APPEAL NO. 991886

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On August 10, 1999, a contested case hearing (CCH) was held in. The issues disputed at the CCH were whether the appellant, _____, who is the claimant, sustained an injury on _____, and whether the respondent (carrier) was relieved from liability for claimant's failure to notify the employer within 30 days after his injury. Disability was also in issue.

The hearing officer held that the claimant was not injured in the course and scope of employment, and that he did not give timely notice of injury to his employer and was without good cause for his failure to do so. The hearing officer further held that the claimant did not have disability.

The claimant appeals, arguing that he was injured as stated, and that he informed his employer, who knew that his back was hurting. He argues he first sought medical treatment on March 15th, not May 6th, as found by the hearing officer. The carrier responds that all facts found by the hearing officer are supported and within his responsibility as the trier of fact and should not be set aside on appeal.

DECISION

Affirmed.

All dates are 1999 unless otherwise stated. The hearing officer has set out the facts in his statement of the evidence and findings of fact; we shall briefly summarize them here. The claimant had been employed by the (employer) for less than a year as a salesclerk. He maintained that on _____, during a shift that ran from 3:00 to 10:00 p.m., he was cleaning out crates and soft drink cartons from a storeroom and injured his low back. He worked but said he had growing pain that became so severe that on March 14th he asked permission from his manager, (Mr. R), to see a doctor. He went to the doctor on March 15th, but then returned to work and worked through March 25th, when his employment was terminated. His next doctor's appointment, he said, was April 10th. Claimant described his pain as severe such that he could perform no work at all. When asked why he waited from March 15th until April 10th to see the doctor, he then said that he believed he was also seen and treated on March 17th. Claimant also said that he did not think that the injury was that serious, and when asked why he did not, he was somewhat nonresponsive, replying again that the pain kept growing and growing.

Claimant's reason for cleaning out the storeroom was specifically so that a county health inspection could be done and new tiles put on the floor. Mr. R testified, and produced supporting documentation, that the floor was retiled on February 20th, in response to the county inspection performed on February 10th. Mr. R said he asked claimant, who was working two shifts that day, to clean out the storeroom beginning on

February 19th, to be completed by early the next morning. He said the storeroom was about the size of a large walk-in closet, and that lifting would be required. Mr. R testified that the job was being done so slowly that he had to return to the store by 6:00 a.m. on the 20th to urge claimant to accomplish it timely.

Mr. R said that claimant did not report any injury to him relating to that incident. He produced payroll records to show that claimant worked the "graveyard" shift on _____, from 10:00 p.m. to 8:00 a.m. Mr. R said that the storeroom was not cleared out on _____. Mr. R said that claimant usually worked the graveyard shift on Sunday, Monday, and Tuesday, and then he would try to schedule a one-day shift during the week, for a total of roughly 30 hours a week. He said that claimant had worked his usual shift on Tuesday, March 10th, and was scheduled to work again on March 14th. Mr. R said that when another worker did not report for work, he tried for three days to reach claimant on the telephone, even in the wee hours of the morning, but was told by the person who answered that he was out riding his motorcycle. Mr. R said that he left messages for claimant to call him. On March 14th, claimant called in to say he could not report for work that day because he had injured his back, and was going to see a doctor. Mr. R said that he did not ask claimant how his back was injured, and that claimant did not report that it had anything to do with work. On March 15th, claimant reported for work and brought a slip showing he had been to the doctor. Mr. R said claimant worked his usual shift, and did not appear injured. Mr. R said that in the next few days, he recalled that claimant declined to do any lifting, contending that his back hurt, but again no connection to work was made. Mr. R said that claimant was terminated effective March 30th, although his last day was the 25th, because there were shortages in his cash register and a number of overrings (credits for uncompleted sales or returned items) for transactions where it appeared (apparently from an in-store videotape) that the claimant was giving change to customers.

The Initial Medical Report (TWCC-61) filed by (Dr. W), D.C., for the March 15th examination diagnosed lumbar disc syndrome, and recited that claimant had been lifting cases of soda two weeks earlier and "yesterday" he woke up with low back pain. This report was filed on May 10th along with a Specific and Subsequent Medical Report (TWCC-64) for a May 6, 1999, visit. The TWCC-64 narrative stated that claimant did not say on March 15th that he had been injured on the job. There is no April 10th visit recorded in the doctor's progress notes.

A videotape was taken of claimant on two occasions in the first week of May 1999. He is shown walking to and from his house, carrying plastic sacks of groceries from the store to his home, riding his motorcycle, and lowering a hot water heater from an upright to sideways position on the front porch of his home, bending over as he did so.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association 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 Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole. The facts set out in a medical record are not proof that a work-related injury, in fact, occurred. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Section 409.001(a)(1) and (b) require that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should at a minimum apprize the employer of the fact of an injury and the general area of the body affected. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). The hearing officer has support in this record for his inference that claimant was not injured on _____ at work, and that he did not timely inform his employer of a work-related injury. He could further believe that there was no inability to obtain and retain employment due to the asserted injury.

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 Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that that is the case here, and affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge