APPEAL NO. 94147

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held in (city), Texas, on January 6, 1994, (hearing officer) presiding. With regard to the issues in dispute, the hearing officer determined that the claimant, who is the appellant in this action, did not sustain compensable injuries to her left knee and back on (date of injury), and that accordingly she did not sustain any disability as the result of her alleged injuries. While the hearing officer held the claimant timely reported her alleged knee injury, she held that she did not timely report her alleged back injury. On appeal the claimant challenges those findings of fact and conclusions of law which were decided against her, and states that she believes the report of a doctor she has seen (which report she does not yet have) will help her with her case. The respondent, which is the self-insured city for which claimant worked, asserts that the hearing officer's decision is sufficiently supported by the evidence.

DECISION

The decision and order of the hearing officer are affirmed.

The claimant had been employed as a laborer in the street maintenance department of the self-insured city (hereinafter "city"). Her duties required her to, among other things, drive trucks and shovel gravel.

Claimant testified that as she was driving a truck on (date of injury), she felt a "pull" from her left knee to her hip when she pushed on the clutch. (She also stated that she had to then push the clutch with her right leg and that she felt pain in that knee also, which later resolved.) She got to the work area, and told the first employee to arrive, (Mr. VD), that she had hurt her leg. Mr. VD, who was the supervisor's assistant and who sometimes worked in a supervisory capacity, advised her to tell (Mr. D), the supervisor. Claimant said she called out to Mr. D, who apparently was operating a piece of machinery, and told him, "[s]omething happened, I'm hurting." She said Mr. D told her to go home if she couldn't work, and he asked another coworker to drive claimant to the operations center to clock out. Claimant's time card, which was in evidence, shows she worked two hours on (date of injury) and took 6 hours sick leave.

The following day claimant saw (Dr. E), who she said gave her a shot for the pain. She testified that she told Dr. E how the injury occurred, but conceded that neither his report of that visit nor of subsequent visits on September 10th and October 21st reflect this (although notes from the initial visit state, "laborer, occ. drives trucks"). Dr. E also noted lower back pain. His diagnosis was arthritis, degenerative joint disease, although he was not able to perform blood tests or x-rays because of claimant's inability to pay. Dr. E also prescribed medications.

The claimant asked for, and received from (Dr. W), Dr. E's associate, a light duty release to work. She said she took this release, which gives the nature of the illness or injury as "rheumatoid arthritis," to (Mr. F), Mr. D's supervisor, and also told him about the

medicine she had been prescribed. She said that Mr. F later told her she needed a full release before she returned to work, and she said at the time she brought in that release (which was before she returned to work on September 17th) she told Mr. F that her physical problems were work related. The claimant worked September 17th and 18th, then had to quit because of the pain.

The claimant was seen by (Dr. R) at the University of Texas Medical Branch Hospital – (city) and x-rays of her knees on December 2, 1991 were normal. She said she told Dr. R that her knee pain arose at work but he did not record this.

The claimant contended her back pain arose from the repetitive physical stress of her job, including shoveling. She said her supervisor was aware that the job was causing her back pain, and had told her to take it easy.

Mr. D testified that he does not remember claimant reporting a work related injury to him in September 1991; he said he was aware that claimant had been off work and had received medication, but he thought it was for a female problem. When asked by claimant whether he remembered telling her to take it easy when she said her back hurt while shoveling, he replied that he tried to do that to all his workers.

Mr. F testified that the city uses a particular form on which to record job-related injuries and no such form was in claimant's personnel file. He said he had seen claimant's light duty release, but that it only mentioned arthritis and claimant did not tell him the injury was related to driving the truck. According to his records, the city first received notice in May of 1992 that claimant was alleging a work-related injury.

The claimant introduced into evidence signed statements from several coworkers which stated, among other things, that claimant had had problems with the city's trucks in the past and had asked to trade trucks. Mr. D testified that he remembered asking other workers to trade trucks with claimant, but that no one wanted to. Mr. F stated that the truck claimant drove most often had been in for maintenance work two times since claimant had worked there, and that if a clutch problem had been reported it would have been fixed.

The claimant has not returned to work, although she said she has made efforts to do so. She said she has not been released by a doctor to return to work, although she acknowledged that no doctor has in writing taken her off work.

In the discussion of evidence the hearing officer noted that the record does not contain a preponderance of the credible evidence that a compensable injury occurred. The claimant in a workers' compensation case has the burden to prove by a preponderance of evidence that an injury was sustained in the course and scope of employment. Washington v. Aetna Casualty and Surety Company, 521 S.W.2d 313 (Tex. Civ. App.-Fort Worth 1975, no writ). While a claimant's testimony alone can establish that a compensable injury occurred, Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ), the trier of fact is not bound to accept the testimony of a claimant,

an interested witness, at face value. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The evidence in this case included medical reports indicating that claimant had a degenerative disease and not mentioning any incident at work; except for Dr. E's initial report, there was no mention of any problem with claimant's back, and no injury with relation to the back was ever established. The hearing officer could determine, based upon this evidence, that claimant's physical symptoms and problems did not arise out of or in the course and scope of her employment. We would additionally note that pain alone is not compensable under workers' compensation. *See* Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992.

The claimant makes reference in her appeal to a doctor's report that was not in evidence below; however, this panel is limited in its review to the evidence developed at the contested case hearing. Section 410.203.

We also do not find error in the hearing officer's determination that claimant did not timely report any injury to her back. The 1989 Act provides that an occupational disease must be reported to the employer within 30 days of the date a claimant knows or should have known that the injury may be related to the employment. Section 409.001(a)(2). While an employer's actual knowledge can suffice for purposes of timely reporting, and claimant on appeal contends her supervisor knew of her complaints of back pain, there was no evidence regarding when the claimant knew or should have known that her back pain was related to her employment, and when her supervisor (or another acting in a supervisory capacity) was notified or had actual knowledge.

The act provides that disability is the inability to obtain or retain employment at preinjury wages due to a compensable injury. Section 401.011(16). Based on our affirmance of the hearing officer's determination of the issue of injury in the course and scope of employment, we find no error in her determination that this claimant did not have disability.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). Where testimony and evidence is inconsistent and conflicting, the hearing officer can resolve such inconsistency and conflict. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). We will not set aside the decision of the hearing officer where it finds support in the evidence and where it is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge