APPEAL NO. 92043

On January 9, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant suffered a compensable injury limited to his left shin and ordered the payment of benefits if and when they accrue as prescribed by the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant urges that the decision is against the great weight and preponderance of the evidence and that the hearing officer erred in a finding of fact and conclusion of law which failed to include injuries to the appellant's neck, shoulders and back. Appellant asks for reversal and the rendering of a new decision.

DECISION

Finding sufficient evidence to support the hearing officer's findings, conclusions, and decision, we affirm.

The appellant worked for (employer), who carried workers' compensation coverage with the appellant. He had worked for two days when, on (date of injury), he injured himself in cleaning a "mud box" on a construction job site. He claims the mud box was on a fork lift and when it started rolling forward, he had his hand on it and came forward with it and hit his left leg on the fork lift. He wasn't sure if he fell just to his knees or all the way to the ground but he did hobble around because of hitting his shin. He states he didn't say anything to anyone at work or while riding home with other employees about hurting his shoulders, neck or back but that the next morning he woke up sore and hurting in the neck and shoulder area. He testified he has been unable to work since (date of injury). He denied any drug or alcohol use before or during his duty on (date of injury), and acknowledged on cross-examination that he had filed some six (6) workers' compensation claims between 1983 and 1987 which concerned back injuries. He also acknowledged a felony conviction for the knowing delivery of the drug marijuana to another.

A witness testified that the appellant rode to work with him on (date of injury), and that he did not see the appellant use drugs or alcohol on that date and that he appeared to be normal. The witness stated he observed the appellant hit his shin and hobble around but did not see him fall in any manner. He saw the skin peeled back and a trickle of blood on the appellant's shin. He testified the appellant did not say anything about hurting himself anywhere but on his shin either at the job site or during the ride home. (The job site was apparently located a considerable distance from appellant's home.)

The appellant did not go to work on (date), but sent a note to (Mr. H) about injuring himself. Mr. H came to his house late in the afternoon on (date), and accompanied the appellant to a hospital emergency room. The medical report of this (date) visit (a carrier exhibit) indicated, *inter alia*, that the appellant was uncooperative and exaggerated response to light palpation and that a drug screen was positive for cocaine. The diagnosis was "low back pain -- suspect malingering."

The appellant testified he went to a (Dr. P) sometime after the emergency room visit. A medical report dated August 20, 1991, reflects that the appellant was first seen by Dr. P on August 20, 1991, complaining of pain "bilaterally in the posterior cervical area" resulting from an injury when he fell backwards while lifting a mud tub. The report notes prior medical history including back surgery in "approximately 1987" involving a fusion at the L5/S1. Dr. P's impression was "injury to the cervical area with bilateral radiculopathy, right more than left. Injury to the lumbar area with bilateral radiculopathy."

The finding of fact and conclusion of law with which the appellant disagrees are:

FINDINGS OF FACT

IV

The Claimant struck his left shin against a "mud box" while at work.

CONCLUSIONS OF LAW

III

The Claimant had an injury limited to his left shin while in the course and scope of his employment on (date of injury).

As we initially indicated, there is sufficient evidence to support the hearing officer's findings and conclusions. Clearly, the hearing officer was not bound to accept all, or for that matter, any particular part of the appellant's testimony. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). While the appellant's testimony and the report of Dr. P standing alone might result in a different finding, other evidence directly impacts the weight and credibility that a fact finder might attach to this evidence. The hearing officer, as fact finder, is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given it. Article 8308-6.34(e). Aside from the evidence potentially affecting the appellant's credibility, there was testimony from a witness to the incident whose testimony is consistent with the finding of the more limited nature of the appellant's injury. Aside from the lack of any initial complaint of injury other than to appellant's shin, the medical report from the emergency room shows uncooperativeness and a suspicion by the examining doctor of "malingering." The appellant's visit 11 days later to Dr. P, particularly with the prior medical history of appellant, is not necessarily compelling. The history of the injury as set forth in Dr. P's medical report and the testimony of the appellant is certainly not evidence so strong as to require a different result in light of other evidence of record. Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ); Hartford Accident and Indemnity Co. v. Hale, 400 S.W.2d 310 (Tex 1966).

Where a case is reviewed for sufficiency of the evidence to support the findings of

the fact finder, reversal is appropriate only if, after reviewing the entire record, the findings are so contrary to overwhelming weight of evidence as to be clearly wrong and unjust. Employers' Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); In re Kings Estate 224 S.W.2d 660 (Tex. 1951).

This is not the situation here and, accordingly, the findings, conclusions, and decision of the hearing officer are affirmed.

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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