APPEAL NO. 93223

On February 24, 1993, a contested case hearing was held in(city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant who is the appellant, had not sustained an injury on (date of injury), in the course and scope of her employment with (the employer). The hearing officer also found, relating to the second issue on whether claimant had disability, that she had not been unable to obtain or retain employment due to the incident of (date of injury). The definition of "disability" is set forth in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03(16) (Vernon Supp. 1993) (1989 Act).

The claimant appealed, arguing that the great weight of the evidence is to the contrary. Specifically, claimant argues that the testimony clearly demonstrates that an accident occurred, and further that medical evidence demonstrates that "a severe disability exists." The respondent asks that the decision of the hearing officer be affirmed.

DECISION

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

I

The claimant, a 48 year old woman, worked for the employer on (date of injury), as an assembler of circuit boards, working the second shift from approximately 4:15 p.m. to 12:45 a.m. She stated that on the night in question, at around 5:00 p.m., she was walking down a passage when she was struck by a forklift driven by (Mr. V). She stated that she fell when something struck her, and she could see that the driver looked very surprised. She stated that she was pressed between a "bread rack" (a metal rack where products were stored) and the forklift, and was hit in her back. She stated that she reported this incident at least twice that evening, to her supervisor, (Mr. O), and has never changed her story concerning the accident. The claimant returned to work the rest of her shift, but said she began to ache all over as the days passed. She went to Hospital and has not returned to work since. (Medical records refer to the visit at Vista Hills as taking place on September 16, 1992).

No medical records from this hospital were put into evidence. In evidence is a January 17, 1993 report, completed by (Dr. B). The claimant said she first saw Dr. B on September 18, 1992. Dr. B's medical report lists thirteen separate "post traumatic" injuries, which consist of back and hip injuries, stress, temporomandibular joint disfunction, and migraine headache. A CT scan of the lumbar spine conducted November 19, 1992 records impressions of spinal stenosis, mild to prominent bulging at two lumbar disc areas, dystrophic annular calcification at L3-4, and degenerative changes. No leg injuries are recorded in the records.

The carrier put into evidence a September 22, 1992 evaluation from Dr. M, (Dr. R),

an orthopedic surgeon, who noted normal x-rays and an abnormal EKG test performed at Vista Hills. Dr. R gave claimant an off work slip for two weeks, and scheduled a return visit for 10 days. The report indicates that claimant was involved in a twisting injury when her foot got caught in a forklift.

Mr. V, the forklift driver, indicated that the claimant stepped in front of his forklift, and he turned it sharply to the side to avoid hitting her. He stated that the forklift hit the wall near a doorjamb, putting a hole in the wall. The empty pallet he was carrying was shifted by the impact, and he stated that it struck her pants leg. Mr. V stated that claimant did not move, and that after the accident she said she was okay and was more worried about the wall. On redirect, Mr. V characterized the contact of the pallet and claimant's pants leg as "grazing."

(Mr. Z) stated he was in the area and the time and saw the forklift strike the wall. While he did not see the actual contact with claimant, he stated that she did not fall and was not pushed into a bread rack. He stated that when he saw claimant later, she said she was okay, nothing happened, and the pallet just "grazed" her leg. He stated he was certain that this was the word she used.

Mr. O, claimant's former supervisor, was employed elsewhere at the time of the contested case hearing, and stated he had first talked with the carrier's attorney that day. He stated that he was notified by claimant of the accident on September 3rd, and that she reported she had been "grazed" in the lower right leg; she did not report that the forklift itself hit her or that any other part of her body was struck. He stated that she raised her pants leg and he could see no bruises or scratches. Mr. O stated that he asked if she was okay and she stated she was. He stated she did not appear to be injured and finished her shift with no problems. Mr. O stated that he next discussed this accident about a week later in the employer's personnel office, when claimant then reported that she had been struck in the shoulder and back by the forklift.

Five coworkers reported that on that evening, during break or in other conversations, claimant stated that she had "almost" been run over by the forklift and was lucky not to be hurt.

(Mr. G), in charge of workers' compensation at the time, stated that the incident was reported to him on September 3rd by a supervisor, Mr. G, in a version consistent with Mr. V's account. Mr. G stated that the next week, Mr. O reported to him that claimant indicated she was having chest pains related to the accident, and when Mr. G spoke to her then, she told a completely different story from the one he heard. Mr. G stated that claimant contended she was first struck by the main body of the forklift, that the forklift then hit the wall, and that her pants leg was then grazed. He stated that she told him she had been "squashed like a cockroach" and was lucky to be alive. Mr. G stated that when he pointed

out to her that the pallet would have been past her when she contended the main body of the forklift struck her, she stated that she was short and could have been hit by the pallet. Mr. G stated that his investigation indicated that the area of damage to the wall was only 12 inches from the floor. Mr. G stated that he suggested that claimant seek regular medical treatment for her shoulder, and that she responded that she could not afford the deductible or co-insurance because her husband wasn't working.

(Ms. B), who stated that she drove claimant to and from work during this time, said that she heard about the accident on the way home the night of September 3rd, that claimant said she had "almost" been hit, and showed Ms. B her leg, which did not appear to be bruised. She stated that claimant was angry with Mr. V because he had not apologized for the accident. Ms. B said that claimant told her the following week that she had been swimming and dancing over the Labor Day weekend. Ms. B stated that she felt she had to testify because what claimant was saying was not right, and it was important to tell the truth. In brief rebuttal testimony, the claimant denied the statements Ms. B contended were made to her, and had no explanation for a motive for Ms. B.

(Ms. M), the personnel manager for the employer, stated that claimant brought her some records from Vista Hills, and when she asked claimant why she had all the testing indicated, claimant told her that she was hit on the leg by the forklift, that her right foot got caught under the forklift, and this caused her to twist and hit her back on a bread rack. Ms. M said her understanding of the incident before this was that claimant's leg had been only brushed by the pallet. Ms. M stated that, in her 27 years with the company, this was the first workers' compensation claim that the employer had asked its carrier to contest.

The hearing officer is the sole judge of the relevance and materiality as well as the weight and credibility of the evidence offered in a contested case hearing. Article 8308-6.34(e) (1989 Act). Compensation is paid for on-the-job injuries, not for accidents which do not result in injuries. 1989 Act, Art. 8308-1.03 (10); 1.03 (27); and 3.01. 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 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). Medical evidence is not generally binding on the trier of fact. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). In response to claimant's assertion that the medical evidence indicates "severe disability", we would note that the disability issue before the hearing officer had to do with that term as defined in Art. 8308-1.03(16), which depends upon the threshold

finding of a compensable injury. Without a compensable injury, an employee cannot have disability under the 1989 Act.

There is sufficient evidence to support the hearing officer's decision that no injury occurred, and it is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge