APPEAL NO. 92461

On August 5, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), who is the appellant, did not sustain an injury on (date of injury), in the course and scope of his employment as a nurse's aide with (employer). Because of this finding, the second issue, whether disability resulted from such injury, was not addressed.

Appellant asks for reconsideration by the Appeals Panel, saying that the evidence supports his contention that he was injured on the date claimed. Respondent replies that the decision of the hearing officer is supported by the evidence.

DECISION

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

The appellant stated that he was injured both on May 22, 1992 and (date of injury), performing essentially the same task, while caring for (Mr. W). Appellant stated that Mr. W had slipped down in his bed, so that his feet were sticking over the end, and it was necessary for appellant to pull him up toward the headboard, by getting both knees up on the bed and pulling Mr. W from under the armpits. He stated that the way he twisted while pulling injured his lower back on the right side, about three inches above the belt line. Appellant characterized the pain as a dull ache, sometimes constant, sometimes not. He first consulted a doctor at the emergency room of University Medical Center on June 7, 1992, and was taken off work until June 10, 1992. Appellant stated that he worked for the Visiting Nurses Association since June 12, 1992, on an "on-call" basis, but could work full time if it became available. He stated that he worked for the Visiting Nurses Association for some time before June 12, 1992. The total amount of time he was off from work, he stated, was a week.

The document from University Medical Center indicates no heavy lifting, and suggests a follow-up as soon as possible. There is no diagnosis indicated on this form, or a description of the condition for which treatment was sought.

Appellant was terminated for good cause on (date), for an episode involving the use of a credit card of Mr. W's wife. He did not dispute that he was terminated for cause. Appellant said he wrote a letter to inform his employer about his injury, after he got home late at night on (date of injury). His explanation for not calling was that his telephone had been disconnected that day. However, he said it was reconnected the next morning, when (Ms. B), from the employer, called him and terminated him. Appellant did not mention that he had been injured, because he thought the letter would handle that. He said he wrote and mailed the letter prior to his termination. He agreed, however, that the letter was dated (date), and the envelope was postmarked June 3rd, when both were shown to him.

Appellant agreed that he was required to keep daily notes concerning Mr. W, and that he did not note either incident where Mr. W slipped down in his bed because they were

not significant and did not involve falling incidents. The note for (date of injury), indicates that Mr. W "slept the whole night no problems."

Ms. B stated that appellant had worked on an "on-call" basis for them before being assigned to Mr. W, whom he served full-time. She stated that incidents where Mr. W slipped down should have been noted as these could indicate the need for a hospital bed or a support. She stated that appellant was terminated on (date), and she first found out the next day that he was claiming an on-the-job injury.

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. ANN. art. 8308-6.34(e) (Vernon's Supp. 1992). 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.). The decision reached here is not against the great weight and preponderance of the evidence. Montes v. Texas Employers' Insurance Ass'n, 779 S.W.2d 485 (Tex. App.- El Paso 1989, writ denied). The hearing officer could have believed that the appellant's claim was made after his termination, and that medical records did not indicate physical damage which could be attributed to the circumstance described by appellant. The hearing officer could further believe that the nurse's note made on (date of injury) was inconsistent with the incident described by the appellant.

There being sufficient evidence to support the decision of the hearing officer, we affirm her decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge