APPEAL NO. 92091

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 December 11, 1991, a hearing was held in _____, Texas, with (hearing officer) presiding. He found no injury in the course and scope of employment and reversed the interlocutory order calling for provision of benefits. Claimant, appellant herein, asserts error in the hearing officer's decision that no injury occurred in course and scope of employment and states that the evidence shows the carrier is liable for benefits.

DECISION

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

Claimant had worked for (employer) approximately three months when he stated he was injured on (date of injury). On that day claimant and other employees travelled to City 1 from the home office in City 2 to clean asphalt from the bottoms of oil storage tanks approximately 60 feet in diameter. Claimant did not work alone. Six men worked on the inside of a tank using air hammers to break up chunks of asphalt to be manually carried out a door to two employees immediately outside. The environment was noisy and earplugs were used. Lighting was described by some employees as good, consisting of six, 150 watt job lights plus other light sources, and by claimant as only consisting of three lights. Claimant testified that he dropped a piece of asphalt weighing approximately 50 pounds on his foot breaking a bone. (He broke the fibula--a much smaller bone than the tibia, also located between the knee and ankle.) Claimant told no one at the job site and said nothing of the accident to several other employees in the vehicle during the one and one half hour ride back to City 2 at the end of work. No one saw him drop the asphalt or limp during the day.

Claimant testified that after the company vehicle brought them back to City 2, an employee named Mr. F "dropped me off at home before six p.m." He said he had bought a six pack of beer to go but had not been in a bar. MC testified that claimant was her "live-in boyfriend" and "common-law spouse" and that two men carried claimant upstairs to their home (one on each side of claimant) at 7:30 or 8:00 p.m. She said when he took his boot off his leg was swollen and purple, and SS who had been a nurse and lived nearby viewed the leg and said it was broken (SS did not testify and offered no statement). Mr. F provided a statement that acknowledged bringing claimant home after going to "the Blue Room where [claimant] and myself drank a few beers." Mr. F added he drove claimant home and that claimant said nothing of getting hurt, did not complain, and did not limp the entire time.

Claimant said he was afraid to say anything about the injury because he could lose his job but admitted he had notified his supervisor for this same employer previously when

hit by an errant air hose. He did not file a claim for that injury but was given time off with pay to recuperate and was not reprimanded or chastised for having so reported.

The morning after the injury a call was made to employer reporting the injury, and claimant was taken that afternoon to a hospital emergency room--where a broken fibula was found (the history shows claimant's report of dropping a piece of solid tar on his ankle and later adds ". . . as he was going up the stairs he heard something crack.")

The hearing officer is the sole judge of weight and credibility of evidence. He is not compelled to accept the testimony of an interested party such as claimant as to an injury. Presley v. Royal Indemnity Ins. Co., 557 S.W.2d 611 (Tex. App.-Texarkana 1977, no writ). He could choose to weigh contradictions between claimant's statement of January 21, 1992, in which he said that he told no one because he had little pain and thought the injury was unimportant and his testimony at hearing in which he described continuous sharp pain but said he told no one because he was afraid he would lose his job. Montes v. TEIA, 779 S.W.2d 485 (Tex. App.-El Paso 1989, writ dismissed). The hearing officer could choose to believe that no one in the vicinity saw the accident at work because it did not happen there although an injury did occur somewhere. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. App.-Texarkana 1961, no writ). The findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

We affirm.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Susan M. Kelley
Appeals Judge