APPEAL NO. 92675

On November 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), had not sustained a compensable injury in the course and scope of his employment for (employer), and further, had not notified the employer of an alleged injury within thirty days, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon Supp. 1992) (1989 Act).

The claimant appealed, arguing that the preponderance of the evidence supports a decision in claimant's favor on both issues. The carrier responds that the decision of the hearing officer is supported by the record.

DECISION

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

The claimant said that he injured his back on (date of injury), as he assisted a crew in taking down and moving a drilling rig. The claimant said he was moving a "two-by-eight" board into position to support a heavy piece of equipment being lowered into place from above. The claimant stated that the board broke when the crew chief let down a chain, and that claimant, who was holding the board, was thrown back and into a hole. He said that his leg went into the "floor" of this level of the rig, and that, while he didn't really fall, his back hit the edge of the floor. He stated that his immediate supervisor, (Mr. S), was there, and that he also reported the injury to him. The claimant said that he was advised to stay there, although he could just sit aside and not work. The claimant said that the crew was in the running for a safety award and this is why, he feels, that he was not advised to leave.

The claimant stated that the next day he was unable to go to work. When he went back the next day, he talked to the top supervisor, (Mr. H), told him what happened, and asked if the employer would pay for a doctor. The claimant reported that Mr. H told him that he didn't have a job there, was terminated, and that the employer would not pay for anything. The claimant said he thereafter went to an attorney (not the one who represented him at the contested case hearing), then to (Dr. V), to whom he was referred by his attorney.

Reports from Dr. V indicate that claimant was first seen February 1, 1991. An x-ray taken that day showed normal SI joints, with "spina bifida occulta" at L5, as well as a slight anterior subluxation of L5-S1. The opinion was normal hips and pelvis, with Grade 1 spondylolisthesis L5 on S1. Claimant continued to be treated for pain and received physical therapy. The account of the accident recorded by Dr. V is that claimant fell backward when trying to remove a bolt, hitting his back and left leg with a roller. Medical records indicate that claimant is 20 years old. On physical therapy records, a diagnosis of lumbar strain/sprain is noted. It appears that claimant filed a claim with the Texas Workers' Compensation Commission on March 25, 1991; this claim gives history of the accident generally consistent with claimant's account of pulling a board and having it give way.

Some details, or terminology, are somewhat different, and claimant admitted this, but said that he didn't remember clearly what happened because it had been a long time.

Claimant said that coworker (Mr. NH) witnessed the accident, but no statement was presented from Mr. NH. An affidavit from Mr. S was presented by the carrier, which denies knowledge about any incident as described, and feels that he would have recalled such an incident. He did recall, on a unspecified date, that the claimant showed him a fresh scratch on the leg. Mr. S stated that he recalled that claimant failed to show up for work. An affidavit from (Mr. KH), a tool pusher and supervisor of the rig where the accident was alleged to have occurred, said that he was unaware of any accident, and that the employer's policy required the reporting of any incidents, regardless of how minor they were. He recalled that claimant failed to show up for work at some point without explanation. Mr. KH first knew about the incident when he was contacted by Mr. H sometime after summer 1991, asking if he knew anything about it. A time log put into evidence shows that claimant was credited with having worked 12 hours on (date of injury).

The claimant's wife testified and, although not present when the accident occurred, said she observed that her husband's leg was swollen and he had bruises on his knee. She was aware that he was terminated by Mr. H, although the record does not support the assertion made in the appeal, that she personally observed the termination.

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 hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Art. 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). 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). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole.

We do not view with significance in this case the fact that the doctor may have recorded a different account of the accident than the claimant has stated. As the Appeals Panel has observed before, the facts set out in a medical record would not be good evidence to prove that an accident in fact occurred. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The claimant made the point at the

hearing that he is not responsible for what the doctor writes and that is generally true. However, the inconsistency that the hearing officer noted in versions of the accident in evidence was not the only evidence against the claimant in this case.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge