APPEAL NO. 980249
FILED MARCH 23, 1998

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 December 1, 1997, in (City), Texas, with (hearing officer) presiding as hearing officer. The record was closed on December 16, 1997. With respect to the disputed issues before her, the hearing officer determined that appellant (claimant) did not sustain an injury in the course and scope of her employment on _____ (all dates are 1996 unless otherwise noted), and that, since claimant had not sustained a compensable injury, claimant does not have disability. The hearing officer also determined that claimant had not made an election of remedies by filing for benefits under a group health and disability plan. The hearing officer's decision on election of remedies has not been appealed and therefore has become final pursuant to Section 410.169. The parties agreed on the average weekly wage.

Claimant appealed the hearing officer's decision on injury and disability, reiterating her position that she sustained a low back injury when she backed into an "electric pole" with her car and that her treating doctor's reports support certain periods of disability. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) urges affirmance.

DECISION

Affirmed.

Claimant was employed as a home health aide going to clients' homes to assist patients in bathing and cleaning. Claimant testified that on _____, after finishing at a client's home, she was backing out of the driveway and hit a telephone pole. Claimant's testimony on the circumstances of that accident is conflicting. Claimant testified both that she was backing out "pretty fast," that she swerved in order not to hit the client's car and that she was backing out into a "busy street." Claimant said that she continued her calls, went home after she had finished at about 12:30, "took two Tylenol and . . . went to sleep." Claimant said her back began to hurt sometime (when is not clear) that day. How much, if any, damage claimant's car sustained is not clear. Claimant said that some "old crud" or creosote had gotten on the bumper which either she or her husband had rubbed off. Claimant continued working and first saw a doctor for her injury, on December 16th when her family doctor referred her to Dr. M. Claimant testified that a coworker or assistant manager asked her what was wrong on December 22nd or 23rd. It is undisputed that claimant reported her accident and injury to her direct supervisor on December 26th.

In a progress note dated December 16th, Dr. M notes he saw claimant "in reference to low back pain," which claimant has been experiencing "for approximately

three months." There is no mention of hitting a telephone pole. In a subsequent report dated August 7, 1997, Dr. M states that the reference to three months in his December 16th progress note was a transcription error which should have read three weeks. Other progress notes dated January 2, 9, 16, 23, February 6, and March 19, 1997, make no mention of the accident of hitting the telephone pole until a progress note of May 22, 1997, which states:

> [Claimant] came into the office today to state that she recalls leaving a patient's home in November, 1996, and while attempting to avoid hitting another car, backed into a telephone pole. She recalls that it was at this time that her back pain began.

Similarly, an Initial Medical Report (TWCC-61) dated May 6, 1997, referencing claimant's January 2, 1997, office visit mentions that claimant "backed into a telephone pole while trying to avoid a parked vehicle." Also in evidence is a physical therapy evaluation dated December 26th, which notes a herniated disc at L5-S1 with a "Date of Onset: 10-22-96."

Claimant at the CCH initially denied any prior back injuries and Dr. M's initial progress note of December 16th notes "she has no previous back injury." Cross-examination established that claimant had prior back injury claims in 1980 and one or two more in 1987, at least one of which had been settled in a lump sum compromise settlement.

Claimant has had an MRI of the lumbar spine, lumbar milligram and "post-milligram CT of the lumbar spine." Dr. F, a referral doctor, in a report of April 15, 1997, refers to an injury "while driving her vehicle" and interprets the various tests as showing disc bulges at L4-5 and L5-S1, and "3 mm . . . protrusions . . . at L5-S1 [and] L4-5."

The hearing officer considered all of the evidence, commented that claimant "could not recall how fast she was traveling when she backed into the pole" and noted inconsistencies in claimant's testimony and "other evidence." The hearing officer remarks that the "issue of credibility played a pivotal role" and that this incident [hitting the telephone pole] occurred [but that] . . . the bigger question is whether this incident caused an injury to the Claimant's low back." The hearing officer determined claimant had not sustained an injury on _____ as she described. Claimant appealed, citing her testimony and Dr. M's reports.

The claimant has the burden to prove that she was injured in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). We have previously observed that entitlement to workers' compensation benefits does not arise out of accidents, but from compensable injuries. Texas Workers' Compensation Commission Appeal No. 92276, decided August 5, 1992. Whether claimant's back injury was caused by hitting the

telephone pole on _____ was a factual question to be resolved by the hearing officer. We have many times noted that the hearing officer is charged with the responsibility for resolving the conflicts and inconsistencies in the evidence, including the medical evidence. Texas Employers Insurance Association v. Campos , 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness, including the claimant, and could properly decide what weight she would assign to the other evidence before her. Campos, *supra.* While we have generally noted that injury and disability may be established by the testimony of the claimant alone, Texas Workers' Compensation Commission Appeal No. 931002, decided December 13, 1993, it is also well established that a hearing officer is not bound to accept the claimant's testimony at face value; rather, it only raises an issue of fact for the hearing officer to resolve. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). In this case, the hearing officer obviously considered all the evidence, noted some of the inconsistencies and determined that claimant had not been injured in bumping the telephone pole. Nothing in the record would lead us to concude that the great weight and preponderance of the evidence necessary to reverse a hearing officer's factual determinations is present in this case.

Upon review of the record submitted, we find not 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

Gary L. Kilgore
Appeals Judge