APPEAL NO. 92196

On March 30, 1992, a contested case hearing was held in (city), Texas, (hearing officer) presiding as hearing officer. At issue was whether the appellant, claimant below, sustained an injury in the course and scope of his employment on (date of injury). The hearing officer held that appellant failed to prove that the injury was sustained in the course and scope of employment, and denied all income and medical benefits under the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN., arts 8308-1.01 *et seq*. (Vernon Supp. 1992). Appellant asks that the decision be reversed and rendered with a finding that appellant did sustain an on-the-job injury on (date of injury). In the alternative, appellant asks that the decision below be reversed and remanded for a second proceeding.

DECISION

The hearing officer's decision was sufficiently supported by evidence of record and is affirmed.

Appellant raises two interrelated issues on appeal. First, he disputes the hearing officer's Finding of Fact No. 7, which states "[c]laimant was not injured on (date of injury), while working for the employer." He also disputes Conclusion of Law No. 2, which states "[t]he Claimant did not prove by a preponderance of the evidence that he sustained an injury during the course and scope of his employment on (date of injury)."

It is undisputed that appellant was employed by respondent, the (Employer 1), as a janitor beginning June 10, 1991, and was so employed on (date of injury). Respondent is a self-insured governmental entity. Beyond these facts, the hearing was essentially a swearing match between witnesses for each side. Appellant testified that he and a coworker, (Mr. C), were jointly operating a large carpet cleaning machine in a portable building at (Employer 2) on the morning of (date of injury). At the time of the alleged injury, appellant testified that Mr. C was pushing the machine and appellant was standing behind him holding the electric cord clear of the machine. Appellant testified that Mr. C fainted or blacked out and fell backward, that he caught Mr. C, and both men fell to the floor. Appellant said he rolled Mr. C off him, helped him up, and assisted him into a break room, where Mr. C blacked out again. Appellant said Mr. C asked him not to mention the incident, as he was afraid he would lose his job. No other employees witnessed the incident. Appellant contended that as a result of his fall he suffered injury to his right shoulder and back. In response to a question on cross-examination, appellant said he had not had back problems prior to the time he was employed with the school district.

Appellant did not report his injury that day, although he testified that he called the school principal on the afternoon of (date of injury) to verify that school employees would be released early because of the upcoming holiday. On cross-examination appellant said he reported back to work on (date) and worked a full day on that and every subsequent work day until August 8, 1991. On that date he reported the injury for the first time, after having seen a doctor on August 7, more than 30 days after the injury. He did not report the injury

before that time, he said, even though his shoulder and back were sore, until he was required to do more strenuous work that required moving furniture and lifting books, and because he had promised Mr. C that he would not. Admitted into evidence was a personnel document from the school district which required employees to report all on the job injuries immediately and which appellant acknowledged receiving.

Notices of disputed claim (TWCC-21) filed by respondent were made part of the record. Basically, these were based on new evidence indicating that the injury was preexisting and that claimant was not injured in the course and scope of his employment. On November 11, appellant filed an amended notice of injury, alleging an alternative ground of repetitious traumatic activity.

Also made part of the record were the reports filed by doctors who had examined appellant. The initial medical report showed x-rays had been taken, and the doctor opined that appellant had suffered a cervical/lumbar strain. Appellant was not released for work, pending a reevaluation in seven days. The next report, dated August 15, stated "[e]xam virtually unchanged with no obvious neurological signs. I feel he has had a soft tissue injury and strain to RUE and L-spine." It recommended physical therapy and gave an estimated return to work date of August 26. A report dated August 23 recommended continuing physiotherapy. It said appellant was told by his employer that no light work was available, so he felt he could not return to work August 26. A September 9 report noted "some limited movement in the right upper extremity, but this appears somewhat nonspecific." The doctor also said "I can't help but get the impression that he is exaggerating his symptomatology to some extent. Reflexes are brisk and symmetrical." With regard to the lumbar spine, the report said "normally aligned. He has limitation of forward flexion, although again this is equivocal. No motor weakness." The report recommended a bone scan and, if normal, orthopedic referral for a second opinion.

Following report of a normal bone scan, appellant was seen by a second doctor, who identified a huge subacromial spur and recommended an MRI scan, although he said appellant would require surgical intervention regardless of the outcome of the scan. The report of the MRI, dated October 1, also noted a prominent spur of the right shoulder. An October 7 report from the second doctor notes the MRI's showing of the spur which the doctor said he felt was preexisting. A November 11 statement from that doctor said he believed the preexisting condition was aggravated by the accident. A November 25 report from the same doctor noted some degenerative disc changes and recommended keeping appellant on disability for another month because of lack of light duty work. At the end of that time, the doctor anticipated appellant could be returned to full duty work. A final report dated January 8, 1992, released him to regular work on January 20.

Mr. C, who had limited use of the English language and was assisted by an interpreter, was called as a witness for respondent. He testified that he was using the machine with appellant on (date of injury), but that he did not black out or fall at that time or any other time. He testified that he became ill with breathing difficulties, and on (date) went

to a hospital where he remained for more than two weeks. He said he was diagnosed with pneumonia, although it was originally thought he might have tuberculosis. Appellant had testified on direct examination that he had been told Mr. C was in the hospital with tuberculosis and that appellant and other coworkers were sent to the health center for tuberculosis tests.

Mr. C further testified that he had worked for the school district for more than 10 years, and would have reported any accident. He said appellant had told him that he (appellant) had a back problem and could not do lifting.

Admitted into evidence over appellant's hearsay objection was an affidavit of another coworker, (Mr. E). The affidavit stated that in moving furniture out of a classroom appellant said his back was hurt and he couldn't lift a heavy desk. Mr. E's affidavit also said Mr. C had told him he did not pass out and that appellant had lied. The hearing officer noted in his decision that he had given the parties time to obtain additional evidence but that appellant did not try to depose Mr. E or get any additional evidence concerning his affidavit.

Based on all of the foregoing, the hearing officer found that the appellant failed to present sufficient credible evidence to sustain his burden of proof on the issue of injury. Article 8303-6.34(e) provides that the hearing officer is the sole judge of the relevancy and materiality of the evidence offered and of the weight and credibility to be given the evidence. As the finder of fact, he resolves conflicts in testimony and in the evidence. Burlesmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer's decision and order will be disturbed only if it is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.). We believe that the record below, even with its diametrically opposed testimony, contained sufficient evidence to allow the hearing officer to rule that the burden of proof was not met. We affirm.

_____
Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Robert W. Potts
Appeals Judge