APPEAL NO. 92629

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On October 16, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the respondent, claimant herein, injured his back while using a large machine to remove wax from the floor of the sales area of a department store. Appellant, carrier herein, asserts that claimant had had problems with fellow employees and supervisors; his story at hearing was not reliable; and the decision should be reversed.

DECISION

Finding that the decision is supported by sufficient evidence of record, we affirm.

Claimant has worked for this employer for over five years in different outlets around the country. He had come to his current store from one in a nearby town to fill a position as a leadman on a night janitorial crew. His hours were from 10:00 p.m. to 7:00 a.m. with his accident occurring on (date of injury) in mid shift. At that time he was using a large, square machine that cleaned, shampooed, and vacuumed the floor after wax removers were applied. The machine weighed, by estimate of different witnesses, from 400 to 900 pounds. It was not operating correctly and claimant testified that he had "hot-wired" it to keep it going, even at a reduced level. Claimant testified that although the machine is self-propelling, it did not propel well after his repair and he had to manually turn it as he reached the end of an aisle. While turning it his foot slipped on the surface made slippery by the wax remover. While he did not fall to the floor, his response in catching himself pulled his back and he felt pain. He still feels pain and says he has not been able to work.

No one witnessed the slip, but one fellow employee, CO, testified that the machine did not function well that night, the floor was slippery, and he saw claimant using the machine. Another employee, DM, also said they had problems with the machine that night and that claimant was slipping and sliding while operating the machine. The first employee, CO, and claimant were not friends and had each complained of the other to their supervisor. CO recalled claimant saying within a short time before the accident that he ought to make the machine run over his back, or words to that effect.

Claimant testified, without contradiction, that the night workcrew was locked in the store and was there until the morning shift arrived and opened the doors. For that reason, claimant said he waited until the day crew came and told a supervisor, HH, of his injury. Both claimant and HH acknowledge that HH quoted store policy to claimant that he had to get a drug test. HH said she would have taken claimant to a nearby emergency room to get the sample, but he refused. Claimant said he had clocked out and was going to see his doctor in a city approximately 30 minutes distant. HH also testified that as she came in and claimant told her of his injury, he was not standing as if he had a recent back injury. When claimant's doctor, Dr. P, DC, called WT, then assistant manager of the store in question, Dr. P told him that claimant reported an injury on the job. WT told Dr. P that he

could not authorize treatment because claimant would not submit to a drug test. Claimant was fired. WT also said that claimant told him more than one variation of the story of how he was hurt and had told HH another version.

Carrier's appeal stresses that claimant was a disgruntled employee who had been reprimanded in the past. It correctly points out that claimant is an interested witness and his testimony is open to questions of credibility. It questioned claimant's motives because of testimony that claimant might quit if he did not get his way in the dispute he had with CO. It questioned why claimant would not go for medical care nearby as part of a drug test but chose to go to another town for care. All these factors are for the hearing officer to assess and weigh. He is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. Although claimant had been reprimanded and did not choose to cooperate with his supervisor about the drug test, these points do not preclude the hearing officer from believing the basic elements of claimant's story that he was injured on the job. Claimant's story was corroborated in several aspects by the testimony of two other employees. A weak link in the claimant's story was created by his choice not to provide any chiropractic records showing injury for this record. Claimant testified that Dr. P said he would have to align his twisted back. That does not necessarily indicate that the back was injured as opposed to being chronically curved. On the other hand, WT acknowledged that Dr. P told him on the phone that claimant had come to him for treatment describing an injury at work.

Carrier states that finding of facts saying claimant injured his back at work and that Dr. P confirmed a problem with the back are erroneous. The first is not against the great weight and preponderance of the evidence. The hearing officer could believe claimant even though he is an interested witness. *See* Texas Workers' Compensation Commission Appeal No. 92348, dated September 8, 1992. While medical evidence is minimal, the finding in question only says that a "problem" was found. This finding is of little consequence to the decision of the case and could be disregarded as unnecessary. *See* Texas Indemnity Insurance Co. v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940). However, even though there are no medical records, no medical statements, and no medical testimony, the hearing officer can give some weight to the testimony of the claimant as to what his physician indicated to him about his condition. *See* Texas Workers' Compensation Commission Appeal No. 92167, dated June 11, 1992. *Also see* Article 8308-6.34(e) which provides that conformity to the rules of evidence is not necessary.

The findings of fact and conclusions of law are sufficiently supported by the evidence and the decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge