APPEAL NO. 93173

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On January 29, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues that remained in dispute were: 1) whether claimant was injured in the course and scope of his employment on (date of injury); 2) whether claimant notified employer of his injury not later than 30 days after (date of injury); 3) and, whether claimant suffered any disability as a result of the claimed injury of (date of injury). The hearing officer determined that the appellant, claimant, was not injured in the course and scope of his employment on (date of injury), did not report an injury to the employer within 30 days, and did not suffer disability as that term is defined in the 1989 Act. Claimant contends that the hearing officer erred and abused his discretion in making his findings and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The evidence in this case is fairly and accurately set out in the hearing officer's discussion of the evidence and is adopted for purposes of this decision. Briefly, the claimant stated he was employed as a mechanic by (employer) on Monday, (date of injury). On that date, claimant states he had just punched back in from a 10 minute break when his supervisor walked up to him, pushed him, told him to go back to work and then kicked him in the middle of his buttocks. Claimant continued to work but stated that later his back began to hurt. Claimant, as well as the supervisor, (Mr. A), agreed that the incident was witnessed by a department manager named (B) (later identified as (Ms. G)). Claimant states he was off work Tuesday and Wednesday and went to the doctor, (Dr. P), on Thursday, May 14th, and was given an off-work slip. Both claimant and Mr. A agreed that Mr. A called claimant's house on Friday, May 15th and that claimant's wife spoke with Mr. A telling him claimant was unavailable (it is unclear whether she said claimant was "still sick", or that he was in the shower, or both). Claimant and claimant's wife testified she went to the employer's store on Friday, May 22nd to pick up claimant's paycheck and to drop off claimant's sick slip. Claimant's wife testified she gave the sick slip to the lady where she picked up claimant's check. Claimant testified, and is supported by Dr. P's periodic reports, that he had been taken off work until further notice by Dr. P. Claimant testified he is unable to work because of his injury, but there is some dispute about whether claimant was seen working on his car.

The medical evidence in this case consisted of a report and TWCC-61 (Initial Medical Report) from Dr. P dated May 21, 1992, indicating "point tenderness of the lumbar spine with slight decreased range of motion. . . there was no neurological deficit." Claimant was given pain medication and physical therapy. A TWCC-64 (Specific and Subsequent

Medical Report) dated 8/6/92 showed the same problems as the TWCC-61, continued use of Naprosyn, an anti-inflammatory analgesic, and a work hardening program. Another TWCC-64, dated 10/21/92 showed the same complaints with a treatment plan to continue conservative treatment. Another TWCC-64, dated 11/9/92 shows claimant "still has residual pain over the L-spine" and continues pain medication. None of the medical reports show objective causes for claimant's complaints.

Ms. G testified she witnessed the (date) incident and was in the breakroom when it occurred. Ms. G stated that claimant and Mr. A were already in the breakroom sitting together, talking and joking when she arrived. She states the three walked out together after she had been there about 10 minutes. She stated after claimant had punched back in and as claimant and Mr. A were walking off, Mr. A playfully kicked claimant in the seat of his pants. She further testified it was not an angry kick and that it did not appear to hurt claimant, who simply looked around and then went back to work. Ms. G testified she heard no angry works exchanged and did not see Mr. A push claimant.

Mr. A testified he is automotive manager for the employer and was claimant's supervisor on (date). He denies harassing claimant and does not remember ever kicking claimant. Mr. A states he called claimant's house on May 15th and claimant's wife answered. He states claimant's wife said claimant was in the shower and could not talk, but that they would bring in a sick slip. Mr. A states that he never spoke with claimant and that claimant's wife never mentioned an injury at work as the reason for missing work. Mr. A testified he thought he and claimant were friends and it was Mr. A's uncontradicted testimony that Mr. A had gotten claimant the job with the employer.

The challenged Findings of Fact and Conclusions of Law are:

FINDINGS OF FACT

4.Claimant and his supervisor, [Mr. A], were talking and joking around in the breakroom for at least 10 minutes prior to the alleged injury on (date of injury).

5.As they departed the breakroom and after Claimant clocked in, [Mr. A] playfully kicked Claimant in the seat of the pants.

6.The kick was not sufficiently hard that it would cause the alleged injury to Claimant's back.

7.Claimant did not report the injury to Employer as an on-the-job injury until he filed his claim on or about July 14, 1992, which was more than 30 days after

(date of injury).

8.Claimant did not miss any work due to an injury allegedly incurred at work on (date of injury).

CONCLUSIONS OF LAW

3.Claimant failed to prove by a preponderance of the evidence that he was injured in the course and scope of his employment on (date of injury) (Article 8308.3.01).

4.Claimant failed to notify Employer that an injury occurred on the job on (date of injury), until later than 30 days after that date (Article 8308-5.01(A)).

5.Claimant did not suffer any disability as that term is defined in the Act as a result of a (date of injury), injury (Article 8308-1.03(16) and Article 8308-4.23(a)).

Claimant basically takes issue with Findings of Fact Nos. 4 through 8 and Conclusions of Law Nos. 3 through 5 on a sufficiency of the evidence basis by reciting evidence most favorable to claimant.

In this case, the factual determinations, on which the legal conclusions are based, depend largely on the credibility of the witnesses and the weight given their testimony. The hearing officer saw and heard the testimony and observed the demeanor of the witnesses, including that of the claimant. One of the witnesses, Ms. G, was a relatively unbiased witness who testified that Mr. A playfully kicked claimant in the seat of the pants. It was within the purview of the hearing officer to determine whether claimant sustained the injuries he is claiming from this kick. We note that claimant's wife only testified that claimant had a sick slip and nowhere did she testify she informed Mr. A, or anyone else in authority, that claimant had suffered a work-related injury. From our review of the record, we do not find any basis to disturb the assessment of the hearing officer. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). The claimant's testimony is that of an interested party and as such, his testimony only raises an issue of fact for the trier of fact. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). When sufficiency of the evidence is being tested on review, a case should be reversed only if the findings are so against the great weight and preponderance of the evidence as to be clearly 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.); In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. We do not so find.

The decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Appeals Judge

DISSENTING OPINION:

I respectfully dissent from the majority opinion, because I believe that the hearing officer's decision is against the great weight and preponderance of the evidence. I would reverse the hearing officer's determination relating both to the injury and notice issues, and remand the case for determination of the disability issue.

In this case, there is uncontroverted evidence, and the hearing officer finds as fact, that the supervisor, Mr. A, kicked the claimant in the rear end. The claimant is someone who he hired, and who is ostensibly a friend. There is a witness, Ms. G. She agreed that there was a kick, albeit not an angry kick, and that claimant turned around in reaction. (This corroborates the claimant's testimony that he was surprised by the kick). She said she couldn't speak for claimant, but in the same situation would have "turned around and said something" if she had been hurt. But I find Ms. G's testimony at best equivocal, and not directly responsive, when she was asked to characterize the force of the kick. In any case, the fact that the kick was not angry does not in and of itself rule out the fact that it was forceful enough to cause a lumbar strain. Likewise, the fact that the recipient of the blow is large, rather than a small person, does not, in and of itself, preclude injury.

Later that day, claimant felt pain. He was home for two regularly scheduled days off, then he went to the doctor three days after the incident, and was diagnosed with a lumbar strain. The doctor gave claimant an "off work" slip for back pain. The doctor noted that claimant had reduced range of motion. Claimant went to the doctor and received physical therapy. Although his doctor ordered objective tests, these apparently were not consummated.

There is some evidence of possible horseplay prior to the incident. However, a sworn

affidavit from a coworker, who is still a company employee, indicates that claimant had been hit before by Mr. A. In any case, the hearing officer did not apply the horseplay exception in denying liability, so this consideration is not before us.

Mr. A stated that he cannot remember the kick, yet appeared to remember a subsequent conversation with claimant's wife with comparative clarity. Ms. G, characterized as a relatively unbiased witness by the majority decision, nevertheless accompanied Mr. A on a post-claim excursion to videotape the claimant, which would not appear to be within her direct responsibility as the housewares department manager. The claimant's testimony offered some contradiction in his assertion that the supervisor had hit him before. So, to the extent that the hearing officer is charged with judging credibility of the witnesses, it would appear that all witnesses' testimony had contradictory aspects.

That being apparently the case, it is not then clear, from the record here, given the medical evidence demonstrating injury (which, we have repeatedly held in other cases, is not needed to establish injury and need not consist merely of objective tests), the fact that the incident was witnessed, and claimant's testimony that linked pain to the incident, why the hearing officer would apparently wholly discount such evidence and find that the blow was "not sufficiently hard enough" to cause injury. I am left wondering what more the claimant could have proven to convince the hearing officer that the blow was "hard enough", and the hearing officer's decision leaves me a bit in the dark as to the facts that led him to conclude this. For all these reasons, I find that decision of the hearing officer to be against the great weight and preponderance of the evidence so as to be manifestly unjust, and I would reverse.

On the issue of notice, the evidence is clear that Mr. A, the supervisor, had actual notice of the injury within the meaning of Article 8308-5.02, such that further notice was not necessary. *See* Miller v. Texas Employers' Insurance Ass'n, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). Therefore, I would hold that employer had actual knowledge and that claimant was excused from giving notice under Article 8308-5.01.

As the failure to find disability was premised on the holding that there was no compensable injury, I would remand the case for a factual determination of whether the injury resulted in the failure to obtain and retain employment equivalent to the preinjury wage.

Susan M. Kelley
Appeals Judge