APPEAL NO. 93255

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 held on March 3, 1993, in (city), Texas, before hearing officer (hearing officer). With regard to the issues in dispute, the hearing officer held that the claimant was injured within the course and scope of her employment on (date of injury); that she timely notified her employer of such injury; and that she has had disability since October 2, 1992. The appellant, hereinafter carrier, contends that the hearing officer erred in his determination of the foregoing issues. The respondent (claimant) basically contends that the hearing officer's decision is supported by sufficient evidence.

DECISION

The hearing officer's decision is affirmed.

The claimant was employed by the (employer) as a housekeeper at Church. Her duties included cleaning the rectory, cooking for the priest, cleaning the offices and bathrooms, and cleaning the church. She testified that on (date of injury), as she moved a piano in order to vacuum under it, she felt a sharp pain in her lower back. She said she went to the church office and told her supervisor, (Sr. R), that she had hurt her back when she moved the piano; she said Sr. R told her to use a heating pad on it. As she was leaving the office claimant said (Ms. B), the bookkeeper, asked her whether she was going to see a doctor, and that she told claimant, "[w]ell, even if you're not going to the doctor, I have to make a report." Claimant said she also stopped by (Ms. W) office and told her about the injury. The claimant said she continued to work, although she took some days off work because of back pain. She said that she mentioned her back pain to several coworkers. However, she said she was afraid to take off work to see a doctor because she was afraid of losing her job.

Also in the summer of 1992, the claimant said she began having problems with her toe on her right foot, which became infected. She said that about two weeks before the church's family fair in late September she asked to see a doctor, but that Sr. R told her to wait until the fair was over. On Thursday, October 1st she said she went to (Dr. P). When she returned to work, according to the claimant, Sr. R reacted angrily because the claimant had gone to the doctor on Thursday rather than Friday. She said Sr. R shoved her, raised her hand as if to strike her, and blocked the door to keep claimant from leaving. (Claimant also said that Sr. R had been physically abusive to her in the past and that she was intimidated by her.) Nevertheless, the claimant testified that Sr. R did not fire her, and told her to go home and put her foot up. She said that when she left,"I thought I still had a job." The same day, however, the claimant wrote a letter to the church pastor, (Fr. F) wherein she said, among other things, that she did not know that going to the doctor "was going to cost me my job which I do not have any more." She did not immediately get a response from Fr. F, and because she said she had heard from another parishioner that she was fired, she went to see him on October 3rd. She said when she walked into his office,

Fr. F said, "I accept your resignation." The same day he wrote claimant a letter saying the same thing. A written, signed statement by Fr. F said claimant's October 1st letter to him indicated that she was not working at the church any more.

Sr. R testified that she was a pastoral associate at the church, in charge of administration. She said she was not aware that claimant had a back injury until after she was no longer working at the church, and she denied she had ever prohibited claimant from seeing a doctor. She said the claimant had been sent to a doctor for a previous job-related wrist injury, and that when she noticed claimant limping in September she had asked claimant whether she needed to see a doctor for her toe. She said it was claimant who did not want to go to the doctor until after the family fair. With regard to the altercation on October 1st, Sr. R said she had taken claimant into her office and closed the door, to ask the claimant why she had not said she would not be at work that morning. She said claimant became angry and shoved her. Sr. R denied she grabbed claimant, only "put my arm out," and said she tried to keep claimant in her office to calm her down. She characterized claimant as "aggressive," "moody," and "volatile," and said she had intimidated other employees.

Coworkers testified both in support of, and in opposition to, claimant's version of events. Two former employees testified that they were aware claimant had hurt her back moving a piano. Ms N, who had been the receptionist, said claimant told her she had told Sr. R about the injury. She said Sr. R intimidated and controlled claimant, although she said she could not imagine Sr. R hitting the claimant. Ms. W, who had been Fr. F's secretary, testified that she had overheard the conversation in which Sr. R told the claimant to use a heating pad on her back. She said Sr. R was a physically and mentally intimidating person, and that claimant was afraid of her. Both former employees said one of the reasons they had quit their jobs with the church was because of Sr. R.

(Ms. C), the church secretary, said she did not know claimant had hurt her back; that she saw her on a daily basis and she did not complain of back pain or appear to be in pain. She said claimant was moody and that she had telephoned her and called her names and cursed at her. Rather than being mistreated, Ms. C said claimant had gotten special treatment at work. Ms. B, the church bookkeeper, said she saw claimant every day and took cigarette breaks with her, but she did not mention a back injury. Ms. B, who was responsible for workers' compensation claims, remembered claimant telling her about a wrist injury, which was reported to Sr. R and processed as a workers' compensation claim. Perkins Brasher, who was the church's business manager and had served on church committees, also said he was not aware of claimant having a back injury until he received notification from the Workers' Compensation Commission.

The claimant said Dr. P, to whom she went because of her infected toe, also examined her back. Medical records in evidence show claimant's October 5, 1992 x-rays

disclosed "significant narrowing of L1-L2, L2-L3, L5-S1 intervertebral disc space." On November 1st Dr. P completed a "Statement of Attending Physician" wherein he gave a diagnosis of lumbar spine sprain. The record also contains several statements from Dr. P whereby he took her off work from October 2, 1992 to "until further notice." At the carrier's request the claimant was also examined by (Dr. D). On January 25, 1993, Dr. D reviewed claimant's lumbar spine x-rays and found what appeared to be disk space narrowing, arthritis, and some retrolisthesis at L2-3; he stated his impression as "Residual lumbar syndrome. Residual injury to the L2-3 disc with mild retrolisthesis," and recommended a functional capacity analysis and rehabilitation and work hardening.

The carrier alleges error in the hearing officer's findings and conclusions that claimant was injured in the course and scope of her employment and that she timely reported such injury to her employer. While the evidence in this case is conflicting, our review of the record discloses sufficient probative evidence to support the hearing officer's determinations. The claimant testified that she injured her back while moving a piano in the course of her cleaning responsibilities and that she immediately reported it to her supervisor; one coworker testified that she overheard the conversation in which claimant reported her injury. Claimant further testified that when she sought medical treatment for her toe in October she asked Dr. P to examine her back; Dr. P's records bear this out, as her back was x-rayed on October 5th and a diagnosis of lumbar sprain was made thereafter. Conversely, Sr. R and other employees of the church testified that they were not aware claimant was claiming a back injury until she left the church's employ some four months later, and that she showed no evidence of back problems. Judging the credibility of witnesses is within the clear province of the hearing officer. As one court has said with regard to the discretion to reject or accept evidence, the finder of fact "may accept some parts of a witness' testimony and reject other parts, when the testimony given is inconsistent, contradictory, contrary to established physical facts, or from the manner and demeanor of the witness creating a doubt of its truthfulness, or because of the interest the witness has in the fact sought to be established or discloses a prejudice or bias on his part prompting what he has said. In such instance [the fact finder] may form its verdict upon that part accepted along with any other testimony of probative value tending to support the same fact." Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App. - Dallas 1947, no writ).

It has also been held that fact finders are "privileged to believe all or part or none of the testimony of any one witness," Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.). Upon our review of the evidence in the record, we do not find the hearing officer's determination that the claimant suffered a compensable injury which she timely reported to be so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The carrier also alleges error in the hearing officer's determination that claimant has disability from her injury beginning October 2, 1992. The carrier argues that the claimant's

disability was due to her toe or foot condition (carrier characterizes this as noncompensable, although the claimant testified at the hearing that she had a pending workers' compensation claim with regard to her toe), or due to her voluntary resignation from her job.

In order for a claimant to prove disability, he or she must establish by a preponderance of the evidence that a compensable injury was the cause of his or her inability to obtain or retain employment at the equivalent of preinjury wages. Article 8308-1.03(16). Disability is a fact question which may be established by lay witnesses including a claimant; objective medical evidence is not essential to a determination. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. This panel has ruled that the 1989 Act does not limit the evidence that may be considered concerning the question of disability. Texas Workers' Compensation Commission Appeal No. 92322, decided August 14, 1992.

Our review of the record in this case reveals the following evidence which was adduced with regard to disability. The claimant stated her last day at work was October 2, 1992, and that she had not worked since that time. She testified that she had had surgery on both feet just prior to the hearing, but she denied that her toe problems were the primary problem she was not working. She contended that a doctor had told her that her back problems had exacerbated her problems with her toes, but no medical records were in evidence that linked the two. She stated that because of her back she could not lift or perform the other tasks which had been required of her as a housekeeper. She said although she originally saw Dr. P on October 1st because of her infected toe, she asked him to also examine her back, and his records show he had sent her for a back x-ray which was performed on October 5th. He also gave her off-work slips beginning on October 2nd, although, as the carrier points out in its appeal, they do not specify whether he took her off work because of her back or her toe, or both. A November 1, 1992 statement completed by Dr. P indicated he was treating her both for a toe abscess and a lumbar spine sprain. The evidence with regard to claimant's separation from her employment was conflicting, with obvious confusion existing on both sides. While this panel has upheld a hearing officer's decision that a claimant was not entitled to temporary income benefits because he had voluntarily resigned his job rather than contend with a suspension process, *see* Texas Workers' Compensation Commission Appeal No. 91098, decided January 15, 1992, the evidence surrounding claimant's separation consisted of conflicting testimony and documentary evidence which the hearing officer was entitled to weigh. Article 8308-6.34(e).

While the evidence with regard to claimant's disability could have supported a different conclusion this is not, in and of itself, a sound basis to reverse the fact finder's decision. While there was evidence contrary to the hearing officer's determination, we do not believe it is of such great weight or preponderance as to mandate reversal. *See* In re Kings Estate, *supra*. We find there was sufficient evidence to support the hearing officer's

finding that claimant had disability beginning October 2, 1992.

We affirm the hearing officer's decision and order.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

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Gary L. Kilgore
Appeals Judge