APPEAL NO. 92228

On February 28, 1992, a contested case hearing was held in (city), Texas, with (hearing officer). presiding. The hearing officer determined that the claimant, (claimant), the appellant herein, had not sustained an injury to his back in the course and scope of his employment as an optician with (employer) on (date of injury). The record in the case was held open for a few days and closed on March 3, 1992. A decision was issued May 6, 1992, and forwarded on May 19, 1992 to the parties.

The appellant asks that the decision be reviewed and reversed, arguing, in essence, that the decision of the hearing officer was against the great weight and sufficiency of the evidence presented at the hearing. The appellant complains that evidence presented at the hearing and noted in the full statement of the evidence regarding reasons for his termination are not relevant to whether an injury occurred, and were presented merely to impeach his credibility. The appellant has described facts that he feels prove that he was injured on the job. The appellant finally complains, understandably, that the hearing officer took 67 days to issue his decision.

The respondent replies by pointing out the evidence that supports the hearing officer's decision.

DECISION

After reviewing the record, we find that there is sufficient evidence to support the determinations of the hearing officer and affirm his decision. It does not appear to us that the hearing officer based his determination upon any underlying allegations regarding the appellant's termination, but weighed the evidence concerning the claim itself and determined that the appellant had not proven a causal connection between any incident at work on (date of injury) and his back condition.

The hearing officer is the sole judge of the relevance and materiality, and 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). 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 activity arising out of the employment. 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 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); Whaley v. Transport Insurance Co., 559 S.W.2d 451 (Tex. Civ. App.- Tyler 1977, writ ref'd n.r.e.).

The facts were sharply disputed. At the time of the alleged incident, the appellant had worked as an optician for the employer for about a year and a half. Appellant stated that the accident happened at 11:40 a.m. on Thursday, (date of injury). A description of the workroom where the accident allegedly occurred was entered into the record through testimony, photographs, and a schematic drawing. The room is 14 feet by 10½ feet; however, counter-topped work cabinets encroach into the floor space, resulting in a floor area around 8 feet by 6 feet. The floor is a waxed tile surface, but carpet scraps are placed around the perimeter of the floor next to the cabinets. Before the alleged accident, appellant stated that he was working at a machine called an edger, facing one of the 10½ foot wide walls. The edger uses rinse water. The water is collected into a holding tank in the cabinets beneath the edger. On this date, appellant stated, the water had overflowed onto the floor and rugs.

Another optician, (Mr. HW), was working a crossword puzzle at the far end of a counter which ran along the adjacent 14 feet long wall. According to the evidence, he was

sitting on a stool, to the left of one of the entry doors, facing the wall, with the appellant located to his right back side.

Appellant stated that he shut off his machine, then got some cloths to wipe the floor. To do this, he exited the door on the wall opposite from his work station, right where Mr. HW was sitting on his stool. When he returned, appellant said that he squatted down to wipe the floor and, as he was doing this, his left leg slipped out from under him and he fell back onto his left buttock, catching himself with his left hand. His right leg slipped also but did not go out entirely from under him. He stated that he did not, to his recollection, make a thump, bump, or outcry. He stated he was embarrassed and, although he felt some pain, did not think his injury was serious at that time. Consequently, he never mentioned it to Mr. HW and, because his back faced toward Mr. HW, did not know whether or not Mr. HW saw him fall (although he surmised that he did not). Appellant left the room to dispose of the wet cloths. Each time he entered and exited, he passed right by Mr. HW.

Appellant worked the rest of the day. He went to work the next day, Friday, (date), although he had experienced leg and lower back pain the night before. He stated that he talked briefly to the owner, (Mr. P), when Mr. P called into the office from his vacation, but did not mention his injury to him. He said that on Friday, he told Mr. HW that he felt bad, although he did not describe the nature of his ailment, or its cause, to Mr. HW.

Appellant testified that he felt increasingly worse over the weekend, and stayed at home the entire time. By Monday, (date), appellant had trouble walking and standing, and called Mr. P. He stated that he told Mr. P he had been injured on Thursday at work, and had an appointment to see a doctor that morning. Appellant testified that Mr. P told him to call after he had seen the doctor. Appellant saw (Dr. B) that day. He states that he was diagnosed with sciatica and given cortisone medication, and put on one week bed rest. He called and talked to Mr. HW that afternoon to tell him he would not be at work, and then called Mr. P that night at his house. Mr. P had company and could not talk to him. The next morning, appellant said he called, spoke to Mr. P , and offered to take a week's vacation time. He stated that Mr. P's response was to fire him, with the given reason that he made unauthorized use of a prescription.

Regarding appellant's medical history, he stated that he had suffered a compression fracture in his lumbar area of the back in 1975, and has been treated for rheumatoid arthritis since 1986. Appellant said that he went for a CT scan at Dr. B's recommendation, but did not see Dr. B after the visit on (date). Appellant stated that he had a CT scan on December 13th. The next doctor he saw was (Dr. S), a neurosurgeon, on December 20th, and thereafter his wife, (Dr. RS), a neurologist. He states that Dr. S has told him he needs surgery. In between seeing Dr. B and Dr. S, appellant saw his regular doctor, (Dr. A), a rheumatologist, for his arthritis.

A December 19th letter from Dr. B to the respondent's claims department states that appellant was treated initially for sciatica, that he then had a CT scan which was reviewed

with Dr. B on November 22nd, and that he was subsequently referred to Dr. S. Dr. B's letter concludes with: "The question of whether this was really a work related injury: he claims he hurt his back on (date of injury) and apparently was terminated from his employment on (date)11/12/91, and did not notify employer of an injury until 11/22/91." Dr. S's December 13th letter to Dr. B indicates:

> Review of his plain CT scan of the lumbar spine reveals a herniated disc on the left at the L5-S1 and mild bilateral stenosis at L3-4. This CT, however, was read as unremarkable by radiology. My impression is that he has a possible L4 radiculopathy on the left of unknown etiology except for the possible lateral stenosis at L3-4. Additionally, he has a clear L1 radiculopathy on the left and what appears to be a L5-S1 herniated disc on plain CT scan.

Dr. S goes on to recommend further testing.

Concerning the highly disputed matter of the prescription, appellant indicated that the adjoining ophthalmologist, (Dr. BR), had earlier prescribed diet medication for his wife, and that Dr. BR's nurse, (Ms. L), had called in refills of this prescription. Appellant indicated that he called the pharmacy about a refill, and then spoke to Ms. L on (date) to tell her the pharmacy would be calling for authorization. Dr. BR testified that, although he had prescribed some skin rash medication for appellant, he had never prescribed nor authorized his nurse to refill any diet medication for appellant's wife, and never authorized appellant to use either his name or physician's number. However, an affidavit from Ms. L indicates that she had, on at least one occasion, called in a refill of diet medication for appellant that she understood was prescribed by another doctor. Ms. L also swore that on (date), appellant told her his back hurt him and that he thought it was a kidney problem. Appellant's attorney made continuing objection to evidence about the prescription as irrelevant to whether an injury occurred. The hearing officer agreed that the connection was tenuous but indicated he thought the testimony was being produced to compromise appellant's credibility based upon motivations for filing the asserted claim, and overruled the objection.

Mr. HW said that he was in the room at 11:40 a.m. on (date of injury), working a crossword puzzle. He stated that he did not see or hear appellant fall, nor did appellant walk past him to get cloths. Mr. HW stated that appellant would have been to his right and he felt he would have seen the movement of a fall even if he had been looking at his crossword puzzle. He stated that appellant was a big man, around 6 feet tall. Mr. HW said that appellant never complained about an injury that Thursday or next Friday. He said that, in the past, appellant had frequently talked about physical ailments or pains. He agreed that he talked to appellant on Monday afternoon. Mr. HW said appellant told him his back was hurt, and when Mr. HW asked how he hurt it, he told Mr. HW he did not know. Mr. HW said that the edger water overflowed around once a month.

Mr. P said that when he called the office from vacation on Friday, (date), he spoke briefly to appellant, who did not say he had been injured. Mr. P said that Monday morning,

appellant called him to say he had a 9:00 a.m. doctor's appointment because his back was hurting, but he did not say he had injured his back. Mr. P was not told, nor did he inquire further, about the nature or cause of appellant's hurt back. Mr. P said that appellant told him he would call after he saw the doctor, and that he talked to Mr. HW later that afternoon. Mr. P was telephoned that night at home by appellant, who said he "needed to talk to him." Mr. P did not talk because he had company. Mr. P agreed that he terminated appellant the next day relating to a prescription incident. Mr. P stated that he first knew that appellant was claiming he was injured on the job, on November 20th, when the local office of the Texas Workers' Compensation Commission asked him to file an employer's report of injury.

We agree with appellant that the circumstances of his termination were not the subject of the hearing. Although conformity to the formal rules of evidence is not necessary under Art. 8308-6.34(e) of the 1989 Act, they provide some guidance in contested case hearings. We would note, for example, that Texas Rules of Civil Evidence, Rule 608b generally precludes proof of specific acts of misconduct for purposes of attacking a witnesses' credibility, by showing that he would behave in the specific matter at hand in a manner consistent with past behavior. Thus, the reasons behind the termination would not be admissible, under the rules of evidence, for the purpose of showing that appellant was being untruthful about the facts of an injury. *See* Appeals Panel Decision No. 91065 (Docket No. redacted) decided December 16, 1991. The fact of the termination, however, may be relevant on the issue of whether a claim was motivated by such action. However, it does not appear that the hearing officer gave much, if any, weight to this evidence in his decision. It appears that the hearing officer considered the prescription matter for the limited purpose of whether the workers' compensation claim was filed in retaliation for appellant's termination. He decided this issue favorably to appellant, stating that there was evidence that appellant complained about his hurt back prior to his termination.

Statements and inconsistencies concerning the occurrence of an accident on (date of injury) are matters that were for the trier of fact to weigh. What appears to have weighed greatest in the hearing officer's determination was the lack of a connection of appellant's back injury to his employment; in essence, the hearing officer has stated that, although there is some evidence that appellant sustained an injury to his back at some time prior to (date), there is less than a preponderance of evidence that the injury happened on the job as related by the appellant. The hearing officer notes that neither Dr. B nor Dr. S gave the opinion that the injury occurred at work. He may have considered that Dr. B's treatment with anti-inflammatory cortisone drugs was consistent with appellant's arthritic condition. He also notes that persons who worked around appellant stated that he frequently discussed his physical ailments, and he inferred that appellant would likely have mentioned his pain from a slip-and-fall right away. Also, the hearing officer could have inferred that, given the size of the room, Mr. HW likely would have been aware of the matters appellant testified about. He may have inferred that, if the accident happened as stated by appellant, a fall of a few inches from a squatting position which caused no noise would not have been forceful enough to cause physical ailments eventually diagnosed a month after the appellant left his job.

Because the hearing officer was at the hearing, and had the opportunity to observe the parties, their demeanor, and assess their testimony, we will not substitute our judgment for that of the hearing officer unless the record indicates that the great weight and preponderance of the evidence is against his determination. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). There is sufficient probative evidence to support the

decision of the hearing officer, and it 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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Robert W. Potts
Appeals Judge