APPEAL NO. 000295

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 11, 2000, a hearing was held. The hearing officer determined that appellant (claimant) did not sustain an injury on _____, including injury to her left knee, left hip, left shoulder, and low back; that she did not give timely notice to her employer of an injury; and that she had no disability. Claimant asserts that she did sustain an injury at work on _____, and cites medical evidence in support of that point; she also states that she timely notified employer, citing statements by Mr. P, Mr. R, and Ms. M; disability is also claimed on appeal. Respondent (carrier) replied that the decision should be affirmed.

DECISION

Affirmed in part, and reversed and rendered in part.

Claimant worked for (employer) on _____. Claimant testified that on that date she tripped over a pallet jack and fell backwards to the floor. She said that her supervisor, Mr. P, was holding the pallet jack and saw her fall, but she agreed that she did not tell him that she injured herself. There was no evidence that claimant received medical care until May 12, 1999, and there was no evidence that she did not continue to work until May 6, 1999, when she was terminated based on attendance quotas. Claimant did not testify that any attendance difficulties resulted from the fall occurring on _____.

Mr. P in his statement indicated no observation of claimant having difficulty working after _____. *Compare to* Miller v. Tex. Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.) in which a claimant was observed by a supervisor when he fell five feet from the bed of a truck. In addition, there was evidence that although that claimant said nothing, he worked at a slower rate. The court said that these facts did not show actual knowledge as a matter of law, but provided a question for the fact finder to decide as to whether notice requirements had been satisfied.

In the statement he gave, Mr. P said, as claimant states on appeal, "I need to go see a doctor," but Mr. P's statement should be quoted more fully. A question was asked, "[d]id she ever make any type of complaint or have any difficulty doing her job?" Mr. P answered," . . . No. She . . . she . . . tell next day for . . . come see him to me I think I need to go see . . . she said . . . I need to see go see a doctor she . . . I think I think think." The next question was, "[d]o you know if she ever went to see a doctor or did she request to see a doctor?" Mr. P answered," . . . she never say . . . I need to go . . . I think I need to see a doctor to go see a doctor she said . . ." subsequent questions and answers do not appear to be any clearer than the above sequence. We cannot say that Mr. P's statement alone constitutes the great weight and preponderance of the evidence needed to reverse the factual determination of the hearing officer that notice of injury was not timely provided.

Ms. M also provided a statement in which she said that she is a packaging group leader. Her statement indicates that claimant called her at home to tell her of an injury, not just a fall. The statement includes a question to Ms. M which asked, "[d]o you know if she--she called you before or after her discharge?" Ms. M answered, "I want to say it was after she was discharged. Because I believe I was at work the day she was discharged so I think it was that next day, but I'm not sure cause it's been awhile." (Claimant cites this answer in relation to her discharge on May 6, 1999, so that May 7, 1999, would be within 30 days of _____.) However, Ms. M also was asked, "[w]hy don't you go ahead and tell me what knowledge you have in regards to or anything regarding an incident involving [claimant]?" Ms. M answered, in part, "I don't exactly know what month . . . I had a message left on my answering machine . . . later that afternoon around about 9 o'clock that night she [claimant] called back. [Claimant] said she had been injured at work . . . I said . . . you need to call [JB] or [R]. . . . She said well it don't matter whether I go whether I talk to whoever I'm going to the doctor tomorrow I said okay that's fine that was the end of our conversation. . . ." (Claimant first saw Dr. S on May 12, 1999; a call the day before would have been on May 11, 1999, beyond the 30-day time period.) We cannot say that Ms. M's statement alone constitutes the great weight and preponderance of the evidence necessary to reverse the decision of the hearing officer that notice was not timely.

More important to whether the hearing officer's decision--timely notice of an injury was not given--should be reversed are the statements of Mr. R and Ms. N. Mr. R is Mr. P's supervisor. He was asked whether he said a report was completed. Mr. R replied, "[y]es ma'am. A report was I completed the report and asked her how she was doing and uh she said that she was fine nothing don't hurt anything she said she . . . slowly uh but the . . . back she even got up and showed me how she fell. But she said that nothing was hurting that it was more an embarrassment of falling than the really hurting herself." (While there is some language ". . . more embarrassment . . . than . . . hurting" which provides some evidence of notice, Mr. R also said in this answer that claimant said "nothing was hurting.") Mr. R did say that he made a report. Ms. N said in her statement that she is personnel manager for employer. One of her answers indicated that Mr. R had talked with claimant after she fell; Ms. N was then asked, "[h]ow long ago?" She replied that it was "back in April . . . nobody can find the actual written documentation . . . they interviewed her wrote up a near miss which is what we write up when there's not an injury that requires someone to go to the doctor and that is usually done if the employee says they don't need to go to the doctor. . . ." (Emphasis added.) Ms. N did not say that the report made in regard to claimant's fall was an incident report that is done whether there is an injury or not, but said that it was a "near miss" report that is done when "there's not an injury that requires someone to go to the doctor." That statement, coupled with Mr. R's statement indicating that such a report was made, shows that employer was documenting a report of an injury. The 1989 Act at Section 409.001 only says that notification shall be given the employer of "an injury" not later than 30 days after the date; it does not say that notification shall be given of an injury that requires a person to go to the doctor. Ms. N also said in that same answer that Mr. R told her that he had told claimant "to notify me should she feel the need to go to a doctor. . . ." The 1989 Act also does not require multiple notifications. The

determination that claimant did not give timely notice is reversed and a new decision is rendered that claimant did give timely notice.

The evidence also shows that claimant continued to work for 26 days after the fall. It also indicates that part of claimant's job was moving boxes of mushrooms, which weigh 20 pounds, more than infrequently. It also shows that claimant quit working when terminated, said nothing of an injury when terminated, and did not see a doctor until May 12, 1999. On May 12, 1999, Dr. S noted that claimant said she had fallen at work on _____; was embarrassed; and did not go to a doctor then. Dr. S noted "bruises on bottom." Claimant then began seeing Dr. C, on June 14, 1999. As stated by the hearing officer, Dr. C's records indicate multiple areas of pain claimant complained of at different times in her treatment by Dr. C.

The record does show that claimant at times in her testimony contradicted herself. The hearing officer specifically said in his Statement of Evidence that claimant "was neither credible nor truthful in the presentation of her claim"; similarly the hearing officer commented that Dr. C's medical records "were neither credible nor reliable."

Claimant was seen by Dr. B on behalf of the carrier. He stated on October 11, 1999, in reference to claimant's initial visit to Dr. S on May 12, 1999, "[g]iven the time frame, her clinical presentation at that time may or may not have any relationship to the incident date of _____." Dr. B also said that "current clinical findings do not demonstrate any evidence of objective pathology." Carrier also obtained a peer review by another chiropractor, Dr. P, who said there was no "objective or clinical evidence" that claimant's complaints made on June 14, 1999 (to Dr. C) "are in any way related to the event occurring on _____" so that "there is . . . no evidence that the claimant sustained any material injury on _____, that would require treatment."

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. In the absence of a determination that his decision is against the great weight and preponderance of the evidence, it will not be reversed on appeal. While carrier's own evidence provided the great weight of the evidence as to notice, those same statements, if anything, show that claimant was able to keep working until she was terminated. This fact finder determined that claimant was not injured on _____. He did not find that claimant never incurred any injury to her buttocks in the form of a bruise, or any other injury, at some other time. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ), which indicated that a fact finder may believe that a claimant was injured, even on the date in question, but not in the way claimed. With credibility a matter for the hearing officer to determine, and with no prompt sequence of events indicating that a particular incident caused injury, the evidence does not reach the level of great weight so that the determinations that claimant did not show that she was injured on _____, and did not show that she sustained a compensable injury on _____, are not against the great weight and preponderance of the evidence.

With no compensable injury, there can be no disability. *See* Section 401.011(16).

The decision and order found at the end of the hearing officer's opinion are affirmed except insofar as they indicate that claimant did not timely report a claimed injury; the decision and order as affirmed include that claimant did timely notify her employer of an injury.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge