On February 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. Mr. C determined that the claimant, Mr. B, the appellant herein, did not sustain a compensable injury on (date of injury), in the course and scope of his employment as a truck driver with Affiliated Foods (employer), that he failed to give notice to his employer of injury within 30 days as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon's Supp. 1992) (1989 Act), and that he did not show good cause for failure to notify his employer within the statutory time frame.

The appellant asks that the decision be reviewed and reversed. Specifically, the appellant complains that the hearing officer has misapplied the law, or misconstrued the facts, in finding that appellant did not give notice to a supervisory employee, in finding that the senior truck driver who was with appellant when he was injured was not a supervisor, and that, alternatively, any failure to notify employer within 30 days was excused by a bona fide belief that the injury was not serious. Appellant also argues that the finding that appellant did not sustain an injury in the course and scope of employment was against the great weight and preponderance of the evidence.

DECISION

Finding no error in the findings and conclusions of the hearing officer, we affirm his decision.

Appellant worked as a truck driver for employer for approximately two weeks prior to his alleged injury. He stated that while driving a delivery run to 21 food stores in (city) Texas, on a rainy day, he slipped as he was unloading groceries from a trailer. He stated that to pull down the door of the wet trailer, one needed to pull a rope and jump to the ground. He said he slipped on the trailer and landed on his buttocks on the trailer, not

on the ground, on Friday, (date of injury). Appellant said he was not hanging onto the door handle. He could not recall the city where this occurred but stated that it may have occurred around noon. At the time, the other driver on the delivery route was (Mr. B), who had more seniority. Appellant testified that the route was established by employer, but that Mr. B was basically in charge during this run, and probably could have gotten him fired if he had done anything wrong. He stated that he reported his injury to Mr. B after it happened, and that Mr. B loaned him his back brace support. He stated that he went in the following week to get a back brace for himself. He says that he saw a (Ms. C), and her assistant (Ms. F) whom he asked for a back brace, and was told they were on order and asked to come in the next week. He stated at first that he did not report the injury to them, but on cross-examination indicated that he did not see them for the purpose of reporting his injury, but in fact told both women he had hurt his back.

The following week, he stated he returned to Ms. C's office, got a back brace, and again reported his injury. He was then asked by one of the women whether he had reported the injury to his supervisor (Mr. WB), and told him that he could lose his job if he did not. He stated that he immediately went to Mr. WB, who told him that if he filled out an injury report, he would have to go to the clinic, which would likely take him off work for 2-3 weeks. Because he did not consider the injury to be serious, and because he could not afford to lose that time from work, appellant stated that he did not complete an injury report at this time. Eventually, his back pain got so bad that he went to his dispatcher, (Mr. D) to report his injury on October 28, 1991. Appellant stated that he was working 120 hour weeks during this time.

Mr. B testified that appellant had reported to him during the September 13th run that he had fallen out of the trailer and injured his back. He said he loaned his back brace to appellant and told him to report the injury to his supervisor if it continued to bother him. However, Mr. B stated that he did not witness the accident, and that there was one occasion where he recalled seeing appellant hanging onto the door handle, with his feet on the ground. Mr. B stated that his previous statement given to the adjuster for respondent was based upon his recollection of another fall that occurred when another driver with him fell. He said that he initially didn't remember any injury associated with appellant, and acknowledged that appellant had contacted him after he gave the statement to the adjuster and came over to his house to discuss the injury for about an hour.

Testimony from Ms. C, Ms. F, and Mr. WB brought forth evidence that appellant had not, within anyone's recollection, reported his injury to a supervisor or to Ms. C prior to October 28th, that the company policy was to require reporting of all injuries, no matter how minor, and that reporting to a supervisor was required. Appellant's supervisors were described as Mr. WB or Mr. D for purposes of reporting an injury. Ms. C, the Employee Relations Manager in charge of filing and coordinating workers' compensation claims for the employer, noted that on a rare occasion when a supervisor couldn't be found, she would take a report of injury. In all other instances, Ms. C or Ms. F stated they would refer the employee back to his/her supervisor. Ms. C and Ms. F stated that back braces were ordered and issued as a safety device to all employees, and, although the first few had been given to those employees with prior back injuries, they were thereafter issued on a first-come-first-served basis, with no requirement that an employee be injured in order to receive one. They further stated that employer was in the course of issuing back braces to all employees, as ordered, around the time that appellant stated he came to Ms. C seeking a brace. Ms. F stated that she asked appellant if he reported his injury to his supervisor, when he initially reported it to her on October 28th. Mr. WB additionally noted that a two-person delivery situation usually involved a sleeping driver, and that although the senior driver might take the lead, it was the driver who was awake who controlled the situation at hand. He noted that the route was established before the drivers went out on the delivery route. Mr. WB said that the senior driver would have no power to hire, fire, or change the route.

Mr. F, who worked with appellant every day for two weeks following the alleged injury, stated that appellant never mentioned he had been hurt, and worked right with him, lifting weights that varied from 0-25 pounds, with no sign of problems or distress, and with no complaints that he could recall.

Although the benefit review conference notes that there were many medical reports considered by the benefit review officer in making his recommendation, none are in the record here. Appellant testified he saw a chiropractor prior to reporting his injury on October 28th but did not claim this on workers' compensation. Two work notices issued by (city) Industrial Health Center, the health care provider the claimant was referred to by the employer, stated that appellant was taken off work until seen further by a doctor, on both October 29 and November 1, 1991. Neither document contains a diagnosis of a physical condition or injury. The testimony of appellant was that he had not recovered from how he felt on October 10, 1991, the week when he identified that his severe pain began.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be

drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appellate-level body in reviewing and analyzing a "no evidence" point of error should and must consider only the evidence and reasonable inferences therefrom that support the trier of fact, and disregard inferences and evidence that are adverse to the determination. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. Civ. App.-Beaumont 1991, no writ). In reviewing a point of "insufficient evidence", if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Youngblood, *supra*. We do not substitute our judgment for that of hearing officer when, as here, his findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. Civ. App.- Texarkana 1989, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred within the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Although it is true that a claimant's testimony alone is sufficient to establish that an injury occurred, Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394, a claimant must link the contended physical injury to an event at the workplace. Johnson v. Employers' Reinsurance Corp. , 351 S.W.2d 936 (Tex. Civ. App.- Texarkana 1961, no writ). The trier of fact may chose to reconcile conflicting evidence about the injury against the claimant. *Id.*

Although the issue of notice is somewhat moot in light of the hearing officer's determination that a compensable injury did not occur, we will briefly respond to the points raised on notice by the appellant. The appellant argues that the rule concerning the employee's notice to the employer about injury, as found in Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE §122.1 (Rule 122.1) was interpreted by the commission to preclude the employer from denying that Mr. B, the senior truck driver, was not a supervisor. Appellant cites the rule adoption preamble as it appeared in the January 15, 1991 issue of the Texas Register, 16 Tex. Reg. 228. However, review of the entire preamble does not support the interpretation urged by appellant, but rather supports the interpretation of the facts reflected by the hearing officer's determination that Mr. B was not a supervisor.

In the preamble, one commentor wanted the proposed rule broadened to "allow the notice to be given to other designated employees of the employer." The commission disagreed with this suggestion, noting as basis for disagreement that the statute, Article 8308-5.01, required that the notice be given to employees holding a supervisory or management position. While the commission agreed that notice to lower level supervisors would satisfy this notice requirement, and that such language need not be added expressly to the rule, it is clear that the commission rejected the notion urged by appellant: that notice to another employee who might not actually "hold" a supervisory or management "position" with the company could nevertheless validate a 30-day notice. *See* Rule 122.1(c).

While we would agree that the employer in this case could not have insisted that valid notice could only have been given to Mr. WB, rather than Ms. C (who was also a manager),

it is clear that notice to a co-worker (Mr. B) who does not have status as either a manager or supervisor is not "notice" for purposes of Article 8308-5.01(c) or Rule 122.1. In determining whether an employee is a supervisor or manager, the trier of fact is certainly entitled to give great weight to the employer's testimony concerning its company's chain of command. We do not find that the hearing officer has erred on the law as argued by appellant.

On the issue of good cause, we would note that the determination of whether good cause exists for not timely reporting an injury is one for the trier of fact. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). In light of testimony that the employer required reporting of all injuries, regardless of severity, as well as Mr. B's statement that he told appellant to report his back injury to his supervisor, the hearing officer did not misapply the law by failing to find an exception for good cause.

On other matters raised by appellant, we find sufficient probative evidence supporting the hearing officer's decision and recitation of the facts in his summary of the case, and affirm his decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge