APPEAL NO. 001561

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 15, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____, _____, or on any other relevant date; that the respondent (carrier) is not relieved from liability under Section 409.002 because good cause exists for the claimant's failure to provide notice in a timely manner; and that the claimant did not have disability.

The claimant appealed and argues facts that she believes support her injury. She attaches additional documents that she wishes to have considered. (However, one of those documents was in evidence.) The carrier responded that the documents not entered into evidence at the CCH cannot be considered by the Appeals Panel. The carrier states that the fact determinations made by the hearing officer are supported by the record. The notice-to-employer issue was not appealed.

DECISION

We affirm the hearing officer's decision.

We note at the outset that evidence not admitted into the record of the CCH cannot be considered for the first time on appeal. Some of the documents attached to the claimant's appeal were dated well in advance of the CCH and could have been produced at that time. However, some of the records can be considered because they were already in evidence.

The claimant was employed by an oral surgeon, Dr. N. She said that on _____, she was cleaning up part of a new office space to which Dr. N had just moved. At the time, Dr. N was on vacation. She said that this entailed shoveling parts of a broken-up concrete slab into pails and moving them for disposal. She said that she filled eleven five-gallon pails and a wheelbarrow and then swept the area. The claimant said the job took about two hours after which she was tired and sore.

The claimant said she did not know that she injured herself until six weeks later, when she began having problems with numbness in her legs. She was worried that she might be developing multiple sclerosis and sought medical attention. During a time when she was awaiting test results, she went to a hospital emergency room on August 3, 1999, due to back pain. The attending physician, Dr. S, was also a back pain specialist and told her she had sustained a back injury. Dr. S questioned her about whether she had been in a car accident or done any lifting and she told him about the office cleanup.

An MRI showed "compressed discs" in her back and she was treated with steroid injections. She reported the injury to Dr. N on _____. The claimant said that Dr. S took her off work and that after she was released in late September and on October 4,

1999, she started another job. She did not receive wages during the time she was off work. The claimant said she had begun to seek another job in mid-September.

The claimant agreed that she had been diagnosed in 1997 with chronic back pain. She said that the day of the office cleanup, she was only scheduled to work until noon. She said that her husband came and helped her move two cabinets. The claimant agreed that she was not in pain the day after the move and that by June any soreness had gone completely away. The claimant agreed that she moved from her residence on June 17, 1999, but denied that she picked anything up.

Dr. N testified that the claimant did not mention any back pain between _____ and _____. He could not remember that she had any back complaints before _____. He said that he believed that the claimant had injured her back lifting cabinets, rather than cement pieces, during the time he was on vacation. He believed this was around May 20 or 21. Dr. N said he had never wanted the cabinets moved. Dr. N recalled that the claimant's back "popped" around the first of August and she had pain a few days before she went on medical leave. He noted in his records that she was on sick leave August 2 and 3, 1999.

A record from the claimant's family doctor, Dr. M, is dated July 22, 1999, and opines that some nerve entrapment was causing the claimant's numbness, which could originate in the back or pelvis. Dr. M recorded that the claimant's episodes of pain and numbness in her legs (but not any other part of her body) had been going on about three months. The claimant questioned if a tubal ligation she had could be causing these problems. The claimant reported no history of trauma. An MRI dated _____, reported mild disc bulges, no nerve root compression, and no herniations or stenosis.

On December 3, 1999, Dr. S wrote a long letter to the adjustor to explain the source of the claimant's back pain. Dr. S set out the history that the claimant reported to him of carrying pieces of cement in buckets. Dr. S diagnosed lumbar radiculitis related to the claimant's disc bulges which were due to her back injury sustained on _____. He said that she suffered a strain injury from repetitive bending.

Medical records from 1997 show that the claimant had her stomach stapled for obesity. By 1999, according to medical records, she had lost over 100 pounds. In January 1997, chronic back pain was part of several diagnoses.

The hearing officer is the sole judge of the relevance, the 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 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).

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.). It appears that the hearing officer concluded, based in large part on the large gap between the incident and the claimant's symptoms, that her back problems were not attributed to the incident she described. Reviewing the record as a whole, the decision is not against the great weight and preponderance of the evidence and we, therefore, affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge