APPEAL NO. 002479

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 October 5, 2000. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury on _____; whether he had disability as a result of his injury; and whether the appellant (carrier) was released from liability for the failure of the claimant to give timely notice of his injury to his employer.

The hearing officer found that the claimant injured his back on _____; timely notified his employer of this injury on _____; and had disability from this injury beginning on January 12 and continuing through the date of the CCH.

The carrier has appealed. The carrier recites evidence that shows presence of a low back injury prior to the asserted date of injury. The carrier asserts that reversal is mandated because the hearing officer made a finding based upon evidence not included in the record. The carrier asked that a remand be considered if the case is not reversed and rendered. The carrier concludes by also asserting that the notice and disability findings cannot be found without evidentiary support. The claimant responds that even if the hearing officer went outside the record and found a pivotal fact, she is empowered to do so. The claimant also argues that the decision is supported by the record.

DECISION

Affirmed.

The claimant was employed by (employer). He said that he hurt his back while pulling a 46-foot-long chain up 20 feet to a scaffold. His complaints of injury were made to his coworker at the time, Mr. S. Mr. S testified and corroborated the activity undertaken that day as well as the statement that the claimant made that he thought he hurt himself. Mr. S said he was a friend of the claimant outside of work.

The case was somewhat complicated by the fact that this occurred at a time when the claimant was recovering from a bout of a testicular inflammation and infection, which he said started in October 1999. He had gone to see his doctor on January 7, fearing that it was returning. He saw his doctor, Dr. M, on the 11th, and Dr. M pursued a sonogram of his left testicle, which revealed a cyst. At this point, the claimant said he began to fear that he had something more, such as testicular cancer, and this became the primary concern. He thought his other pain could be radiating from this. After a few referrals, the claimant was examined by a urologist who told him it was more likely he had nerve damage. A lumbar MRI revealed a herniation, for which the claimant had surgery on September 20 paid for by his private health insurance.

The claimant said he undertook to report the back injury on _____ to his employer, but the employer would not fill out an accident report, contending either that the claimant was not injured on the job or that they did not have the proper paperwork. The claimant thereafter hired counsel.

Much of the evidence developed involved whether the claimant did, or did not, have leg and back pain prior to _____ (and if so, how far before that date); the failure of his doctors to note a specific incident of that date early in the course of treatment; and the conditions for which he was treated in January. Although the claimant testified and a later treating doctor, Dr. J, diagnosed a herniation, reports of objective testing from around February 1 indicate that the claimant had spurring with pressure on his left L5-S1 nerve root. Some tests describe this as degenerative. Dr. J's later reports prior to the claimant's surgery described the chain incident and noted that the problem was initially thought to be a strain in the groin area. There are statements from his doctor in evidence which take him off work during time periods claimed for disability.

In summary, conflicting evidence was presented and it was the responsibility of the finder of fact to reconcile such differences. 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 claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). Generally, lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation. Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733 (Tex. 1984).

We agree that the hearing officer appears to have made a finding of fact as to when the claimant has filed his Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) that is not borne out in the admitted evidence of the case. There is no TWCC-41 dated February 10, 2000, only a subsequent amended March 16 TWCC-41. It may be that the hearing officer picked up a reference in the benefit review officer's report to a claim filed on February 10. However, this report is not evidence of substantive matters referred to therein. We cannot agree with the claimant's assertion that going outside the record by the hearing officer for a basis for fact findings is permitted. If official notice of a document filed with the Texas Workers' Compensation Commission is made, that must be done on the record. However, we disagree that this finding constitutes reversible error. A TWCC-41 is an assertion of injury, not evidence thereof. We cannot agree, in reviewing the decision, that her finding spelled out the only basis upon which the hearing officer agreed that an injury occurred on _____ or that it tipped the balance in any way.

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 finding sufficient support in the record for the hearing officer's decision on the appealed issues, we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Thomas A. Knapp
Appeals Judge