APPEAL NO. 92406

On July 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The claimant, (claimant), appellant herein, contends that the hearing officer erred in determining that appellant was not injured in the course and scope of her employment on (date of injury), and (date of injury), and erred in determining that appellant did not give her employer timely notice of her alleged injury. Appellant requests that we reverse the hearing officer's decision. No response was filed.

DECISION

The decision of the hearing officer is affirmed.

Appellant's request for review and supplement to request for review were timely filed. A document attached to the supplemental request will not be considered as it was not made a part of the record at the contested case hearing. Texas Workers' Compensation Commission Appeal No. 92393 (Docket No. redacted) decided September 17, 1992. Appellant's second supplement to request for review was not timely filed and will not be considered. Texas Workers' Compensation Commission Appeal No. 92003 (Docket No. redacted) decided February 12, 1992.

The issues at the hearing were: (1) was appellant injured in the course and scope of her employment on (date of injury), and (date of injury); (2) if so, did appellant give her employer timely notice of her injuries of (date of injury), and (date of injury); and, (3) does appellant have disability from her injuries, if any, of (date of injury), and (date of injury).

Based on her findings of fact, which have not been contested, the hearing officer concluded that appellant did not meet her burden of proof by a preponderance of the evidence that she was injured in the course and scope of her employment on (date of injury), and (date of injury), and further concluded that appellant did not provide timely notice of her alleged injury to her employer. Appellant contends that the hearing officer erred in her conclusions because the evidence is clear that appellant sustained a compensable injury and gave timely notice of injury to her employer. The hearing officer also determined that appellant does not have disability because appellant did not sustain a work-related injury.

The parties stipulated that appellant was employed by the County of (city) (employer), a self-insured political subdivision of this state, on (date of injury). Appellant has been employed by the employer for about eight years. In 1988, she sustained a work-related injury to her lower back and was off work for about one year. Since returning to work from the 1988 injury, appellant said she has continued to have neck and back pain, and that she has been under the care of (Dr. P), an orthopaedist, for treatment of her lower back. Since 1990, appellant has been under the care of (Dr. K), a psychiatrist, for depression.

In (month year), appellant worked for the employer as a file clerk filing documents in a small file room. She testified that on (date of injury) she tripped over a box in the file room

(which is also called the vault) and hit her knees on the cement floor. She said she tried to break the fall by catching her elbows and shoulders on the file cabinets, but ended up with her nose on the floor. She said she stayed on the floor for awhile but nobody came into the file room because it was lunch time. She also said that her knees were not bruised in the fall, but that she felt a lot of pain. Appellant further testified that shortly after her fall she reported her injury to her immediate supervisor, (Mr. D).

(Mr. D) testified that appellant told him on (date) that she had tripped and fallen over a box in the vault the day before ((date of injury)), but that she did not say she had been injured. He said he noted the incident in his notebook, and then reported the incident to his supervisor, (Mr. P). (Mr. D) further stated that there were five or six employees who work in the vault and that there was no way appellant could be in the vault alone. He said that when he asked the employees who work in the vault if they saw anything, they said they had not. He further stated that appellant continued to work during November and December 1991, and January 1992.

Appellant said she told (Dr. K) about her (date of injury) fall at work during her therapy session on (date). While (Dr. K') patient notes reflected that he had a therapy session with appellant on (date) where several personal matters were discussed, there is no mention in the notes of that date of appellant having told him about a fall at work. In a May 1992 report, (Dr. K) stated that appellant told him in December 1991 about two bad falls at work.

While in the employer's coffee room on (date of injury), appellant said she slipped on a loose tile and hit her back against metal cabinets. She said that she picked up the tile, showed it to (Mr. P) and told him that she injured her back when she slipped on the loose tile and hit her back on the cabinets. She said she was bent over and limping when she reported the accident. Appellant said that when (Mr. P) acted as if he didn't care, she threw the tile in the trash but later retrieved it for evidence. A piece of tile identified by appellant as the tile she slipped on was admitted into evidence. Appellant stated that there were a lot of witnesses to her accident of (date of injury), but that she could not find anyone who would testify for her. She presented an affidavit from her uncle in which he stated that in November and December 1991, appellant was bent over and in obvious pain and in a depressed mood from the pain.

(Mr. P) testified that sometime in (month year) appellant came up to him with a piece of tile in her hand and said "(M), look, I slipped and almost fell." He said that appellant did not mention anything to him about being injured. A coworker stated in an affidavit that on (date of injury) she overheard appellant tell (Mr. P) that she "almost fell" and that appellant did not complain that she had fallen, injured herself in any way, or indicate that she was claiming any type of accidental injury. (Mr. P) further testified that sometime in January 1992 appellant asked him for three "E-1" forms (employer's first report of injury forms) and that he gave them to her. Although he said that appellant did not say anything else to him at the time, he said he assumed that she wanted the forms to report the "two incidents." He also stated that appellant gave him two completed E-1 forms on January 21, 1992, and that

was the first time that appellant indicated to him that she was claiming an injury from an incident in (month year).

The two E-1 forms which appellant filled out were in evidence. (Mr. P) crossed out appellant's signature at the bottom of each form and signed his name to them as the supervisor. Appellant wrote that the (date of injury) incident of tripping over a box in the file room occurred at 2:25 p.m., and not during the lunch hour as she testified to at the hearing.

Appellant further testified that she worked in pain and with effort after her accidents of (date of injury) and (date), and became extremely depressed because she did not want to be reinjured. She said the insurance company would not approve her visit to a doctor in 1991, and that it was not until January 1992 that she finally got to see (Dr. P). She said her medical treatment with (Dr. P) for her 1988 injury was open until 1993. Appellant said that she has not worked since January 29, 1992, when she said she collapsed as she was going out the door to go to work. Appellant began treatment with (Dr. N), an orthopaedist, in May 1992.

Appellant also testified that she was involved in an automobile accident on January 13, 1992, in which another car bumped into her car at a traffic light while both drivers were waiting for the light to change. She said she was not injured in that accident and that the police were not summoned. (Mr. G), a coworker, testified that on January 7, 1992, appellant told him that two days before that date she had been hit from behind in a traffic accident and that her neck and back were hurting. He said that appellant related to him that she had not obtained the other driver's license plate number and that she asked for advice on whether she should file a police report. This witness also said that appellant never told him about a work-related accident or that she had been injured at work.

Two Initial Medical Reports from (Dr. P) showed that appellant visited (Dr. P) on February 11, 1992, and told him at that time that on (date of injury), at 2:25 p.m. she tripped over a box at work and fell flat on her face, and that on (date of injury), she slipped on a loose tile at work and hit her back on a shelf. (Dr. P) diagnosed appellant as having: cervical, thoracic lumbar strains with probable disc involvement; coccygodynia; costochondritis; post-traumatic rotator cuff strain--right/left shoulders; post-traumatic arthralgia--right/left hips; and post-traumatic anterior talo fibular ligament strain--right ankle. In a series of work notes, (Dr. P) stated that appellant was unable to perform her duties from February 11, 1992 until May 11, 1992, and that she would be reevaluated on May 8, 1992. He noted that appellant was still under his care for her 1988 lower back ruptured disc injury.

Medical reports from (Dr. N) showed that on May 12, 1992, appellant visited him and told him she had tripped over a box at work on (date of injury), and landed on her knees and chest, and that on May 19, 1992, she visited him and told him that she had slipped at work on (date of injury), and hit her back. (Dr. N) diagnosed appellant as having: cervical sprain; thoracic sprain; lumbosacral sprain, and chondromalacia patella.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). The claimant has the burden of proving that he was injured in the course and scope of his employment. Reed v. Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness, and resolves conflicts and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ); Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). While the testimony of a claimant can support a finding of a compensable injury, Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ), the trier of fact is not bound to accept the testimony of the claimant, an interested witness, at face value, Garza, *supra*. That different inferences might reasonably be drawn from the evidence is not a basis to set aside a fact finder's determinations. Garza, *supra*. The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or so against the great weight and preponderance 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.); Texas Workers' Compensation Commission Appeal No. 92398 (Docket No. redacted) decided September 18, 1992. Having reviewed the record, we cannot conclude that the hearing officer's determination that appellant was not injured in the course and scope of her employment on (date of injury), is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *See* Reed, *supra*; Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ); Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ); Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ).

For an injury other than an occupational disease, Article 8308-5.01(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs." The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). Failure to give timely notice relieves the employer and the employer's insurance carrier of liability under the 1989 Act unless the employer, the carrier or a person eligible to receive notice has actual knowledge of the injury, or unless the Commission determines that good cause exists for failure to give notice in a timely manner, or unless the employer or carrier does not contest the claim. Article 8308-5.02. In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the Supreme Court of Texas stated that the purpose of the notice provision is to give the insurer an opportunity immediately to investigate the facts surrounding an injury. The court said that this purpose can be fulfilled without the need of any particular form or manner of notice. The court further stated that, to fulfill the purpose of the statute, the employer need only

know the general nature of the injury and the fact that it is job related, and that more details of the occurrence will be supplied by the claim. The burden is on the claimant to establish the existence of notice. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). In this case the evidence affirmatively showed that appellant reported to her supervisors that she was involved in accidents at work within 30 days of each accident. However, the testimony was conflicting as to whether appellant told her supervisors that she was injured in any way when she reported the accidents. The evidence did show that appellant continued to work for three months after reporting the accidents. The Supreme Court of Texas has said that when presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). Having reviewed the record, we cannot conclude that the hearing officer's determination that appellant did not give her employer timely notice of her alleged injury is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. If the hearing officer did err in determining that appellant failed to give timely notice of injury to her employer, such would not affect the outcome of our decision because of our holding with respect to the hearing officer's determination of no injury within the course and scope of appellant's employment.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge