APPEAL NO. 93274

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On March 8, 1993, a contested case hearing was held in (City), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that claimant (claimant), who is the appellant in this case, did not sustain a compensable injury on (date of injury), while employed by (employer). The hearing officer further determined that the claimant had not timely notified his employer of injury within thirty days, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon Supp. 1993) (1989 Act), and had not shown good cause for failure to give notice. The hearing officer further found that claimant did not have disability as that term is defined in the 1989 Act, art. 8308-1.03(16).

The claimant appeals this determination of the hearing officer, arguing that the findings and conclusions of the hearing officer on these issues are in error, and that the evidence establishes that an injury occurred, notice was given, and claimant had disability. Claimant argues that he was deprived of his right to cross-examine by the admission of hearsay evidence. Claimant further argues that the hearing officer considered evidence that was excluded from the record. The carrier responds that the decision should be upheld.

DECISION

We affirm the hearing officer's decision.

Claimant stated that he worked as a custodian for the employer, and was injured (date of injury) as he lifted a floor buffer. He stated that he felt a pulling sensation in his lower back. He stated that he worked the rest of his shift and for the next four days, and during this time he contacted his supervisor, (Mr. T), by telephone, and personally told him that he was injured. He stated that he attempted to contact Mr. T again at a later time, but found that Mr. T had moved and left no forwarding address or telephone. Claimant stated that he filed a claim for injury on (date of injury) with the (city) field office of the Texas Workers' Compensation Commission. The claim was put into evidence and indicated it was date-stamped June 11, 1992 by the field office. Claimant on cross-examination said that it could have been filed June 11, 1992. Claimant asserted he went to emergency room sometime in May, but could not recall the date. There are no records in evidence from the hospital. Claimant subsequently consulted with (Dr. P) in (City) on July 24, 1992, and was taken off work. Dr. P's initial medical report indicates that his exam revealed pain and tenderness over the lumbar spine. Physical therapy reports in evidence from July and August 1992 indicate the diagnosis of cervical and lumbar strain. On October 2, 1992, Dr. P certified that claimant had reached maximum medical improvement (MMI) effective October 1, 1992 with 0% impairment; claimant agreed with this certification.

Signed but unsworn statements were put into evidence by both parties. Hearsay

objections to these by both parties were overruled. A statement put into evidence by claimant was from (Ms. BR), a coworker with whom claimant resided. This statement says only that claimant did not miss work on (date of injury). Statements entered into the record by carrier purport to be from (Ms. J), the cleaning crew leader, whose statement contends no knowledge of any injury, and from "H," who carrier asserted was Ms. BR, stating that claimant did not mention having a back problem. A transcript of a June 22, 1992 phone conversation between the adjuster and the claimant was put into evidence by the carrier without objection; in this statement, claimant indicated that he went to the St. Joseph emergency room on June 18, 1992, and that he called Mr. T on April 25th about his injury and left a message on his recorder.

Claimant stated that he left work April 25, 1992, to attend to personal business in (City) involving his mother, although he indicated that he sought medical treatment there as well. He stated he returned to (city) in May but has not returned to work for the employer.

(Ms. D), the president of the employer, stated that the employer first found out about the injury through contact from the (city) field office. She stated that Mr. T told her that the only thing claimant had said to him was that he wanted to take time off to take care of personal business in (City). She stated her belief that employees who were injured would likely report this to Mr. T, or, in the alternative, to Ms. J, the crew leader.

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 hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Art. 8308-6.34(e). His 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).

There is sufficient evidence in the record supporting the hearing officer's decision. The fact that claimant may have had a medical diagnosis on July 14, 1992 does not establish a link to the employment, which employment claimant left on April 25, 1992.

Regarding the contention that claimant's right to cross-examination was violated, we would note that the 1989 Act, art. 8038-6.34(e) states that conformity to the rules of evidence

is not necessary. Similar statements were admitted when tendered by both parties. There is no indication in the record that claimant sought to compel Mr. T's presence as a witness at the hearing. We cannot agree that admission of the statements was error by the hearing officer.

At the hearing, carrier sought to put into evidence a copy of an employer's sign-in sheet from the worksite, in order to argue that claimant was not at work (date of injury). The claimant objected and argued that it had requested the original document through interrogatories and the carrier had not produced it. The claimant argued that the original was required to ensure that the sign-in sheet had not been altered. The hearing officer sustained claimant's objection, after a long argument on the record about the document and review of the interrogatories and carrier's responses thereto. Further, when the carrier attempted to elicit testimony from Ms. D about the substance of the sign-in sheet, carrier's attorney was rebuked by the hearing officer and objection to such testimony was sustained. We find no basis for claimant's contention on appeal that any weight was given to this document by the hearing officer in arriving at his decision.

We affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge