presented at the hearing on the disputed issues in this case. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. It is the hearing officer’s prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Nothing in our review of the record indicates that the hearing officer’s decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer’s decision and order are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**DR. SR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Margaret L. Turner
Appeals Judge