APPEAL NO. 93214

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was originally scheduled for October 14, 1992 and, after several continuances, was held on February 19, 1993 in (city), Texas. The appellant, hereinafter claimant, appeals the decision of hearing officer (hearing officer) that she did not injure her back in the course and scope of her employment on (date of injury). Her request for review restates much of her testimony, and essentially asks this panel to find that the hearing officer's decision is not supported by the evidence in the record. The respondent, hereinafter carrier, contends that the hearing officer's decision is supported by sufficient evidence.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who testified with the assistance of a translator, had been employed by (employer) since May 29, 1992, although she said she worked for this employer in 1989 and 1990. Her job as a shirt presser required her to iron shirts, which were on dummies, then hang and bag the shirts. During the first two weeks on her job, she worked alone and was required to iron 50 shirts in an hour (she was paid six cents per shirt for every shirt in excess of this quota). She said when working alone she was able to take her time. On June 15th, she was assigned to work with another shirt presser, (Ms. C), at a quota of 100 shirts an hour. She said when working with a partner, she actually had to work more rapidly because the job was faster.

The claimant said on June 15th, at 12:30 p.m., her back popped when she took a shirt off a dummy. She said she did not tell anyone, including Ms. C, and kept working because she thought the pain would go away. She continued to work the next three days, taking nonprescription pain medication. On June 19th, her husband called in to the employer because claimant could not get out of bed because of the pain. However, claimant admitted her husband did not tell anyone that she had injured her back, and apparently mentioned problems with their babysitter. The claimant said the story about the babysitter was just an excuse, although she said she did not take her child to the sitter on June 19th because she was staying home that day.

On June 29th the claimant and her 11-year-old daughter went in to employer's place of business. She said she accompanied her mother to help translate. The claimant said, and she also agreed, that they spoke to (Mrs. V), employer's manager, to say claimant needed to see a doctor because she had been injured at work. They both said Mrs. V asked why the claimant had not informed her earlier, and that she said she would not send claimant to a doctor because it was too late to report an injury.

Ms. C, claimant's coworker, testified that she speaks Spanish. She said that during the period she worked in tandem with claimant, claimant was able to do the job, did not

appear in pain or injured, and did not say she had gotten hurt. On Thursday, June 18th, Ms. C observed a conversation between claimant, Mrs. V, and the supervisor, Mrs. S, in which claimant asked to take a few days off work to take care of some business; Ms. C said this request was denied because claimant had not been there long enough. Ms. C also spoke to claimant's husband when he called in on June 19th. She said he told her claimant was no longer going to go to work because she did not have a babysitter; he did not mention an injury. Ms. C said she assumed from this conversation that claimant was quitting her job.

Mrs. V, the manager, who does not speak Spanish and relies upon other bilingual employees to translate as necessary, said claimant never reported an injury the week of June 15th, and that she found out claimant was claiming an injury on June 29th. On that date, she said, claimant's daughter indicated that it was her mother's chest that was injured, and that it had happened sometime between June 15th and 18th. She said she asked claimant if she could actually say that that was when it happened, and she said claimant responded negatively. She said she does not remember whether claimant asked to see a doctor at that time. She recalled that sometime during claimant's last week she asked to take time off, but that she told claimant the priority went to the people who had worked there the longest. Mrs. V characterized claimant as a good worker and very fast. However, she stated that claimant's assigned quotas were 85 shirts for two people.

(Mr. V), the owner, said that on Friday, June 26th, the claimant came in with her husband, and carrying her baby, to pick up her paycheck. Mr. V said he could not release the check until the claimant signed certain forms, including an I-9, W-4, and a notice of workers' compensation insurance. He said the claimant did not say she had been injured that day, but asked to take the forms home over the weekend. The following Monday, he said, was when the claimant came back, stating that she had suffered an injury.

The Form TWCC-41 (Employee's Notice of Injury or Occupational Disease and Claim for Compensation) signed by claimant on June 30, 1992, states the nature of the injury was "sharp pain in chest," gives the body part affected as "chest and back," and says the accident was caused by "repetitive trauma--mgmt. increased quota of pressed shirts from 50 to 100." A TWCC-41 filed on July 7, 1992 says the accident happened as follows: "While I was pressing a shirt my back popped, causing injury to my lower back." The nature of the injury was severe pain in lower back.

The only medical record in evidence was a July 10th initial medical report by (Dr. P), which reports pain in cervical and thoracic spine. Dr. P determined not to x-ray the claimant at the time of that examination, and prescribed anti-inflammatory medication, physical therapy, and follow-up in one week.

The claimant in a workers' compensation case has the burden of proof to establish

that a compensable injury arose in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. App.-Beaumont 1976, writ ref'd n.r.e.). In this case, the hearing officer found that burden had not been met. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility, Article 8308-6.34(e). Where testimony is conflicting, as was the case here, the hearing officer as trier of fact must weigh the evidence, determine what credence should be given to the whole, or any part, of the testimony of each witness, and resolve conflicts and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ). We will not disturb the hearing officer's decision unless it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951). Upon review of the record in this case, we decline to do so here.

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge