APPEAL NO. 92301

On June 4,1992, 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 in the course and scope of her employment as a custodian with (employer), and had not given notice of her alleged injury to the employer within 30 days after it occurred, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-5.01(a) and (c) (Vernon's Supp. 1992) (1989 Act). The employer is a self-insured subdivision of the state.

In a timely-filed appeal, 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 hearing. The appellant disagrees with the weight assigned by the hearing officer to portions of the evidence. The appellant argues that the extent of her injury was not in issue at the benefit review conference and consequently she need not have introduced medical evidence at all. Appellant points out that the respondent has not shown that appellant was injured in any way other than at the job. Findings of Fact No. 4 and 5, and Conclusion of Law No. 2 are specifically noted in the arguments cited above. The respondent asks that the decision of the hearing officer be upheld. Respondent implies that the appeal might not have been timely filed, notes that appellant had the burden of proof as to injury, states that there was sufficient evidence to support the decision of the hearing officer on the issues, and disputes appellant's discussion of matters not in the record, as well as perceived personal attacks on a witness. Both sides discuss and debate the extent of the appellant's actual knowledge of the employer's workers' compensation coverage and the employer's procedures for perfecting a claim, although the appellant did not assert at the contested case hearing, as an alternative notice contention, that she had "good cause" for any failure to give notice.

DECISION

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

Appellant was employed for two months as a custodian at (employer) at the time of her contended injury. When hired, she signed a receipt for a 60-page employee handbook, which described the procedures to follow when an employee was hurt on the job. Although the appellant could not pinpoint a date of injury, she recalled an incident, occurring at some time during the last week of (date of injury), during which she felt her back crack or pop, while carrying surplus books for a secretary. She stated that two weeks later, she mentioned to her supervisor, (Mr. CL), that she had hurt her back during this incident, and that he then gave her a partial reprieve from carrying furniture, the immediate task at hand. She characterized his reaction as unconcerned and ignoring her. A report of her injury that she completed in (date) indicated her recollection, at that time, that she told Mr. CL about her injury a month after it occurred. In explanation, she said she has since recalled it was closer to two weeks after the accident.

A statement from Mr. CL denies that appellant reported an injury to him. He did recall her complaining about being tired and about her back hurting and consequently he assigned her to do lighter work. He stated that books were not moved in May, but in June.

Appellant stated that she went to her family doctor, (Dr. C) in July about the back pain in her lower back. He agreed with her, she said, that it was probably work related. However, through January, Dr. C was paid through her regular medical benefits plan at work. The only medical notes from Dr. C in evidence are dated (date) and January 14, 1992. "Sciatica syndrome" is noted . On the earlier note, Dr. C indicates that appellant assesses her problem as job-related and states that he agrees. The later note recites a brief history of her consultations with another health care provider and advises that she should consider cortisone shots. On a medical report dated January 10, 1992, the Austin Bone and Joint Clinic notes that a CT scan shows a right-sided disc herniation at L5-S1, with impingement of the S1 nerve root, and that sciatica is secondary to this.

Appellant continued to work through January 7, 1992. She stated that she was unaware that her employer had workers' compensation and the benefits it provided. She stated that her sister advised her about this. On (date), her sister called the employer's district supervisor of custodial operations, (Mr. WH), to report her injury for her, because appellant was a "little scared". At this point, the employer began completing paperwork and filing a report of injury with its servicing contractor, according to documents in the record.

Mr. WH testified that Mr. CL had been demoted in August 1991. He stated that an injury would not be considered as a blemish on a supervisor's record. He stated that the first time that appellant's injury was reported to him by anyone was (date) when appellant's sister called to report it. He stated that appellant's sister attributed the cause either to working in the cafeteria before the holidays, or moving furniture the previous summer. He stated that when he talked with appellant, she said her injury occurred near the end of (date of injury).

Appellant testified that for about a month's duration in August 1991, she did weekend housekeeping tasks for some teachers and a friend of the principal of the elementary school where she worked.

The hearing officer is the sole judge of the relevance and materiality as well as the weight and credibility of the evidence offered in a contested case hearing. 1989 Act, Article 8308-6.34(e). 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 arising out of 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). Even though there is no hard-and-fast requirement that injury be proved by objective medical evidence, we would note that any medical evidence submitted may be weighed by the trier of fact as to whether it tends to corroborate the fact that an injury did, or did not, occur as claimed.

Clearly, the statements and inconsistencies in this record were matters that were for the trier of fact to weigh and resolve. On the matter of injury, the hearing officer could well have concluded that the appellant, in seeking a cause for her apparent herniation, is in retrospect, attributing it to some event at the work place and that such recollection, made months after the fact, is not wholly accurate. Even if this issue had been resolved in her favor, however, the failure to give timely notice to her employer without good cause is sufficient to relieve the respondent from liability. Article 8308-5.02. 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 unjust. Accordingly, we affirm his decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge