APPEAL NO. 001545

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 14, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury and did not have disability.

The claimant appeals and asserts that he indeed sustained a back injury as he testified. He contends that this resulted in 100% disability. The claimant argues facts he believes support his decision and show the bad faith of the employer. The respondent (carrier) responded by reciting facts in favor of the decision.

DECISION

We affirm the hearing officer's decision.

The claimant was employed by (employer) as a seller of carpeting and flooring. He contended that on Friday, _____, around lunchtime, he and a manager, Mr. H, moved some mattresses off the company loading dock. He said that the delivery driver, who also worked for the employer, resigned abruptly and other "service people in the back" had gone to lunch, which is why his assistance was required. This took about ten minutes and he did not fall or trip. He felt no pain at that time and went home for his regularly scheduled afternoon off. The claimant contended he had growing soreness and tightness in his back beginning that evening. The claimant worked his regular Saturday shift the next day.

The claimant said he treated his back pain on Saturday and Sunday with over-the-counter drugs. On _____, a Monday, he went to work and worked until around noon, then took off early to see the doctor. The claimant said he told Mr. H that he had hurt his back moving the mattresses.

The claimant agreed that as of August 23, he had been offered, and accepted, another job with a carpet company in California. The claimant moved to California over Labor Day weekend, renting a rental truck to accomplish the move himself; he said that the packing began prior to August 20 but was done entirely by his wife. He asserted he did nothing to assist in the move that involved lifting and packing items. He could not recall the exact date he placed his home on the market, although it was before August 20. The claimant agreed he was distressed with the employer because he believed he was not receiving commissions due on sales he made and was working, in a lot of instances, for free.

The claimant was seen by Dr. M. He contended he saw Dr. M only this one time, but talked to him on the telephone on August 28. Dr. M prescribed seven days bed rest for a lumbar strain. The claimant said he had called Dr. M on the August 28 because he had fever and chills. The claimant said he was treated by Dr. B, a chiropractor in California, about 12 to 13 times throughout September. There is only one report from Dr. B and it diagnoses a lumbar strain/sprain from lifting mattresses. The claimant contended

he had numerous tests, including three CT scans and four MRIs. None of the CT scans or MRIs to which the claimant referred are in evidence.

The claimant said that his lower back and right side were injured. The records from California indicate that treatment and testing centered on the claimant's lower thoracic spine. The claimant agreed that an MRI of his lumbar spine was normal. Medical records from a VA hospital dated January 20, 2000, state that claimant has staph aureus vertebral osteomyelitis. This report also lists a compression fracture at T8-9. The claimant said that no doctor told him how long this infection had been present.

There was evidence presented that the mattresses in question had been delivered on August 19, although claimant was adamant that he had helped move them on the August 20. He denied telling coworkers that he was going to be "detailing" a car the afternoon of the August 20, although he agreed that this was a service he would occasionally perform.

Mr. H testified that claimant had problems correctly doing paperwork on his sales. He said that by August 17, the claimant's performance continued to downgrade. Mr. H agreed that some of the commission went to the office manager due to her need to redo the claimant's paperwork. On August 17, Mr. H said that claimant was taken out of management and made a regular salesman, which affected his commission. Mr. H said that while claimant would ordinarily take off Friday afternoon, he was told on Tuesday that Tuesday would in the future be his day off. Mr. H said that the claimant asked to take the coming Friday afternoon off because he had scheduled the "detailing" of a car, and he was given permission to do so.

Concerning the mattresses, Mr. H confirmed that they were delivered on August 19. He agreed that the claimant came to his office and advised moving the mattresses so that the resigned employee would not retaliate and that he and the claimant moved the mattresses on the 19th. Mr. H said that the claimant at no time mentioned straining or hurting his back on _____. Mr. H said that the claimant, on August 23, said his back was hurting but did not attribute it to moving mattresses, and that he asked for time off early to see the doctor. Mr. H said that there would never be an occasion for leaving mattresses on the loading dock overnight or moving them back onto the loading dock. Mr. H said he knew nothing about the contended injury until contacted by a California chiropractor a month later for the coverage information.

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). 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).

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 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 Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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 this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Philip F. O'Neill
Appeals Judge