APPEAL NO. 93197

On February 9, 1993, after three continuances, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues considered were whether the claimant,(who is the appellant in this case) sustained a back injury in the course and scope of her employment with (employer), whether she gave timely notice of her injury to her employer in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon Supp. 1993) (1989 Act), whether she had disability as a result of her injury, and whether she made an election of remedies by submitting her bills to her group health insurance carrier.

The hearing officer determined that the claimant had not been injured "in (date of injury)" in the course and scope of her employment, although she gave timely notice of claimed injury to an assistant manager for the employer, that she did not have disability from her injury, and she had not made an election of remedies by filing on regular health insurance.

The claimant appealed, arguing that the medical reports in evidence verify that claimant had an on-the-job injury, and that no evidence was offered to prove that she had not had an injury "in (date of injury)." The respondent points out that the burden is on the claimant to prove that an on-the-job injury occurred, not on the carrier to disprove it. The respondent recites the evidence in favor of the hearing officer's decision.

DECISION

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

I.

FACTS

At the outset of the hearing, the claimant disputed that October 1, 1991 was her date of injury, although this date had been identified on earlier documents in the case and the benefit review conference report. The claimant's attorney asserted that the injury occurred in (date of injury), stating "we don't know the exact date." The carrier did not object or accept the hearing officer's offer of a continuance. The hearing went forward with a date no more specific than "(date of injury)," although the theory was still that the injury resulted from a specific event, not repetitive trauma.

Claimant, who was a sales associate and cashier, stated that she was injured while working on the second shift for the employer, which took place from 2 p.m. to 9 p.m. She said that as part of her duties, she would do stocking. Claimant, who said she was seven months pregnant at the time of the injury, said that because the other sales associate was busy, she decided to replenish a stock of beer that she noticed was getting low. She went into the cooler, and attempted to lift down a case of beer from above and to the side of a place several inches above her head (about six feet above the ground). She opined that the

cardboard collapsed and the beer fell on top of her head. On cross-examination, she indicated that a case on top of the one she was trying to move fell on her.

Claimant stated repeatedly that her immediate sensation was not of pain, but of being "shooken up" by this. She stated that she told the other sales associate, who was either (MB) or (RF), what had happened. She didn't recall if she was in pain the next day. She said that her neck did become stiff and sore "probably within the week, within a couple of days." Claimant said she called her supervisor (Mr. T) at home that night to report the accident. Under cross-examination, claimant stated that she could not definitely recall if she called Mr. T for the purpose of reporting her accident or not (as opposed to some other purpose). A few days later, she stated she also told her mid-level, immediate supervisor, (Ms. P), that her neck was stiff, and about the accident, and was told not to do such things again, because she was pregnant, but to get someone else to do stocking. Under cross-examination, claimant said she did not tell Ms. P that her neck was stiff because of the accident.

Claimant stated she filled out two intra-company safety hazard reports, called "Safety Sentinels," which she stated could result in employee rewards for pointing out safety problems. She said she filed one the month before her accident, and in December 1991, regarding the high stacking of beer in the cooler room. Under cross-examination, claimant read her December 20, 1991 report, which stated her opinion that "someday, someone is going to hurt themselves" by the high stacking of product in the cooler. She said that there was no ladder or step stool in the cooler area. Claimant agreed that third shift employees customarily did to the stocking of products at the store.

The claimant said she first went to a doctor when her neck continued to be sore, at a time later identified in her testimony from records as September 4, 1991. This was before her baby was born. The doctor was a chiropractor, (Dr. S). She stated that Dr. S would not do testing on her until after the birth. On cross-examination, the claimant said that she was referred to Dr. S by her husband, who sought treatment from Dr. S because of a work-related injury he had sustained, after her own accident had occurred. She stated that she did not tell Dr. S how her accident had happened, because at that point she didn't know what was causing her stiff neck and didn't, therefore, want to "point the finger."

Claimant then saw her family doctor, (Dr. SW), and a consulting doctor,(Dr. M), a neurologist, for her neck after her baby was born. She stated that she didn't make a connection of her neck to the cooler incident until told by Dr. M (sometime in December 1991) that the ruptured disc he diagnosed was caused by "something" traumatic that would have happened in the last six months to a year. The cooler incident was the only trauma that she could recall.

Claimant acknowledged that she had a motor vehicle accident in 1988 but did not

know whether her neck was injured then or not. She stated that she had not been treated for her neck as a result. Claimant acknowledged that she initially filed her medical treatment under her husband's group health insurance because she didn't know what procedure to follow. She acknowledged that this insurer had contacted her by letter asking if her injury was work-related, but that she never answered.

Claimant said she was off from work for a six week maternity leave and went back to the same facility until December. She then resigned in expectation of getting another job that did not occur, and then went back to work at another employer. store in January 1992, doing light duty only. She said that she was out for doctor's appointment occasionally, and in June 1992 she was terminated because she called in to work with a headache and her boss told her to show up at her regular time or she would be fired.

Aside from the herniated disc, claimant attributed nerve damage, migraines, and "brain seizures" to the incident in the cooler. Her treatment has been pain medication and physical therapy, from the beginning of her treatment to the time around the contested case hearing.

(Mr. L), a manager in training for employer during (date of injury), stated that he was familiar with the store where claimant worked and knew her. He said that there was a step stool in the cooler. He characterized claimant as a talkative person, but said she did not mention a beer incident to him. Mr. L said that claimant was a diesel cashier, and the other sales associate on duty would have been a gas cashier. He stated that the diesel cashier involved specific knowledge about ringing up diesel sales, and that the gas cashier would not know this. Because of this, it was customary practice in that store, although not an official policy of employer, for the gas cashier to stock the cooler, and for the diesel cashier to do the floor and condiments. He emphasized, however, that the first responsibility of a cashier was the register, which didn't usually allow for going back to stock.

(Ms. C), the district manager of the store during (date of injury), stated that during July and August 1991, the store where claimant worked, unlike other stores, had a full-time stocker, who worked the third shift, because of the sales volume at that store. She stated that the first notice she was able to discover that had been given to the employer about claimant's injury was March 1992.

Finally, (Ms. FC), who was the mother of claimant's coworker RF, said that she usually relieved claimant at the next shift and claimant would generally stay and talk with her until she decided it was time for her to leave. She said that her opinion was that if claimant had something happen to her, she would hear about it. She stated that she considered claimant to be a chronic complainer. She said she had talked with her son and MB about claimant's asserted cooler incident, and neither man knew anything about it. She agreed with Mr. L's testimony that diesel cashiering took different experience and that

claimant couldn't have left the register to go stock.

An unsworn written statement in evidence, signed "Ms P" indicated that the declarant was told by claimant that she had injured her back while trying to remove beer from the cooler. The declarant stated that she did not file an accident report. Unsworn written statements are also in evidence from "Irma Delgado," "Mr T," and "Mr F" who deny awareness of a cooler accident. Mr. T's statement indicates that the first time claimant mentioned the incident was March 31, 1992.

A confidential patient history signed by claimant September 4, 1991 at the office of Dr. S checked "no" in response to a question whether the condition was due to accident or injury. A treatment record from Dr. S covering September 1991 through December 1991 indicates "no" under work injury, and lists diagnoses of cervicocranial syndrome, brachial neuritis or radiculitis, and cervical muscle spasm. Payroll records indicate that in (date of injury) claimant worked on July 3rd, 4th, 6th, 7th, 9th-16th, 19th-21st, 23rd, 26th-28th, and the 30th.

Records of Dr. M indicate that claimant was initially treated by him March 19, 1992, at which time she reported the cooler incident. Dr. M attributes her seizures, for which he prescribed Dilantin, to a post-concussion syndrome. In April 1992, claimant had an abnormal EEG. An MRI of the head dated June 22, 1992 was normal for the intracranial region. There was no testimony about when the seizures began, and claimant's stated her reason for going to see Dr. S beginning in September was for stiffness of the neck. A note from the records of Dr. SW on March 10, 1992 appears to attribute her neck pain to "MVA" (motor vehicle accident, according to cross-examination). Claimant denied that she had neck pain related to her previous accident or that she told the doctor she did. On March 17, 1992 Dr. SW documents that, on further questioning, the claimant recalled an incident in which she had been struck in the head by a case of beer in (date of injury). Although claimant indicated in her testimony that she was told about a herniated disc as early as December 1991, the records in evidence indicate a mild protrusion at C5-6 was detected by MRI performed March 12, 1992. An X-ray of the cervical spine taken March 10, 1992 noted no significant abnormalities.

II.

WHETHER THE HEARING OFFICER ERRED IN CONCLUDING THAT THE CLAIMANT DID NOT SUSTAIN A COMPENSABLE INJURY

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. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.34(e) (Vernon Supp. 1993) (1989 Act). 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 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 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).

In order for an injury to be held compensable as a result of an accident (as opposed to an occupational disease), there must be an undesigned, untoward event traceable to a definite time, place, and cause. Panola Junior College v. Estate of Thompson, 727 S.W.2d 677 (Tex. App.-Texarkana 1987, writ ref'd n.r.e), and cases cited therein. We would further note that it has been held that a claimant contending that an injury resulted from an accident, as opposed to an occupational disease, must plead and prove a definite time when there occurred an accident from which the injury resulted. Texas Employers Insurance Ass'n v. McKay, 205 S.W. 2d 833 (Tex. Civ. App.-Amarillo 1947) *aff'd* 210 S.W.2d 147 (Tex. 1948). The fact of an injury is the controlling issue to be determined rather than the date, so long as there is no danger of confusing the injury with another injury. *See* Texas Employers' Insurance Ass'n v. Patterson, 331 S.W.2d 898 (Tex. Civ. App.-Amarillo 1950, writ ref'd). However, in the Patterson case itself, the claimant had not utterly failed to specify a date, but had advanced two different specific dates at the administrative and court levels.

It seems to us that when a claimant announces, as was done here, that the occurrence of an accident cannot be more specifically targeted than an entire month, the claimant arguably has failed to prove one of the elements of its case, a date of injury, upon which the duration of benefits, and matters relating to notice, depend. Although we need not directly rule on that matter in this case, because the hearing officer determined the injury issue in favor of the carrier, we note that the failure of claimant to be more specific than a month in alleging the occurrence of an injury, as well as the fact that recollection of the incident was, according to claimant's own testimony, made after the diagnosis of herniated disc, could, in this case, appropriately be weighed by the trier of fact as a factor in assessing the credibility of that recollection. Certainly the delay between the incident and the manifestation of physical injuries, the testimony about the usual job duties of a diesel cashier, the lack of pain immediately after the alleged incident, and the language used on the December Safety Sentinel, were all factors which the hearing officer could weigh to determine that claimant was not injured in the course and scope of her employment. There are conflicts in the record, but those were the responsibility of the hearing officer to reconcile, considering the demeanor of the witnesses and the record as a whole.

We affirm the determination of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge