APPEAL NO. 92510

A contested case hearing was held on August 26, 1992, in (city), Texas, before (hearing officer). The issue at the hearing was whether the appellant (claimant below) sustained an injury in the course and scope of his employment on (date of injury). The hearing officer held that the appellant did not prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on the above date.

The appellant disputes the hearing officer's finding of fact and conclusion of law on injury in course and scope, saying that his own testimony was uncontradicted and free of inconsistency and, therefore, should have been accepted as true by the hearing officer. He also argues that respondent, the employer's workers' compensation insurance carrier, should not be allowed to contest the stated issue because it did not specify this ground for refusal of the claim in its form TWCC-21. Appellant also contends that respondent committed various administrative violations under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992)(1989 Act). The respondent basically contends that there is sufficient record evidence to support the hearing officer's determination.

DECISION

We affirm the decision and order of the hearing officer.

Appellant testified that he had worked off and on for (employer), a commercial roofing company, since 1987. On (date of injury) he said he was at a job site picking up scraps of material from a roof and loading them into a dumpster which was below the loading dock on which he was standing. He was pulling on a sheet of material when it tore and he fell backwards, hitting his lower back on the dumpster and falling into the dumpster. The other employees at the job site were on the roof and did not witness the fall. He said he crawled out and sat down for a period of time, then since it was near the end of the workday, he helped the others gather up the tools. He said he had to climb a ladder to get some tools, and that he was not limping or doing anything else noticeable that would indicate he was hurt. Although he said he mentioned that his back hurt to a coworker, he said he did not tell the foreman, (Mr. Z), that afternoon that he had been hurt on the job because he didn't think he was that badly hurt.

After work appellant and some other coworkers loaded wooden porch steps approximately 5 feet wide and weighing as much as 80 or 90 pounds onto a truck, and then Mr. Z drove appellant home. (Appellant was taking the steps home for his personal use.) When they arrived appellant said he and Mr. Z "flipped" the steps off the truck, but that he left the steps on the driveway. The next day, a Thursday, appellant said his back was hurting badly and he was not able to go to work. That morning around 7 a.m., when he was supposed to be at work, he said he called employer's office but no one answered. He said that around 9 a.m. he reached the owner of the company, (Mr. Mc) and told him he had been injured on the job. He said Mr. Mc cursed at him, asked him whether he didn't know he needed to fill out an accident report, and said "[w]hat do you think I should do about it?"

Appellant said he did not see a doctor on Thursday because the doctor he called said it would cost $30 and appellant did not have the money. Appellant acknowledged that he called the employer's office that day and tried to borrow the money from his employer. On Friday, appellant and his wife went to employer's office to fill out an accident report. There, he said, Mr. Mc told him he did not work there any longer. The same day, appellant said he went to the offices of the Texas Workers' Compensation Commission (Commission) to fill out an accident report, and then upon their advice went to the emergency room where he was allowed to charge his treatment to respondent.

Appellant's medical records show he was seen at the East Texas Medical Center Emergency Room on (date) by (Dr. A). The history contained in the report was that appellant injured his back falling into a dumpster at work. The x-ray of his spine was negative, but an MRI performed the same day found a small focal posterior disc herniation at L4-5. Dr. A's initial diagnosis was L4-5, S1 radiculopathy and herniated L4 disc, and he took appellant off work until he could be seen by a referral doctor. Appellant was seen on June 23 by (Dr. D) of (city) Neurosurgical Associates. Dr. D examined appellant and reviewed his MRI, and said he found no evidence of neurological deficit but that appellant had a degenerated disc at L4-5 with a very small central bulge and sacralization of L5. Dr. D recommended appellant be started on epidural steroid injections and a physical therapy program, and said he thought appellant could be rehabilitated without surgical intervention. A June 24th letter sent by registered mail to appellant from Dr. D stated that, because appellant had failed to report for his steroid injection that morning, Dr. D was withdrawing as appellant's treating physician. Appellant testified that he never received the letter because it was not sent to his correct address, that he missed the appointment because of a flat tire, and that he had telephoned Dr. D's office to let them know he could not keep the appointment.

Appellant said he attended physical therapy sessions for seven or eight weeks, per Dr. D's recommendation. He was also seen by (Dr. PD) of the Neuro-Skeletal Center, upon Dr. D's referral. Dr. PD's report dated July 30, 1992 stated in part as follows:

> . . . patient suffering from upper lumbar facet dysfunction although pain is not specifically localized to any one or two levels . . . significant secondary musculotendinous tightness with some deconditioning noted . . . no obvious evidence of myelopathy or radiculopathy and no neural tension signs or anatomic findings are consistent with this diagnosis."

He recommended continued physical therapy and possible lumbar facet injections.

Mr. Z testified that he has worked for employer for two years and that he has been roofing crew foreman for one year. He said he was on the roof the afternoon of (date of injury), did not observe appellant in pain, and saw him wrapping up materials and carrying hand tools off the roof. Later, he said, he and appellant loaded the wooden steps onto the truck by sliding them off a dock. He estimated the steps weighted in excess of 100 pounds.

He said he and appellant unloaded them by hand and that as he drove away he saw appellant pulling the steps up the driveway.

Mr. Z said he was not present when appellant reported his injury to Mr. Mc or when Mr. Mc fired appellant for not showing up at work on (date). He said appellant had been unreliable for the past few years, but that the employer had decided to be more strict about attendance. He said appellant was not the first worker to have been fired for not showing up. Appellant admitted he had missed work on occasion before, but maintained he had always called in except for times he had been in jail.

At the outset, we address appellant's contention that respondent should not be allowed to contest the issue of injury because it did not specify that issue as a grounds for refusal in its notice of refused or disputed claim (Form TWCC-21). Appellant cites Article 8308-5.21(c) which states in part:

> The insurance carrier's notice must specify the grounds for the refusal. The grounds specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

Appellant points out that respondent's TWCC-21 states that this is a "grudge claim" brought by appellant in response to his firing. The respondent contends the TWCC-21 was not a document in evidence, but argues in the alternative that the defense of a retaliatory claim encompasses the position that an injury never occurred.

The record in this case indicates that the TWCC-21 was a hearing officer's exhibit which was admitted into evidence without objection by the parties. However, it does not appear that the question of whether respondent had adequately stated a defense under Article 8308-5.21 was an issue raised at the benefit review conference or added at the contested case hearing pursuant to one of the provisions of the statute or rules of the Commission. Not having been so raised, we find that it is waived. *See* Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992. Even if this issue had been timely raised, however, the TWCC-21 in this case, read as a whole, clearly puts the occurrence of an injury in dispute and adequately states a defense under Article 8308-5.21.

Appellant claims that his testimony regarding his injury was undisputed and was corroborated by medical records which recite appellant's versions of events and show that he sustained a serious and disabling injury. Thus, he argues, the hearing officer can assume that it is established fact as a matter of law.

Indisputably, 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). While the testimony of a claimant alone can establish the existence of an injury, even the uncontradicted testimony of the claimant as an interested witness does nothing more than raise an issue of fact unless such testimony is clear, direct, and positive, and there are no circumstances in evidence tending to discredit or impeach such testimony. Anchor Casualty Co. v. Bowers, 393 S.W.2d 168 (Tex. 1965). This is a case that clearly turned on the credibility of appellant. The hearing officer as sole judge of the evidence in a case, Article 8308-6.34(e) is entitled to judge the demeanor and credibility of a witness and believe all or part or none of a witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer could determine appellant's credibility to have been diminished by his own testimony and that of Mr. Z concerning his unreliability as a worker. He may also have found appellant's rendition of the circumstances surrounding an injury less credible because of appellant's subsequent actions in loading and unloading heavy porch steps; he may have determined that the injury arose from appellant's actions with regard to the steps. We believe there was sufficient evidence before the hearing officer to support his finding that appellant did not injure his back in the course and scope of his employment. Even though there may have been evidence that could support different inferences or findings, this is not reason to abrogate the determinations the hearing officer concluded from the evidence to be most reasonable. We find that the hearing officer's findings of fact and conclusions of law are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Appellant also alleges respondent has committed certain administrative violations under the 1989 Act. The Appeals Panel is not the appropriate forum for addressing these claims.

Finding no error on the part of the hearing officer, we affirm.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge