APPEAL NO. 92041

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act),TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On January 2, 1992, (hearing officer) presided at this contested case hearing in (city) Texas. He found claimant, appellant herein, was not compensably injured as a result of an incident on (date of injury). Appellant calls attention to photos in evidence and states that the evidence at hearing shows a compensable injury did occur, takes issue with Finding of Fact 3 and Conclusion of Law 5, and notes appellant's medicinal consumption of alcohol and his disorientation.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Appellant cleaned buses for Texas, (city), and (city) (employer) since 1990. On (date of injury), he slipped on the entrance steps of a bus as he was cleaning it. He testified he grabbed the hand rail but still fell to the steps injuring his back. His medical record from the emergency room of (Center) in (city), dated September 30, 1991 (Carrier Exhibit 1), shows that "Pt. (patient) caught himself on the side rails and did not fall but pt. said he twisted his back." He did tell another employee, (Mr. M), on the same day that he "slipped in the stairwell of a bus," but said he was all right. (This employee had more seniority than appellant but was not a supervisor.) On September 17, Mr. M took appellant's pay to him since he had not been back to work after (date of injury). He further stated that appellant told him then that he hurt his back the past weekend while moving rocks in his yard. At the hearing, appellant stated that he had moved rocks in that yard (owned by his mother) only one time, several months earlier in April, and had some pain in his back then but did not miss work from it. Appellant introduced a series of pictures showing rock-like objects around a tree with some grass growing between them in an attempt to corroborate that the rocks he moved had been in place before September 1991. Appellant said he did not see a doctor until September 28 because he, at first, did not think his injury was serious.

Respondent, in introducing reports of appellant's two visits to medical center emergency rooms on September 28 and 30, 1991, called attention to references to his alcohol intake. The first record showed that appellant presented with lumbar pain with a history of a slip and fall two weeks earlier. He was noted also to have a history of osteoarthritis and alcohol abuse; under a blank for "current medications" was listed "none (etoh)." The emergency room note of September 30 shows appellant "fell backward down bus steps" and later states "pt. (patient) caught himself on the side rails and did not fall but pt. said he twisted his back. Pt. worked for bus company, cleaning buses; he missed work Wednesday and Thursday and was laid off Friday. Pt. says he cannot remember why he missed work last wk (week)." X-rays were taken but no report of their outcome is available. Low back pain was noted and Motrin was prescribed.

Respondent also called (Mr. P), (Mr. MA), and (Mr. G) in addition to Mr. M, discussed previously. Mr. P stated he was the night shift supervisor and had worked with appellant in the past. In an early morning phone call on Monday, September 16, appellant told him he would not be in to work that day because he hurt his back moving rocks in his mother's yard that weekend. Appellant also asked him for the name of a chiropractor.

Mr. MA was the shop foreman who got the report Mr. P made of appellant's absence on Monday, the 17th of September. Mr. MA phoned appellant each day that week but got no answer. He asked Mr. M, when he took a check to appellant on Tuesday the 18th, to have appellant call him. Mr. MA never got a call. In addition he drove to appellant's home on Thursday, confirmed that it was the right house with a neighbor who said appellant had just entered the house, knocked on the door, but got no answer. He again went to the home on Sunday, the 22nd of September but again got no response. On September 27, appellant was fired. After (date of injury), Mr. MA first saw appellant on October 7 when he presented himself at the bus station as ready to work; he still did not say he had been injured on the job. Mr. G then testified that he was the operations manager, that appellant had caused no complaints previously, but that appellant was told he was fired on October 7 because employer had been unable to reach him to tell him of that decision prior to that time.

Appellant's photographs of grass growing next to rock-like objects placed around a tree were said to indicate that the bricks/rocks were there before mid-September. To buttress this assertion, reference was made to the first freeze of the year in Lubbock as curtailing grass growth but no evidence as to type of grass, its rate of growth, fertilization or irrigation was offered. The hearing officer could give the photographs the weight he so chose, just as he assigned weight and credibility to all the evidence. Article 8308-6.34(e) of the 1989 Act.

Appellant's disorientation as to dates, referenced in the appeal, was not placed in evidence at the hearing. To conclude that appellant was confused as to dates when he told Mr. M and Mr. P that yard work caused his injury, the hearing officer would have had to infer disorientation from other evidence of record. The only evidence available, from which to infer, was medical records, made at least 11 days after appellant's discussions, that mentioned he was unable to remember why he missed work one week and said he abused alcohol. Such an inference was not required, and if it had been made, its reasonableness would be open to question. Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951).

Appellant's statement to two other employees that he hurt his back away from the job, his continued work on the date he slipped on the job, and the absence of any witness to his slipping do not make the hearing officer's Finding of Fact 3,

> Claimant (Mr. D) failed to prove by the greater weight of credible evidence that he sustained damage or harm to the physical structure of his body as a result of a fall which occurred on (date of injury), while Claimant (Mr. D) was working for the (Employer) ,

against the great weight and preponderance of the evidence. The hearing officer, as trier of fact, is to weigh evidence, judge credibility, and resolve conflicts and inconsistencies. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). As a result, Conclusion of Law 5 that appellant did not sustain a compensable injury is sufficiently supported by evidence of record and findings of fact.

The decision is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge