

APPEAL NO. 92253

On May 22, 1992, a contested case hearing was held in (city), Texas. The issue as certified by the benefit review officer and acknowledged by the parties as correct was whether respondent (claimant below) sustained an injury in the course and scope of her employment on _____. The hearing officer found for respondent, and this appeal ensued.

In its appeal, appellant (carrier below) alleges that the preponderance of the credible evidence shows that respondent was not injured in the course and scope of her employment on _____. Appellant refers to testimony controverting numerous parts of respondent's testimony. Appellant also notes that the only evidence corroborating respondent's testimony was a written, notarized statement of a coworker appellant characterized as a disgruntled former employee involuntarily terminated from his employment, and that allegations of a cover-up contained in the statement were unsupported by the evidence. Finally, appellant points out that no medical documentation of any kind was introduced to reflect either that respondent sought medical treatment at any time or that any physician formed a medical opinion that respondent suffered an injury.

DECISION

Finding no reversible error below, we affirm the decision of the hearing officer.

On _____, respondent was employed by (employer) as a housekeeper in an apartment complex, a position she had held for approximately nine months. Her job was to clean apartments after tenants had vacated them. On the day of injury, she entered an apartment, which she said she thought was Apartment (#), to clean it. She first cleaned the kitchen, which required pulling the stove away from the wall, then later went to clean the refrigerator. When she tried to move it so she could clean behind it, the refrigerator stuck so that she had to rock it back and forth to move it. She said she felt a sharp pain in her lower back, which occurred every time she tried to move the refrigerator. After cleaning, she had to move the refrigerator back into place. Later that day, when she was cleaning the bathroom of the apartment, she rose from a position on the floor and hit her head on the marble top of the bathroom sink.

Respondent said other employees were working in and around that apartment that day, including Mr. JP and Mr. RG. She said that most of the time she worked by herself on the job, but that more than one person worked together when there was a rush to get an apartment cleaned. She said she couldn't ask for help in moving the refrigerator; she was in apartments every day and couldn't always be telling her supervisor she needed help. She said she had been told by the manager and the assistant manager that she had to work by herself. Respondent said she was in a hurry to clean this apartment because she was under orders from the assistant manager, Ms. L, to finish the apartment that day. Respondent said she reported her injuries to both men who were working with

her on _____. The same day, she also informed her immediate supervisor, Mr. B, who she said told her that "the people in the main office don't want to hear anything about it." As she was leaving work, she mentioned her injuries to Ms. L, the assistant manager, who said to her, "Be careful, (claimant)." She said she did not report her injuries to Ms. P, the manager, because she was not there at the time.

Respondent worked the rest of that week (Thursday and Friday) and also the following week. On (2nd week following _____), she tried to get medical attention at the (Clinic) but because of the long wait she left before she could see a doctor. She said she called her husband from the clinic and asked him to phone her employer to say she was at the clinic and would not be at work. The next morning, as she was cleaning the manager's desk, she saw some papers indicating she was going to be terminated. At that point she became angry, left her keys and a note, and walked off the job. She did not mention her injuries in the note. She said she decided to file a workers' compensation claim after she went to a doctor because she "felt they did me wrong" by deciding to fire her.

Respondent ultimately saw a doctor at the clinic and was x-rayed and told she had muscle spasms and was given pain pills. She was given an MRI in April 1992 but she did not know the results. She said she was supposed to make an appointment for a spinal examination in June or July. She said she continues to experience pain in her back, head, neck, and right side, and that she has not worked since she left employer. No doctor's reports, test results, or any other medical information were introduced into evidence.

Admitted into evidence as an exhibit of respondent's was an affidavit of Mr. JP, respondent's coworker the day she was injured. The affidavit said Mr. JP had not actually seen the accident, but that respondent had told him that day she had injured her head and back and that he could see she was in pain. Mr. JP told respondent "to tell management about the accident, so they could be aware of it . . . I know for a fact that she told everybody about her accident. I was told by Ms. L, Assistant Manager, to say that I did not know anything, that it could jeopardize my job. All of the staff had a conference and Ms. L told us that if the insurance called or asked questions, to say that `we didn't know anything.'"

Ms. L, who on _____ was employer's assistant property manager, testified that respondent never reported any injury to her. She said company procedure was that employees were to report injuries to the property manager, who at that time was Ms. P, that an "incident report" was to be filled out, and that the employee was to be sent to the hospital. She said the first she heard of respondent's injury was in February or March of 1992. Ms. L said that Apartment (#) was scheduled to be occupied on March 29th, so there was no rush for it to be cleaned. She testified that respondent was the only cleaning person working for employer, but that she would be assisted by the "make-

ready" person. She said that as assistant manager it was not her job to instruct employees not to move appliances, but said that it was up to the employees to ask for help from other employees.

Ms. L said respondent was going to be terminated because of absenteeism and also because it was against company policy to have someone else call in for you except in cases of extreme emergency. She said Mr. JP had been terminated because he was injured on the job and was out for a period of time, and she had to replace him because they needed someone on the property to fill that job. When he was injured, she said, the employer's reporting procedures were followed, and he was now collecting workers' compensation benefits.

Mr. B testified that on _____ he was the outside supervisor at the apartment complex who oversaw the work to be done but who did not have the authority to hire or fire. He said he thought they were "working ahead" on apartment (#), which he said meant getting an apartment ready a week early, but that there was never any hurry to finish the apartments under those circumstances. He said respondent did not report any injury to him, nor had anyone else told him she had been injured. He said he had never discouraged her from reporting an injury. He saw respondent at work from time to time after _____ and said he did not observe any changes in her performance. He said he had never instructed anyone not to move the refrigerators, which he estimated to weigh 200-300 pounds. He said he had never told respondent she had to move a refrigerator herself, and had helped her whenever she had asked.

Mr. B said that staff meetings at the apartment complex were held about once a week. These were attended by all the employees, including respondent and Mr. JP. He said he thought it was mentioned that someone had called and said respondent was injured. He couldn't remember who had said that, but that it was probably Ms. L.

When asked about Mr. JP, Mr. B said that he was a trustworthy employee. However, when read the contents of Mr. JP's affidavit, Mr. B said the statements contained therein were not true. He also said he doubted whether Mr. JP actually had been injured on the job because he had seen Mr. JP, after an alleged back injury, carry a big bag of garbage outside and sling it into a garbage can.

Ms. P testified that she was the property manager of the apartments and also respondent's supervisor on_____. She was on the job that day, but she said respondent did not report any injury to her on that or any other day; she learned of the injury some time later from employer's personnel office. She could not remember the vacancy status of Apartment (#), but said if it was scheduled for move-in the following week there would be no hurry to get it cleaned. She said that although the refrigerators had to be moved away from the walls for cleaning, it was not against company policy for an employee to

ask for assistance. She did not know whether respondent had ever asked for help. She said she had meetings with the other employees, but that respondent's injuries were not discussed at a meeting.

Ms. P said that Mr. B complained about Mr. JP on an almost daily basis. Upon reading Mr. JP's affidavit she said it was falsified. She said that Mr. B did not complain about respondent. She said the quality of respondent's work was good, but that her reliability was a problem. She said respondent was going to be terminated due to a combination of excessive absenteeism and the failure to call in to the office herself, a company policy Ms. P said respondent had violated more than once.

The claimant has the burden of proof in a workers' compensation case to prove by a preponderance of the evidence that he or she suffered an injury in the course and scope of employment. Reed v. Aetna Casualty Company, 535 S.W.2d 377 (Tex. App.-Beaumont 1976, writ ref'd n.r.e.). The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), vests in the hearing officer as trier of fact the sole responsibility for judging the relevance and materiality of the evidence offered as well as its weight and credibility. Article 8308-6.34(e). If the record 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 his or her determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

In the instant case respondent's evidence consisted of her own testimony plus the affidavit of Mr. JP. There were no other witnesses to the accident; however, an accident does not have to be witnessed to be compensable and a claimant's testimony alone can establish the occurrence of an injury. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). Mr. JP's statement was not objected to and was admitted into evidence. The contested case hearing procedures of the 1989 Act provide that a hearing officer may allow the presentation of evidence by affidavit and may accept written statements signed by a witness. Article 6.34-(a), (e). As appellant points out, the testimony of respondent and the statement of Mr. JP were controverted by testimony of other witnesses. However, it was within the hearing officer's province to resolve the inconsistencies in testimony and evidence.

Appellant also says that because respondent failed to produce any evidence from any medical care provider, respondent's only evidence of her alleged injury was her testimony and the written statement of Mr. JP. The failure of a claimant to offer any medical reports, while somewhat troubling, is not necessarily fatal. The 1989 Act defines

"injury" in pertinent part as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(27). Respondent testified, without controversion, that she had been examined by a doctor and had been told she had muscle spasms. She also testified that she continues to experience pain in her lower back. As noted above, Gee supra, issues of injury and disability may be established by testimony of the claimant and other lay witnesses; this is equally true where such testimony is contradicted by the unanimous opinions of medical experts. Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. App.-Houston [1st Dist], writ ref'd n.r.e.). See also Texas Workers' Compensation Commission Appeal No. 92167 (Docket No. redacted) decided June 11, 1992.

Under the facts of this case, the hearing officer's determination that an injury occurred within the course and scope of respondent's employment is not against the great weight and preponderance of the evidence. Montes v. Texas Employer's Insurance Association, 779 S.W.2d 485 (Tex. App.-El Paso 1989, writ denied). The decision thus will not be set aside, even though different inferences and conclusions could be drawn on review. Garza v. Commercial Insurance of Newark, N.J., 508 S.W.2d 701 (Tex. App.-Amarillo 1974, no writ).

The decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge