APPEAL NO. 950212

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 (CCH) was held in (city), Texas, on January 23, 1995, with (hearing officer) presiding as hearing officer. With respect to the three issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on (date of injury); that the claimant did not timely report the claimed injury to the employer and did not have good cause for failing timely to report the injury; and that the claimant did not sustain disability. The claimant filed five letters, four of which are timely to be considered as appeals, which we treat as a challenge to the sufficiency of the evidence to support the determinations of the hearing officer, a statement that she did not receive adequate assistance from the ombudsman, and a request that the decision of the hearing officer should be reversed and remanded so that the hearing officer could subpoena witnesses. The respondent, a certified self-insured (self-insured), responded that the evidence is sufficient to support the determinations of the hearing officer, that the record clearly does not support inadequate assistance by the ombudsman, and that the question of subpoenaing witnesses was not raised at the hearing and is raised for the first time on appeal.

DECISION

We affirm.

The claimant testified that she worked for the self-insured as a stocker on (date of injury), when she wedged her foot between wooden slats on a pallet and fell injuring her right foot and low back. She said that she reported her injury to (Mr. K), her supervisor, who told her that he would write it up. She said that she also reported the injury to (L), whose last name she does not know, but who worked in the office of the self-insured. She testified that she missed work the next two days because of the injuries, but did not seek medical attention until February 12, 1994. She testified that she had worked with pneumonia, bronchitis, laryngitis, abnormal vaginal bleeding, and her injury until she could no longer work and quit work on February 23, 1994. She said that in 1991 she hurt her back, hip, leg, shoulder, and head working at a nursing home. She also testified that she fractured a vertebrae in her low back and hurt her head in an automobile accident on(date). She said that she now has a bulging wedge disc and vaginal bleeding that she did not have prior to her fall on (date of injury).

The claimant introduced four exhibits that are medical records. A medical report from (Dr. M), dated March 21, 1994, states that the claimant had chronic back pain in the past, that she reinjured her back while working at the self-insured, that his impression is lumbar spine sprain. In a report dated April 21, 1994, (Dr. F) reported that after the claimant's injury at the nursing home on July 13, 1991, the claimant was unable to work until November 1993 when she went to work for the self-insured; that her back pain worsened with exertion and she had to quit work in February 1994; that he believes that her back problems stem entirely from muscular spasm and strain in her lower back region; that she

has gone to physical therapy and refuses to do home exercises because of increased pain; that she has multiple other complaints; that she clearly has an extreme amount of anxiety, frustration, and anger regarding her medical condition; and that he believes that comprehensive care in a pain clinic including behavioral modification, aggressive physical therapy, and medications will be required. She introduced medical records from her 1993 accident to show that she sustained a fracture of the lower anterior margin of the body of L1. A report from (Dr. S), dated June 1, 1994, contains the following:

> Anterior wedging of the L1 vertebral body, with herniation of L1/2 disc material into the inferior aspects of the L1 vertebral body. There is also mild posterior annular bulging of that disc. These findings were not present on the prior 1991 study, and likely represent a prior remote wedge compression injury.

The self-insured called Mr. K who testified that on (date of injury), he was assistant manager at a store owned by the self-insured; that he was the claimant's supervisor; that the claimant never reported an accident to him, and that if she had mentioned an accident he would have filed an accident report. On cross-examination he testified that in December 1993 the claimant said that she would be slow because she was having problems with her back. He said that it could possibly have been in January, but the way he remembers it was before the new year. The self-insured introduced a return to work certificate dated February 12, 1994, that indicates that the claimant has bronchitis and can return to work on February 15, 1994, and an emergency room record dated February 15, 1994, that indicates that the claimant had upper respiratory infection and anxiety reaction. Neither document mentions back problems.

The burden of proof 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. 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 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). 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. 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 determinations were 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 those determinations. 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 the determinations of the hearing officer that the claimant did not sustain a compensable injury on (date of injury), that she did not timely report her claimed injury, and that she did not have good cause for not timely reporting her claimed injury; we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination that the claimant did not sustain a compensable injury, she cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

As a general rule the Appeals Panel considers only the record developed at the CCH, the request for review, and the response to the request for review. Section 410.203(a); Texas Workers' Compensation Commission Appeal No. 91121, decided February 3, 1992. The record of the CCH does not reveal that failure to subpoena witnesses was raised at the hearing, and it will not be considered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992. Also the record of the CCH does not indicate inadequate assistance by the ombudsman. Other assertions of the claimant made in the appeal, but not specifically discussed in this decision, were considered and none constitutes reversible error.

Finding the determinations of the hearing officer to be supported by sufficient evidence and no reversible error, we affirm.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge