APPEAL NO. 92476

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held in (city), Texas, on May 28, 1992, before hearing officer (hearing officer). Testimony and evidence was adduced from both parties, and the hearing was then recessed to allow appellant (claimant below) an opportunity to retain counsel and to provide additional medical records. The hearing was reconvened on August 13, 1992, and the record was closed on that date.

The two unresolved issues from the benefit review conference were as follows: did appellant sustain an injury in the course and scope of her employment on (date of injury); and did appellant report the injury to her employer within 30 days of (date of injury), as required by Article 8308-5.01(a). The hearing officer held that the appellant did not injure her back on (date of injury) while working for employer, did not report an injury on (date of injury) or within 30 days of (date of injury), and thus the appellant did not prove by a preponderance of the evidence that she had sustained an injury in the course and scope of her employment.

In her request for review the appellant argues that her testimony and evidence supports a finding that she was injured in the course and scope of her employment and that she timely reported the injury to her supervisor. She also claims that the hearing officer gave too much weight to the medical evidence he quoted in his decision and order, and that he gave no consideration to a letter from the same doctor that contradicts the quoted passage. She also says the hearing officer should have given more weight to statements from her former coworkers, who jeopardized their jobs, than to the testimony of a supervisor who failed to report an injury and who fears for his job. Respondent, employer's workers' compensation insurance carrier, essentially contends that the evidence in the case supports the hearing officer's decision.

DECISION

We affirm the decision and order of the hearing officer.

Appellant had worked for (employer), a janitorial service, since February 1987. Her job was to work cleaning a bank Monday through Friday, from 5:30 p.m. to approximately 11:30 p.m. She said on the evening of (date of injury), she picked up a trash can; she said she didn't realize until she had lifted it that it had books in it. After she lifted it she said she felt a pain in her back that went down her left leg. She was working with another person, (Mr. C), but she said he had gone to the bathroom and didn't witness the incident. She said she mentioned the injury to Mr. C, and she also told (Mr. J), the foreman, when she clocked out that she had hurt her back lifting a trash can. The next day she said she went to see her chiropractor, (Dr. T), and did not go to work. She said she telephoned (Mr. L), the owner of the company, that day and told him her back hurt and she would not be able to come in. She said she did not mention she had been hurt at work because she thought Mr. J had

already told him. She later testified that she told Mr. L her back hurt because she lifted a trash can full of looks.

Appellant acknowledged she had had a prior work-related back injury in May of 1989, for which she had been paid medical benefits under workers' compensation. She said that accident occurred in the same manner as the (month year) incident; that is, when she picked up a trash can containing books. Appellant was terminated from her job with employer on December 2, 1991. She filed a complaint with the Equal Employment Opportunity Commission which was pending at the time of hearing.

Appellant's daughter, (Ms. B), said she went over to her mother's house on the evening she telephoned Mr. L, and heard her tell Mr. L she had hurt her back and would not be at work. She said her mother was having extreme back pain that evening and told her about the trash can incident. Ms. B answered the telephone when Mr. J called to see why appellant was not at work; she said she told him appellant was lying down but that when she gave her mother the telephone Mr. J had hung up.

Mr. C, who worked in tandem with appellant, testified that his job at the bank required him to move behind appellant, picking up heavy trash and vacuuming. He said he did not miss any work time in November and that he did not remember appellant telling him she was injured on (date of injury) or (date). He recalled appellant saying she had hurt her back and had gone to a chiropractor, but that was five or six months prior to November.

Mr. J, who said he has been a supervisor for employer for four and one-half years, denied that appellant told him she had been injured on the job sometime in (month year). He said he called her one evening in November when she was late coming in. He said her daughter answered the telephone and told him "[m]ama's sick. You can't tell no lie because she left a message on [Mr. L's] answering machine." He said she came back to work the next day, and could not remember her missing any time until early December, when she was terminated.

Mr. L, the owner of the company that employed appellant, said appellant did not notify him of an on the job injury, either in November or December. He became aware of an injury when his previous workers' compensation insurance carrier, which had paid benefits for appellant's prior injury, notified him that they were receiving medical bills. The previous carrier got in touch with respondent, which notified Mr. L and asked him to file a first report of injury. He said appellant was terminated on grounds of insubordination, continuous misconduct, and causing trouble within the work crew. He said, however, that until she was terminated she didn't miss much work, and that she only missed one day, the (date), in (month).

The record below contained a written statement from (Ms. W), one of appellant's coworkers, which stated that she and others were told by Mr. J that they would have to do appellant's work because she had hurt her back. A written statement from another coworker, (Mr. R), said essentially the same thing.

Appellant testified that her back did not continue to bother her after she was released to work following the 1989 injury, which she thought was near the end of 1989. However, medical records show appellant continuing to complain of back problems throughout 1990 and 1991. They also show appellant was treated for back problems as early as 1983. On (date) appellant went to her chiropractor, (Dr. T), who saw her a total of three times and then, according to appellant, told her to go to her family doctor, (Dr. H). A June 9, 1992 letter from Dr. T said that when he saw appellant on (date) she was complaining of pain in her lower back and left knee, from picking up a trash can containing telephone books at work. An initial medical report filed by Dr. H on February 6, 1992 said "[t]his patient had a new injury on (date) and was seen 11-14-91 and 11-22-91. She was lifting lots of phone books." However, Dr. H's notes from November 14th recite as follows: "[appellant] returns for followup. She has noted increasing pain in her back and also some pain in her left leg for the past 2 weeks . . . She has had a lot of back pain, but does not remember any particular injury setting this episode off." On November 22nd Dr. H's notes say, "[appellant] returns for f/u at this time, still having lots of f/u of her previous injury dated 5/17/89, which has become markedly worse over the past three weeks with pain and numbness radiating down both legs, left worse than the right." Dr. H referred appellant to (Dr. S) who had examined appellant for her 1989 injury. No records from Dr. S were introduced into evidence.

The claimant in a workers' compensation case has the burden to establish by a preponderance of the evidence that an injury was sustained in the course and scope of his or her employment. Washington v. Aetna Casualty and Surety Company, 521 S.W.2d 313 (Tex. Civ. App.-Fort Worth 1975, no writ). The hearing officer found this burden not to have been met. In reaching this decision he had before him appellant's rendition of the occurrence, which was not witnessed, and certain doctors' reports which related appellant's history, that the pain had begun upon lifting a trash can at work. There is nothing to indicate the hearing officer disregarded any medical reports, although he obviously found more credible those reports which were nearer in time to the incident, and which described appellant's back problems as a continuation of an earlier condition and not necessarily linked to a particular injury. Furthermore, while a claimant's testimony alone may be sufficient to sustain a finding in the claimant's favor, Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989), a claimant's testimony, like that of any interested party, only raises an issue of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ.) As the trier of fact, the hearing officer weighs all the evidence, decides the credibility to be given to the whole, or any part, of the testimony of witnesses, and resolves conflicts and inconsistencies in the testimony. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). Unless the findings, conclusions and decision are so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust, we have no basis to disturb the hearing officer's determination. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

With regard to the issue of timely notice, there were contradictions within appellant's own testimony as to what she told employer. In addition, her daughter's testimony and her

coworkers' statements provided only that she had notified her supervisor that her back hurt and she could not work. Case law has held that the employer need only be informed of the general nature of an injury; however, the employer must be put on notice that the injury was work related to give the insurer an opportunity to immediately investigate the facts surrounding the injury. DeAnda v. Home Ins. Co., 618 S.W.2d 529 (Tex. 1980). Appellant's supervisor and the owner of the company denied that they had received any notice at all. Under these facts, there was sufficient evidence also to support the hearing officer's determination that no timely notice of injury was given.

Finding no error on the part of the hearing officer with regard to either issue, we affirm.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge