APPEAL NO. 92042

A contested case hearing was held on January 10, 1992, at (city), Texas, (hearing officer) presiding as hearing officer. She determined the appellant did not injure himself within the course and scope of his employment and was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The appellant filed a request for Review on February 5, 1992, complaining that certain evidence was improperly admitted, that the evidence established that the appellant was injured in the course and scope of his employment and he was entitled to benefits, and that the electronic tape recording of the proceeding (which he was provided) was inadequate. The reply to this request for appeal was received by the Commission on February 11, 1992, and the decision of the hearing officer became final and constituted the final decision of the Appeals Panel on March 12, 1992. Article 8308-6.42(c). We nonetheless have reviewed the complete record in this case, the request for review, and the response thereto and render this review of the hearing officer's decision.

REVIEW

We find that the evidence of record is sufficient to support the findings, conclusions and decision of the hearing officer and do not find merit in the assertions of the appellant in his request for review. We therefore would affirm the decision.

Succinctly, the appellant claims he injured his back on (date of injury), lifting batteries. He was on an assignment to (employer) as a temporary employee of Olsten Temporary Services. He stated he reinjured his back while lifting antennas on another assignment the next day. Although he wasn't certain of the dates, he states the only injury he is claiming for is the one that occurred on (date of injury), and that he reported his injury the day after the second injury (which would be (date)). He testified that he subsequently (date) went to his own doctor where he was diagnosed as having "acute lumbosacral strain" with 12 weeks of disability anticipated. The history given in the medical report indicated the injury was caused "by lifting and stocking flashlight batteries."

During examination by his counsel, appellant denied that he had taken any money from a break room at (employer) on (date of injury), although he was questioned about it by a supervisor (L C) who claimed that he had taken the money. On the Monday following his claimed injury, the appellant went to pick up his pay checks and inquired if there was any work available. He did not say anything about being injured at this time. He also did not mention being injured to his supervisor at the job site on (date of injury). He stated no one witnessed his being injured.

Three witnesses testified for the respondent. In essence, this testimony indicated that on (date of injury), the appellant's job did not involve lifting or handling batteries but only antennas weighing about seven pounds. Records indicate the appellant did not work for this employer on (date) (which would appear to be the date he would have been involved in lifting batteries according to his testimony). It was clear that the supervisor at the job site felt certain the appellant had taken money from the break room (an honor system fund) and

that this resulted in the appellant being sent home shortly after noon on the (date) of September and not being offered further employment.

None of these witnesses observed the appellant to be in pain or distress on (date of injury) or subsequently. It was also stated that the first time that the appellant claimed he was injured to his employer was on (date) when he came into the employer's office and made out a statement after he had seen his doctor. Although he contacted the office at least two times prior to the (date) of September, he did not mention any injury.

During the examination of the first of the three witnesses called by the respondent, the appellant's counsel strongly objected to any questioning about money being missing from the break room. When the hearing officer allowed a witness to explain notations concerning this matter and the appellant's release from duty at noon on (date of injury), appellant's counsel became highly agitated, objected strenuously, claimed violations of constitutional rights, and stormed out of the hearing room with the appellant. The hearing continued.

Clearly, there was conflicting evidence in this case. The appellant's own testimony reflects inconsistencies, some of which, it is recognized, may be caused by the passage of time and fading of memories. However, as the trier of fact, it is the hearing officer's primary function, and well within her authority, to resolve conflicts and inconsistencies in the evidence and assess credibility. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e), 1989 Act. In weighing the sufficiency of the evidence, reversal of the fact finder is appropriate and justified only if, after reviewing the entire record, the determination or decision is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong or unjust. Employers' Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, n.w.h); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We do not find that to be the case here. Given the conflicts in the evidence, and within the appellant's own testimony, the hearing officer could properly disbelieve all or part of the appellant's testimony concerning his claimed injury. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Ft Worth 1947, no writ), Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). And, his actions following the claimed injury, as observed and testified to by the respondent's witnesses, tend to discount that an injury occurred within the course and scope of his employment. In sum, we find probative and sufficient evidence to support the hearing officer's findings, conclusions, and decision.

Appellant also complains in his request for review that he was denied due process and his constitutional rights at the hearing and thus forced to leave the hearing prior to its conclusion. Appellant urges that it became apparent at the hearing that he was being tried on criminal material (the money missing from the break room fund) and that his leaving was not his own volition, but to protect his rights.

Regarding the matter of the missing money and the suspicion being cast on the appellant, the respondent stated the only purpose of this matter was to establish a motive for the appellant's "retaliatory claim." While we support, under the circumstances presented, the hearing officer's relevancy determination in allowing a degree of questioning in this area solely as it tends to show motive to present an unsubstantiated claim, we would not find error in any event. The record is clear that this matter was brought up first by appellant's counsel in his initial examination of the appellant. He specifically asked him if he had stolen any money from the break room, whether or not he had been accused of doing so, and whether there had ever been any criminal charges or arrest. The appellant can hardly be heard to complain on appeal that this evidence was improperly admitted or considered when he himself opened the door. McInnes v. Yamaha Motor Corp., 673 S.W.2d 185 (Tex 1984); Hughes v. State, 302 S.W.2d 747 (Tex. Civ. App.-Eastland 1957, writ ref'd n.r.w.). We find no merit to this assertion of error.

Finally, the appellant complains about the quality of the copy of the electronically recorded tape of the hearing which he requested and was provided. We have inquired into this matter and found that the initial copy provided to the appellant was of poor quality. Upon returning it to the field office, he was provided with a second, higher quality copy which has apparently been accepted without further complaint. While it is recognized that electronically tape recording proceedings occasionally result in less than optimum quality, we have reviewed the entire record in this case and find it to be an adequate and substantially complete recording of the proceeding. Given the practical and cost considerations involved, it has been determined not to be feasible to require transcribed reports of contested case hearings. However, a party may request a court reporter at their expense. Article 8308-6.34(d).

Finding no reversible error in our review of this case, and finding sufficient evidence to support the findings and conclusions of the hearing officer, we would affirm.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge