APPEAL NO. 92177

On January 10, 13 and March 31, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), appellant herein, had not sustained an injury in the course and scope of his employment as a construction worker with (employer).

The appellant asks that the decision be reviewed and reversed, arguing that the decision of the hearing officer was against the great weight and preponderance of the evidence presented at the hearings. The appellant complains that, although notice was not an issue in the case, the hearing officer appears to have based the decision in large part on the perceived failure of the appellant to notify his employer about the injury on the date it occurred. The respondent asks that the decision of the hearing officer be upheld.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

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. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon's Supp. 1992) (1989 Act). 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. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). 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. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in 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.). A claimant must link any contended physical injury to an event at the work place. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-1961, no writ). Although an accident does not have to be witnessed to be compensable, and the claimant's testimony alone may establish an the occurrence of an injury, Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989), the trier of fact is not required to accept the testimony of the claimant but may weigh it along with other evidence. Presley v. Royal Indemnity Insurance Co. , 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

Briefly, the appellant maintained that he injured his back on (date of injury), as he lifted buckets of cement stucco material onto a scaffold. Appellant testified that a coworker charged with loading the buckets let a fairly full bucket "drop" as appellant lifted it up on a rope, and that this motion jerked him such that he injured his back. Appellant testified that he was located on the fifth or sixth scaffold. He testified that he immediately exclaimed and

told his supervisor, (SC), who was on the scaffold with him, that he could not do the job any longer, and he went down off the scaffold. He stated that he was told by SC that if he wanted to keep his job, he had to continue working up on the scaffold. Appellant stated he climbed back and worked for another 15 minutes and then said he could not pull anymore. SC told him to sit down and take it easy so he went ahead and took his lunch break. After lunch, he contended that he was assigned to a lighter duty by SC, scooping wet stucco from a wheelbarrow to a scaffold. He later helped move the scaffold to a project across the street. Appellant went home at the regular time that night, but stated that he was unable to work the next day, and asked his wife to go get his paycheck and tell his boss that he was injured.

His paycheck was not ready, and appellant went in August 2, Friday, to get his check. He stated that he was terminated, and acknowledged that he had been counselled previously about being late, or absent, from work. He had been employed by employer since mid-June, 1991. He stated that he asked for a form from the company that would enable him to receive medical treatment, but did not get one. He indicated that he then called the main office of the employer and talked to (Mr. M), the company owner, who told him that the company would take care of his injury. He never heard anything back from Mr. M but thereafter went to the emergency room of a local hospital. Appellant went to the emergency room of the (Hospital) on August 7th. Appellant says that he was told he had a compressed vertebrae. Medical records from this facility indicate that appellant was treated on August 7, September 22, and November 10, 1991, for "musculoskeletal pain," "low back pain," and "chronic low back pain," respectively. According to the appellant's telephone bill, he made two calls to the Louisiana headquarters of employer on August 16, 1991.

Appellant testified that he called (BL), a project secretary, on August 1st to report his injury. He indicated that he received two paychecks from JL, the second of which was a final paycheck. He had not worked since the date of the alleged injury, nor had he tried to find work.

(JL), the job superintendent for employer, stated that the appellant came into the office on August 2, 1991, after being absent the day before, to get his check. He stated that appellant never mentioned an injury. JL affirmed that appellant was terminated as a result of a previously-given ultimatum regarding poor attendance and absenteeism. JL testified that appellant's wife came in around four or five days later to tell him that appellant had not come into work because he had been injured. JL responded instead that he had been fired, and appellant's wife seemed unaware of this. JL stated that he did not allow appellant's wife to complete an injury report because she was not the injured employee.

It should be noted that at the first hearing, JL testified that appellant's wife came in before appellant, and that appellant came into the office on Monday, August 5, but he amended his testimony at the March hearing. JL testified that a bucket of stucco material probably would weigh from 40 to 50 pounds and that the scaffold where appellant was working was two stories high, not five or six.

BL testified she was a secretary for the general contractor, not for the employer, and that her office handled paychecks but that a subcontractor's job injuries would not be reported to her. She stated that she did not know appellant and that she did not recall any telephone call from him. She stated that his wife came to the office about a week after he had been gone, looking for his paycheck.

Mr. M testified that he was first called by appellant in (State) about two to three weeks after appellant was terminated. He stated that appellant called to find out when his last date of work was, and mentioned that he had been hurt on that date. Mr. M stated that he called JL to inquire about the alleged injury and found out at this time that he had been terminated. Mr. M denied saying that appellant's medical treatment would be covered by the company, and said he advised appellant to report the alleged injury to JL.

SC stated that he worked on the scaffold with appellant on (date of injury), and that he could not recall any complaints from appellant about his back, or any incident in which appellant may have been jerked. He stated that the distance appellant had to raise the buckets was 10 feet, pulling straight up. SC said that other workers would help appellant by "passing" the bucket up to one level. He recalled that appellant was complaining because other workers weren't pulling the buckets up to the scaffold. SC stated that appellant stopped working shortly before lunch after stating that he would take a break. SC noted that appellant was pushing a wheelbarrow around that afternoon, and also helped dismantle the scaffold and move it to a site across the street. He denied that he had put appellant on any lighter duty work. SC stated that at the end of the work day, he observed appellant dancing and jumping around in the parking lot. When he asked appellant if he was supposed to be helping to reassemble the scaffold, appellant told him it was time to go.

Clearly, these statements and any inconsistencies between them are matters that were for the trier of fact to weigh. We disagree that the hearing officer has based his decision upon the failure of the appellant to give an immediate notice of injury, finding nothing in the discussion or the findings of fact or conclusions of law to indicate that this was a factor, let alone the primary factor, in the determination. There is sufficient evidence to support the decision of the hearing officer, which is not so against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust.

Accordingly, we 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