APPEAL NO. 92175

On March 26, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), the appellant herein, had not sustained an injury in the course and scope of his employment as a mechanic with (employer).

The appellant asks that the decision be reviewed and reversed, under what is, in essence, a challenge to the sufficiency of the evidence supporting the determinations of the hearing officer. Specifically, the appellant complains of Finding of Fact Nos. 3 through 6, and Conclusion of Law No. 3 made by the hearing officer, arguing that the only credible evidence offered in the case supports the contention that a back injury was sustained by appellant on (date of injury), as he described at the hearing. The respondent asks that the decision be affirmed.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. Art. 8308-6.34(e) (Vernon's Supp. 1992) (1989 Act). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). A claimant must link any contended physical injury to an event at the work place. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-1961, no writ). Although an accident does not have to be witnessed to be compensable, and the claimant's testimony alone may establish an the occurrence of an injury, Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989), the trier of fact is not required to accept the testimony of the claimant but may weigh it along with other evidence. Presley v. Royal Indemnity Insurance Co. , 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

The appellant stated that he arrived at work around 10:00 a.m. on (date of injury), the day after Labor Day, and that he experienced sharp pain in his back at around 12:30 p.m., as he assisted in unloading tires from a truck. He stated that another coworker was rolling the tires toward him, whereupon he would stop the tires then lift them into a stack. Appellant

stated that he lunged and grabbed the 10th or 12th tire as it rolled toward him at a high rate of speed, and incurred pain to his back as a result of being in a "funny position" during this gesture. Appellant's claim for compensation indicated that he injured his back as he lifted the tire onto a stack. Appellant explained the apparent discrepancy in these versions of the incident by stating that the rolling and lifting were essentially one motion. Appellant stated he had two prior on-the-job back injuries, in summer of 1986 and 1987, but was completely recovered from these injuries.

Appellant stated that he told his supervisor, (RA), that his back hurt. He continued to work another hour and then went to lunch, but went home and took aspirin and applied heat. He stated that when it did not get better, he called RA and told him he would be off for a few days because he pulled his back unloading tires. Appellant stated that RA was intimidating, and stated that the employer would not be responsible for that. Appellant then told him he would pay for the visit himself. According to a record from the clinic that appellant visited that day, Med-Cure, he was diagnosed with a back strain or spasm. Appellant never returned to work for employer after he left for home during his lunch hour.

A statement filed by appellant's wife states that he had no back problems going into work that day. However, some signed transcripts of recorded statements from coworkers indicate that he was observed bent over or walking oddly prior to unloading the tires. RA stated that he observed appellant hobbling around that morning, and asked him about it, and was told by appellant that he had back problems before and was having a spasm. RA further confirmed that appellant called him from his house after he left for lunch, and stated that he would be going to the doctor because his back was hurting so bad. RA stated that appellant told him his back flared up once a year, and not to worry about it, that it was not the employer's fault. RA indicated that appellant had been employed by employer for about 2-1/2 to three weeks.

(BB), another mechanic, saw appellant changing oil that morning around two hours prior to unloading tires and asked him what was wrong. BB states that appellant told him he had a back problem. (SH) observed appellant walking strangely when both came into work around 10:00 a.m., and states that appellant told him that he had a back problem and a real bad hangover. SH stated that appellant had not complained before about his back.

On (date), appellant stated his back hurt so bad he could not move, and he was transported by ambulance to (Medical Center), where he was hospitalized about a week. According to the results of a magnetic resonance imaging (MRI) examination, there was no evidence of herniation or significant encroachment on the thecal sac. The results indicate slight degeneration in signal intensity at the lower three lumbar discs, with some slight bulging at L3-4, 4-5, and 5-S1. Although the ambulance service bill indicates that the injury was not work-related, this is offset by the fact that the hospital records show it as a "workers' comp" injury. Records from (Medical Center) note that appellant reported "a history of low back pain on and off for some years." However, it should be noted that a part of a hospital

record consisting of history given by a claimant is not admissible as proof of the truth of matters stated therein, although it can be used to explain the basis of a witness' opinion. Texas Employers' Insurance Association v. Butler, 483 S.W.2d 530 (Tex. Civ. App.-Houston [14th Dist] 1972, writ ref'd n.r.e.).

Although a different conclusion could have been drawn from the conflicting evidence presented, there is sufficient probative evidence to support the decision of the hearing officer that the appellant's injury was not linked to activities undertaken within the course and scope of employment, and we therefore affirm her decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge