APPEAL NO. 950406

The appeal arises under the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq.* (1989 Act). On January 20, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues were:

(1)Did the claimant sustain a compensable injury on (date of injury);

(2)Is the prior injury the sole cause of the claimant's current condition;

(3)Did the claimant have disability from October 6, 1994, to the present resulting from the injury sustained on (date of injury)?

The hearing officer determined that claimant had sustained a compensable back injury on (date of injury) (all dates are 1994 unless otherwise noted), that a prior (month year) back injury was not the sole cause of claimant's condition on or after (date of injury), but that claimant did not have any disability as the result of her compensable injury. Appellant, (claimant) contends, in essence, as we understand it, that since she had a compensable injury and her condition was not the result of a prior injury, claimant must therefore have disability as verified by the treating doctor. Claimant requests that "[h]uman decency and judicial fairness demands a reversal" of the hearing officer's decision. Respondent (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant was employed as an "E & S agent" (equipment and sanitation worker cleaning equipment and dishes) for (employer), the employer, a firm that catered food for airlines. Claimant testified that she had sustained a noncompensable back injury when she bent over at a convenience store in (month). She saw a doctor once for that injury and testified that the pain from that injury had resolved. Based on what claimant had told employer when she was hired in April, claimant may also have sustained another noncompensable back injury at some prior time. Employer had a "strike" or demerit plan where absences and tardiness were assessed certain points, with 10 points during a rolling twelve month period leading to termination of employment. By mid (month), five and half months after her employment, claimant had already accumulated 8½ points and had been counseled verbally, and in writing, a number of times. Claimant testified that on (date of injury) as she was picking up a bag of soiled linens she "strained [her] back." Claimant testified that the injury occurred around 2:30 or 3:00 a.m. and that she immediately reported the injury to her supervisor. Claimant testified that she was released to go home early. (Claimant worked from 8:30 p.m. to 5:00 a.m.) Later that day (or "the next morning") the employer sent claimant to its on-site medical clinic where claimant was examined, diagnosed as having a "lumbar strain," given medications and returned to modified duty on

(date of injury) with instructions to return on October 7th. Claimant testified that she returned to work that day (apparently at 8:30 p.m. on (date of injury)) but left early because of back pain. Claimant also testified that she thought that she again went to work "the following day" but again left early because of back pain. Thereafter, claimant did not go back to work but "called in and stayed at home." Claimant consulted an attorney on October 6th and the attorney referred claimant to (Dr. G). Claimant did not return to the clinic as she had been instructed.

Employer's human resources director testified that the employer had a light work program which consisted of either removing small plastic dishes, used to serve airline meals, from the dishwasher and stacking them, or filling salt and pepper shakers used in first class meals. Claimant was terminated on October 7th for having accumulated more than 10 points on employer's "strike" or demerit plan. Claimant testified that she is presently unable to work because of back pain.

The medical evidence includes a radiology report of claimant's lumbar spine dated October 6th showing "significant scoliosis." A report dated October 8th from Dr. G gives a diagnosis of "Lumbar sciatica, possible herniated nucleus pulposus - Possible wrist sprain/carpal tunnel syndrome." The past history recites a cyst removal but makes no mention of prior back injuries. A report dated October 28th, records "continued low back pain" as well as "pain and numbness in her left hand." That report takes claimant "off work." A report dated December 2nd from Dr. G emphasizes pain in the left hand and records "her low back pain has also improved significantly." Claimant testified that only her back was injured in the (date of injury) incident. Dr. G diagnosed "carpal tunnel syndrome, lumbar sprain." Work status was "Not working." A report dated December 16th was essentially the same as the December 2nd report.

The hearing officer advised carrier that it had the burden of proof if it contended that claimant's condition was the result of the (month), or any other, injury. Carrier presented no evidence of sole cause other than to get claimant to admit to a (month) injury which claimant said was to a slightly different place in her back and which had resolved after one visit to another doctor.

The hearing officer concluded:

CONCLUSIONS OF LAW

3.On (date of injury), the claimant sustained a compensable back injury while in the course and scope of her employment with [employer].

4.The claimant has not had disability as a result of her compensable injury since October 6, 1994.

5.The prior (month year) back injury was not the sole cause of the claimant's condition on or after (date of injury).

Claimant appealed, vigorously disputing the hearing officer's determinations on disability, and arguing that since claimant prevailed on her injury claim, and on carrier's "counter claim" of sole cause, claimant clearly has disability as supported by Dr. G's medical reports. Claimant argues that we should give "merit to the opinions of specialized medical providers [i.e. Dr. G]."

Disability is defined in Section 401.011(16) as meaning "the inability because of a compensable injury to obtain and retain employment" at the preinjury wage. Claimant appears to be saying that every compensable injury, no matter how minor, must result in a disability provided that a doctor supports that theory. In this case the testimony was that employer offered claimant light duty of either taking small dishes out of a washer and stacking them or filling salt and pepper shakers. Claimant agreed she could do those tasks and those tasks could be done either standing or sitting. Because claimant failed to come to work and thereby apparently had more than 10 points for absenteeism, claimant was terminated. Whether claimant's inability to obtain and retain employment is due to the termination or the compensable injury was a question of fact for the hearing officer to resolve.

As claimant suggests, Section 401.165(a) makes the hearing officer the sole judge of the weight and credibility to be given to the evidence. While the testimony of a claimant alone can establish that an injury and disability occurred, Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989), a claimant's testimony only raises an issue of fact which may or may not be believed over other testimony and evidence. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer, in her statement of evidence, stated that "The credibility of witnesses played a significant part in sorting out the facts" and that in the hearing officer's opinion "the evidence failed to credibly demonstrate that this injury has caused claimant to suffer disability since October 6, 1994." We find sufficient evidence to support that statement, particularly as Dr. G appears to focus on claimant's hand condition, something claimant said was not related to the (date of injury) incident, as the primary medical condition that he was treating.

In any event, it is for the hearing officer, as the trier of fact, to resolve inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). While the claimant objects "that the discretion of the Hearing Officer can fill a Texas size watering tank," we believe that is what the statute mandates.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge