APPEAL NO. 92290

On May 22, 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 on (date of injury), in the course and scope of his employment with (employer). He also determined that the employer had actual notice within 30 days after the alleged accident that appellant was contending he had sustained an on-the-job injury.

The appellant asks that the decision be reviewed and reversed, arguing that the decision of the hearing officer, specifically as to Finding of Fact No. 6 and Conclusion of Law No. 3, was against the great weight and sufficiency of the evidence presented at the hearing. 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, finding sufficient evidence to support his conclusion that an injury did not occur in the course and scope of employment.

Employer manufactured plastic bags to hold newspapers. Appellant was responsible for overseeing two production lines. During his 12-hour shift on the date of injury, a problem ensued with one line. Appellant lifted a coil of plastic film which was estimated to weigh, in total, around 60 lbs. As he did so, he felt a "twinge" in his back. He stated that he did not believe it to be serious at the time, but did mention it to his supervisor, (Mr. M). Appellant was scheduled to work the next two days, but stated that he was fearful of further injuring his back so did not go in. Instead, he stated that he called Mr. M and was told that if he did not come in, it would be as if he quit the job. Appellant acknowledged that when he came to the employer on April 3rd to pick up his final paycheck, he told the woman in the office that his reasons for leaving the company were "personal". He stated that he twice attempted to seek medical treatment, on April 5, 1991, and two weeks later, but did not have the money to pay for treatment when workers' compensation coverage was refused.

Eventually, on May 22nd, appellant received medical treatment from (Dr. R) (Dr. S) for neck and low back pain. Appellant testified both that the pain was greater than he had ever felt, and that he put off seeing a doctor after the second clinic visit because the pain was initially not that great, but increased over time. The reports of Dr. S and a physician analyzing a magnetic resonance imaging examination (performed June 25, 1991) indicate "some" annular bulge in the cervical spine, and some narrowing in the lumbar spine, and a "broad based bulge" in the lumbar spine.

Mr. M denied that he had been told on (date of injury) that appellant hurt himself. He stated that appellant did not call in, and was deemed to have resigned (effectively terminated) when he did not report to work and failed to call in. Mr. M stated that the first

he heard that appellant contended an on-the-job injury was when a clinic called on April 5, 1991, to determine if workers' compensation would cover appellant's treatment.

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 connected to his 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 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).

Clearly, the statements and inconsistencies in the record were matters that were for the trier of fact to weigh. 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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Robert W. Potts
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge