APPEAL NO. 92697

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On November 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether an injury was sustained on (date of injury), to claimant's back, in the course and scope of employment with (employer), by the claimant, (claimant), who is the appellant in this appeal.

The hearing officer determined that claimant did not fall to the ground and injure his back on (date of injury). (The hearing officer agreed that claimant injured his finger on that date, but this injury was not disputed.)

The claimant has appealed this decision, asserting that the evidence supports occurrence of a compensable back injury. The claimant also argues that the carrier waived the reasons for defending compensability by failing to dispute the claim as required by Article 8308-5.21. The respondent carrier argues that the record supports the lack of causal connection between a back injury and any incident at the workplace, and notes that the contention that the carrier waived its defenses was not raised as an issue either at the benefit review conference or the contested case hearing.

DECISION

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

The claimant severely cut his finger on (date of injury), while working as an assistant electrician for the employer at a residence work site. The finger bled profusely after the accident. This injury required stitches and some follow-up surgery, and was not disputed.

The claimant contended that while he was standing by a truck, waiting to be taken to the clinic, he fainted and fell, injuring his back. He claimed that no one was around him when this occurred, and, although he blacked out prior to hitting the ground, he knew he hit the ground because of a cut on his elbow. Although an elbow scar was shown to the hearing officer at the contested case hearing, the claimant acknowledged that he did not receive or seek medical treatment for his elbow, and the elbow is not noted on any of the medical records in evidence. He stated he was not immediately aware of his back injury because he had extreme pain in his finger. Because he took pain medication for about a week following the accident, his back did not hurt until later. The claimant said that his two other coworkers at the work site were "[K]" (Mr. K) and "[P]" (Mr. P), whose last names he never knew. Claimant said that Mr. K took him to the truck and told him to wait while he left to get some spray for the finger, and that he collapsed while Mr. K was gone. He awoke with Mr. K shaking him.

Medical records by claimant's doctor, (Dr. H), indicate a diagnosis of "probable early

disc disorder." The doctor treating the finger was not Dr. H, but (Dr. W). Dr. W's notes about a month after the accident indicate that claimant told him he had back problems but was being treated by another doctor for that. A pain clinic test dated July 22, 1992 indicates that the claimant described no distress from his pain, and no negative emotions. However, this study does document that claimant rated his pain as 3.0 on a scale of 5.0, located in the lower lumbar and left leg and foot regions. An August 10, 1992 nerve study by a neurologist, (Dr. R), evaluates left "L5, S1 radiculopathy" but goes on to indicate that further testing is needed to exclude other possibilities.

The claimant acknowledged a previous back injury and conceded that he probably answered any question about it "wrong" if asked on his job application by the employer, because he wanted a job. The record does not indicate specifically what the prior injury was.

Mr. K, whose full name is (Mr. K), stated that he took the claimant out to the truck to get a Band-Aid for him. He said that claimant was squatting down by the rear passenger wheel of the truck, with his back toward the truck, as Mr. K got a Band-Aid out of the glove compartment. Mr. K noticed that claimant began to fall over, as if he was about to faint. Mr. K said that he caught the claimant, and that claimant never completely blacked out. Mr. K called for Mr. P, and together they assisted the claimant into the passenger seat of the truck. Mr. K drove the claimant first to one clinic, then another, and said that claimant never complained about his back. Mr. K did not notice any elbow injury.

Mr. P, whose full name is (Mr. P), stated that when claimant was injured, he put him under Mr. K's immediate care. Mr. K and the claimant left, but then Mr. K called him urgently, and he went out and observed the claimant standing, and leaning on the truck. Mr. P stated that Mr. K told him he was scared when the claimant, who had been sitting on the curb, began to faint and "kind of fell over." Mr. P did not see or observe an elbow injury, and said the claimant did not complain about his back.

I.

WHETHER THE CARRIER WAIVED ITS DEFENSE UNDER ARTICLE 8303-5.21.

The claimant alleges that the carrier did not list its objections to the compensability of the claimant's back injury on its TWCC-21 notice of dispute, and that the back injury is therefore compensable as not timely disputed. The TWCC-21 is not in the record of this case, so the substance of this point of appeal could not be evaluated even if the issue had been properly before the hearing officer.

As carrier correctly points out, the claimant failed to raise this issue either in the benefit review conference or the contested case hearing. The contested case hearing officer may only consider those issues reported as unresolved after the benefit review conference or added by the consent of the parties or a finding of good cause by the hearing officer. Article 8308-6.31(a). Our own consideration of the issues is limited to the record

below, and the request for review of the hearing officer's decision. Article 8308-6.42(a). We cannot find error on the part of the hearing officer for allowing the carrier to defend the claim for the back injury when waiver of defenses was not raised as an issue, or litigated. There is no support in the record for the claimant's assertion. This point of error is overruled.

II

WHETHER THE HEARING OFFICER'S DETERMINATION THAT THE CLAIMANT DID NOT INJURE HIS BACK ON (DATE OF INJURY), IS SUPPORTED BY SUFFICIENT EVIDENCE

The claimant argues that the hearing officer abused his discretion by making medical judgments about the scar on his elbow, and argues that the probative evidence requires a finding in claimant's favor. The hearing officer's decision indicates that the scar was not sufficient to prove a fall, considering the rest of the record.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence in a contested case hearing. Art. 8308-6.34(e). Because of this, we will set aside the hearing officer's determination only if the evidence supporting the decision is so weak, or against the great weight of the evidence, so as to be manifestly wrong or unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). A trier of fact is not required to accept a claimant's testimony at face value, even when it is 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 facts set forth in a doctor's report detailing the history of an accident as related by a claimant do not amount to good evidence to prove an injury. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

In this case, the facts regarding a back injury were sharply disputed. Nevertheless, the claimant himself was unable to state, unequivocally, that he had fallen; he concluded that he must have fallen based upon a cut elbow. He sought no treatment for the elbow cut. Mr. K stated that claimant was squatting when he began to faint, and that he caught him. The claimant admitted that he had a prior back injury. As observed by the hearing officer, the medical evidence does not indicate that claimant's back pain was traumatic in origin. The discrepancies in the testimony were up to the hearing officer to evaluate, as was the demeanor of the witnesses. There is sufficient evidence in the record to support his decision that a back injury did not occur as a result of claimant's accident on (date of injury), and we affirm his decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge