APPEAL NO. 92136

On March 6, 1992, a contested case hearing was held in _____, Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, appellant herein, did not sustain an injury arising out of and in the course and scope of his employment with (employer) on (date of injury), and, accordingly, denied appellant benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant requests that we review the hearing officer's decision. Respondent, the employer's workers' compensation insurance carrier, contends that the evidence supports the decision.

DECISION

Finding the evidence sufficient to support the hearing officer's decision, and that the decision is not against the great weight and preponderance of the evidence, we affirm. The issue at the hearing was whether appellant sustained an injury on (date of injury), in the course and scope of his employment. Article 8308-1.03(27) defines "injury" as "damage or harm to the physical structure of the body and those diseases and infections naturally resulting from the damage or harm." Article 8308-1.03(10) defines "compensable injury" as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g).

The hearing officer's key finding of fact and conclusion of law are:

Finding of Fact 3:On (date of injury), the date on which claimant claimed to have been injured, claimant did not sustain an injury.

Conclusion of Law 7:On (date of injury), claimant did not sustain an injury arising out of and in the course and scope of employment.

Appellant, who is 29 years of age, claims he sustained an injury to his back on (date of injury), while working as a Mr. D hand. Appellant testified as follows: He was employed as a Mr. D hand from April through December 1991. On November 27, 1991, he fractured a rib in a vehicle accident while driving his employer's truck to work. (Respondent's attorney represented that appellant had filed a workers' compensation claim for his injury of November 27th; that respondent was contesting that claim; that some income benefits had been paid on that claim; and that no benefit review conference on that claim had been set). He was taken to a hospital and shortly thereafter saw Dr. S. Dr. S prescribed pain medication and told him to stay on light duty work for three weeks. He returned to work on December 3rd and did light duty work in the employer's yard for a few days. Then, a few days prior to (date of injury), the toolpusher, Mr. R, sent him to work on a drilling rig. On

(date of injury), he told the toolpusher he could not work on the drilling rig because of his rib injury and that he was supposed to be doing light duty work. The toolpusher sent him out to work on the rig anyway. About 3:00 p.m. that day, he felt a "pop" while helping Mr. H use a "cheater pipe" (an extension put on a wrench to get more leverage) to remove a bolt on the wellhead. While in the presence of Mr. H, he immediately said: "Oh shit, I think I hurt myself." He did not know at the time if it was his rib or back that "popped." He went to the doghouse for 30 minutes, took a pain pill, and then helped the crew remove the blow out preventer. Before leaving work that day, he indicated on a form that he had not been injured at work that day. He had developed a habit of filling out the form in that manner over the prior eight months. At his house that evening, he felt excruciating pain from the middle of his back to his neck. The next day, December 12th, he told the employer's safety director, Mr. L, that he had injured his back the previous day while working on the rig. He did not go back to work until December 16th because of his pain. On December 18, 1991, Dr. S told him he had muscle spasms or had pulled some muscles in his back and to do light duty work. He returned to work the next day, but was told to go home. In January 1992, Dr. M told him he was having muscle spasms in his shoulder and neck and prescribed pain medication. Appellant admitted to a conviction for extortion in 1980, a conviction for forgery within the last five years, and two convictions for parole violations. The hearing officer stated that he would not consider any evidence relating to prior convictions if such evidence violated TEX. R. CIV. EVID. Rule 609 concerning impeachment by evidence of conviction of crimes.

Respondent presented two witnesses: Mr. L, who is the employer's Personnel and Safety Director, and Mr. H who was the operator on the rig and appellant's immediate supervisor. Mr. L testified that on December 12, 1991, appellant asked him why he had been sent out on a rig the day before, but that he did not mention anything about an injury at work on (date of injury). Mr. L called Dr. S and found out that appellant had been released to full duty work status on December 10th. He first found out that appellant was claiming a work-related injury occurring on December 11th when a claims adjustor so informed him on December 16th. Sometime later Mr. L told appellant that he wanted a doctor's opinion that it was safe for appellant to return to work.

Mr. H testified that appellant complained about his ribs bothering him the morning of December 11th and that the crew worked on removing bolts from a wellhead in the afternoon. He asked appellant to help pull on a cheater pipe to remove one bolt. Mostly, appellant used the backup wrench to hold the bolts in place. After three bolts were removed appellant went to the doghouse for about 20 minutes. He asked appellant what the matter was and appellant told him he had taken his medication. Appellant did not tell him he had felt a "pop," nor that he had hurt his back or neck at that time or at any later time.

Medical records and reports showed the following:

1. In a report dated December 5, 1991, Dr. S reported that he had seen appellant for the injury of November 27, 1991. (The date of visit is not indicated).

Dr. S diagnosed a rib fracture, and stated that he anticipated that appellant could return to limited work on December 3, 1991, and to full-time work on December 10, 1991. He anticipated that appellant would achieve maximum medical improvement on January 1, 1992.

2.In a report dated December 27, 1991, Dr. S reported that he had seen appellant on December 18th for his injury of November 27th. The date he anticipated that appellant could return to full-time work was changed to January 1, 1992, and the date he anticipated appellant would achieve maximum medical improvement was changed to January 15, 1992. In what appears to be an attachment to that report, Dr. S indicated that on December 18th, appellant told him that the week before the visit he felt a pulling sensation in his upper back and ribs when he pulled on a cheater pipe. An x-ray of appellant's mid-thoracic spine was normal. Dr. S's physical findings were "mild diffuse tenderness mid-muscular area of left mid scapular area." Dr. S indicated that no treatments were given or prescribed, and that follow-up visits were "as needed only."

3.Dr. M examined appellant on January 28, 1992, for complaints of mid-back pain that radiated up to his neck. Appellant told Dr. M about his rib injury of November 27th and that on December 11th he had felt a pop in his back when he pulled on a cheater pipe at work. Dr. M stated that he thought appellant was suffering from "a cervical facet arthrosis with accompanying muscle spasms of his neck." Pain

medication was prescribed and an appointment made for a return visit in three to four weeks.

Also in evidence was a copy of the employer's "Operator Morning Report" dated (date of injury). Appellant indicated on this form that he had not been injured at work on that date.

Appellant had the burden of proving that he was injured in the course and scope of his employment. Reed v. Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The burden was not on respondent to prove that an injury did not occur while appellant was working on the rig on (date of injury). Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). The trier of fact may believe that a claimant received an accidental injury, but disbelieve the claimant's testimony that he received the injury during the course of his employment. Johnson, *supra*. In this case the evidence was conflicting as to what, if anything, happened to appellant at work on (date of injury), and as to what transpired in the ensuing days. Since the hearing officer was presented with conflicting testimony, he could choose to believe the testimony of respondent's witnesses over the testimony of appellant. *See* R. J. McGalliard v. Kulmon, 722 S.W.2d 694, 697 (Tex. 1987); Article 8308-6.34(e).

The appellant was an interested witness and the trier of fact was not required to accept his testimony that he suffered a back injury on (date of injury). Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611, 613 (Tex. Civ. App.-Texarkana 1977, no writ). Also, the doctors' recitations of the history of appellant's back problem as reported to them by appellant, although admissible for showing the basis of the doctors' opinions, if any, as to the cause of appellant's back problem, were not competent evidence that an injury in fact occurred on the date alleged. Presley, *supra*.

Upon a careful review of the entire record developed at the hearing, we cannot say that the hearing officer's finding of no injury on (date of injury), was so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). That finding supports the hearing officer's conclusion that appellant did not sustain an injury arising out of and in the course and scope of his employment on (date of injury).

Appellant attached seven documents to his request for appeal, five of which were made a part of the record at the hearing, and two of which were not offered at the hearing. In reviewing the record, we have considered all the documents that were admitted into evidence or officially noticed at the hearing. We decline to consider the two documents (a portion of a telephone bill and Employer's First Report of Injury for the November 27, 1991 injury) which were not made a part of the hearing record. Our review of the evidence is limited to the record developed at the hearing. Article 8308-6.42(1). Furthermore, appellant has not shown that these two documents were unknown or unavailable to him at the time of the hearing, and that it was not owing to want of due diligence that they were not brought to light sooner. Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. HO-A086992-01-CC-HO42) decided February 14, 1992.

The hearing officer's decision is affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

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Susan M. Kelley
Appeals Judge