APPEAL NO. 92516

On August 20, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the appellant (claimant) had not sustained a compensable injury on (date of injury) while employed by (employer). He further found that she had not given notice to her employer within 30 days after the contended injury, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01(a) (Vernon's Supp. 1992) (1989 Act).

The claimant argues that the decision of the hearing officer should be reversed as being against the great weight of the evidence, which proved both that the claimant was injured on the job, and that she gave notice of the injury to two supervisors for the employer. Respondent, the carrier, agrees with the hearing officer's decision, and recites evidence it believes supports the decision. On the issue of notice, the carrier emphasizes that the claimant knew the correct company procedure for reporting injuries and yet did not follow it in this instance, and that the statement of the claimant's immediate supervisor is ambiguous and unclear on the issue of notice or knowledge of injury.

DECISION

After reviewing the record, we affirm the determination of the hearing officer concerning his finding that an injury was not sustained on (date of injury).

The claimant said she was injured around 3:00 p.m. on (date of injury), while assisting her immediate supervisor, (AL), with moving a 15-foot long rack of blue jeans. Because the rack did not have wheels, AL put her end of the rack in a shopping basket and then attempted to move it around. The claimant said that the rack tipped over in the process, and it "took her arm over." The claimant asserted that AL was aware of her arm pain, and that she also told (LW), a personnel manager, that same day that she hurt her arm. The next day, she went to see (Dr. S), who she described as a sports doctor. Dr. S gave her cortisone shots and took her off work. At the time of the hearing, claimant had been on medical leave since (date). Claimant acknowledged that Dr. S had treated her for shoulder pain prior to the (date of injury) incident.

Dr. S's "off work" slip for October 9, 1991 stated that she has a "rotator cuff strain on the right." Off work slips were issued at intervals thereafter through May, 1992. The December 21st slip indicates "shoulder capsulitis." The claimant applied for disability income benefits through the employer's private insurance and a portion of the application was completed by Dr. S. On October 23, 1991, he signed an application that indicated "no" in response to a question: "Is this condition related to patient's occupation?" On November 5, 1991, he signed an application that did not check "yes" or "no" in response to this same question. The claimant, on her signed portion of the applications (dated October 17th and November 1st) affirmed that all statements given on the application were true, and also indicated that the injury was not work related. The claimant's explanation for submitting these claims, rather than a workers' compensation claim, was that she was so

instructed by LW. The claimant agreed that she knew the difference between filing for medical disability income benefits, and filing for workers' compensation, and had filed both types of claims for previous illness or injury. She said that she told LW about the injury; when asked her exact words, claimant stated that she told LW she hurt her arm and had to be off work, and "took it she knew" how her arm had been hurt. The claimant also attributed her confusion in filing the disability income claim to being on medication at the time.

None of the records or documents generated by Dr. S connect the claimant's shoulder to her (date of injury) accident until a letter dated June 2, 1992. In that letter, Dr. S notes that she presented with severe right arm pain secondary to an injury suffered at work. He assesses a 10% whole body impairment in that letter. Medical records prior to (date of injury) for the shoulder area show that Dr. S treated her for rotator cuff strain on the left on February 18, 1987; for a job-related left shoulder aggravation July 13, 1987; for right shoulder pain and rotator cuff strain on May 31, 1991; and for this same right shoulder condition on August 7, 1991. Dr. S's notes on (date), state that "[Claimant] began having severe pain down her right arm yesterday. It made her nauseous and vomit because of the pain." A CT scan of her neck done October 16, 1991 showed two bulging discs.[1] On April 9, 1992, after treatment at regular intervals, Dr. S records a diagnosis of adhesive capsulitis.

On February 1, 1992, claimant was informed by letter from the medical disability insurance company, Travelers Insurance, that they could not approve disability income benefits for a work-related injury. Travelers had previously paid disability income benefits to claimant for the last three weeks in (month year).

LW testified that she was not informed, prior to February 6, 1992, that claimant contended that this was a workers' compensation claim. However, LW did indicate that she was informed by the claimant in (month year) that she was having shoulder problems, although LW did not understand them to be work-related. LW also said that, sometime around October 17th, "[claimant] told me that her arm, what she had been doing in the department moving the racks, but she never indicated it was work related." A statement that LW gave to the carrier's adjuster indicates that claimant told LW that the shoulder problems were preexisting, and that claimant told her that she had experienced pain when moving some racks and was going to see her doctor, and did see her doctor "the next day." LW stated her belief that claimant did see her doctor "the next day." LW denied that she instructed claimant to complete claims for disability income through Travelers, rather than workers' compensation, noting that the employer would be charged for either type of claim.

A statement from AL that was given to the adjuster indicates considerable confusion on AL's part about dates or the sequence of events. However, AL recalled the rack-moving

[1] Claimant has not, however, asserted a neck injury, and medical justification for her leave time appears based on her shoulder injury.

incident and that the rack hit claimant in the shoulder, whereupon claimant grabbed her arm. She also recalled the claimant complaining about her shoulder that day, although she was unable to specifically remember the timing of the complaints compared to the accident with the rack.

An adjuster's statement from another coworker/manager, (LG), recalled a day when employees were moving a lot of things around, and claimant complained about pulling heavy jean racks. That evening when they were leaving, claimant complained about her sore arm and said she was going to the doctor. LG recalled that claimant said she would get a couple of shots and everything would be fine. LG recalled claimant complaining about a recurring illness. She recalled that either later that day, or the next day, claimant called and said she would be going on leave because of her arm.

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. 1989 Act, Art. 8308-6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). 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. Johnson v. Employers Reinsurance Corp, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Generally, medical evidence is not required to prove that an injury occurred, and testimony alone may be sufficient proof. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, a trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.- Amarillo 1980, no writ). The Appeals Panel has said that although medical evidence is not required to prove an injury, it may be considered as tending to corroborate testimony that an injury did or did not occur. Texas Workers' Compensation Commission Appeal No. 92301, decided August 24, 1992.

The work-related aggravation or enhancement of a previously-existing condition may itself be considered a compensable injury. Texas Employers' Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977). However, such aggravation or enhancement must qualify as an injury, as that term is defined in Art. 8308-1.03(27). A carrier may assert, and has the burden of proving, that any incapacity after an accident was caused solely by the preexisting condition. Page, *supra*, at p. 100.

We cannot say that the great weight of evidence is against the hearing officer's determination that the claimant did not sustain a compensable injury on (date of injury).

Neither the claimant nor her doctor attributed her shoulder condition to a work-related occurrence in the months following (date), in either notes or in applications for disability income coverage. She was treated for the same condition in the months prior to the accident. There is no medical evidence that an enhanced or aggravated physical condition occurred as a result of the moving of the racks. Claimant testified that she had been treated for shoulder pain before that accident. While she did testify that the pain experienced after (date of injury) was more intense, there was also evidence that claimant told LW and AL that her pain was related to prior shoulder problems. Claimant had previously filed for workers' compensation benefits, as well as disability income benefits, and knew the difference between the two; she first elected not to file for workers' compensation for her rotator cuff strain. Taken as a whole, the evidence supports the hearing officer's determination that claimant did not sustain a compensable injury on (date of injury), a determination which appears to be based in large measure upon comparison of her physical condition both before and after the (date of injury) incident.

In light of our affirming the finding of no compensable injury, a holding on the appealed point regarding notice is moot.

The hearing officer's decision is affirmed.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge