APPEAL NO. 93742

On July 22, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine the issues of whether the claimant, MR the appellant, sustained a repetitive trauma injury in the course and scope of her employment with (employer) on (date of injury); whether she had given notice to her employer of the injury within 30 days of that date; and whether she had disability as a result of that injury. The hearing officer determined that claimant did not prove that she sustained a compensable injury to her neck, back, and shoulder by a preponderance of the evidence, that she had not given notice of injury to her employer, and that she did not prove good cause for failure to give notice, and that the employer did not have actual knowledge that claimant was alleging a work-related injury. Further, the hearing officer found that as no compensable injury had been proven, she did not have disability as that term is defined in the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011(16) (formerly TEX. REV. CIV. STAT. ANN. art. 8038-1.03(16)) (1989 Act).

The claimant has appealed this decision, arguing that it is against the great weight and preponderance of the evidence so as to be manifestly unfair or unjust. The carrier responds that the decision is sufficiently supported by the evidence.

DECISION

We affirm the decision of the hearing officer.

The hearing officer's decision fairly summarizes the evidence and will be incorporated here with minor additions. Claimant worked as a housekeeper for the employer. She had worked at this position for over 10 years.

Claimant testified that she quit because she could not stand the pain in her back and all over. She stated that she was required to lift heavy objects in her work, for example, to flip bed mattresses over. She stated that the cumulative work over several years caused her to feel pain.

Claimant stated that the pain became unbearable while she was at work on (date of injury). She testified that after three hours of work she asked her supervisor,(Mr. H), if she could go home because she was "sick." She testified that he gave her permission to leave.

Claimant testified that her daughter-in-law took her to a chiropractor, (Dr. S), on (date of injury), and the doctor told her that her spine was twisted and she had two ribs out of place. She introduced records of Dr. S which indicate claimant had complaints of pain in the head, arm, shoulder, neck, back, legs, knees, and feet. Notes in those records state that claimant felt on (date of injury), that her pain was related to her work. Claimant said she was treated for about two months by Dr. S, and filed for medical benefits through employer-provided insurance. Thereafter, claimant was treated by (clinic), whose diagnoses have been lumbar and cervical spine radiculopathy, or nerve root irritation.

Claimant submitted a memo dated (date), from Dr. S which stated that she would be off work for two weeks and was suffering from inflammatory cervical radicular syndrome and disc injury. She said she gave this memo to the employer. The memo did not state or characterize the condition as work related. Claimant stated that she later described her injury on the phone to (Ms. A), who called her while in the room with Mr. H, her supervisor. Mr. H, who had been claimant's supervisor for over three years, denied claimant's allegation that she worked for three hours and then asked him to leave on (date of injury). He stated that she called in at the beginning of her shift and said she could not report to work because she was sick. She did not state what was wrong, and did not report that she had been injured at work.

Mr. H testified that he received the memo from Dr. S and considered the doctor's statement to be consistent with the claimant's telephone call that she was sick. He filled out the paperwork to place claimant on sick leave so that she would get paid. He attached the doctor's memo to the sick leave paperwork and sent it to personnel. Mr. H stated that he did not know what the conditions on Dr. S's statement were.

Mr. H stated that claimant could understand English well enough for him to communicate most work assignments to her. However, on occasion he would use another Spanish-speaking employee to communicate with her.

When claimant did not return to work, Mr. H had Ms. A, who spoke Spanish, call and ask about her condition. This occurred six weeks to two months after he had originally spoken to her about being sick. He was advised that claimant was still sick and could not come to work. He had no reason to question this verbal report and stated he did not ask details of an employee's illness because he considered that a private matter.

The director of the housekeeping department, (Mr. G), said that the employer's records indicated that claimant was off on paid leave until May 15, 1992. The record indicated that she filed a claim for workers' compensation with the Texas Workers' Compensation Commission (Commission) dated May 14, 1992.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). 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, by a preponderance of the evidence, 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 are inconsistencies in the record but it was the responsibility of the hearing officer to judge and weigh this evidence, considering the demeanor of the witnesses and the record as a whole.

After review of the record, we affirm the hearing officer's decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge