APPEAL NO. 92182

A contested case hearing was held in (city), Texas, on March 11, 1992, with (hearing officer) presiding as hearing officer. The hearing was reconvened on April 15, 1992, for the reconstruction of the testimony of the respondent (claimant below) and another witness necessitated by a recording equipment malfunction which resulted in the failure of such testimony to be electronically recorded as required by the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-6.34(c) (1989 Act). The two disputed issues before the hearing officer, namely, whether respondent had sustained a back injury in the course and scope of his employment and whether he had timely reported such injury to his employer, were decided in his favor. Appellant does not seek review of the timely notice issue but does challenge the findings and conclusions of the hearing officer to the effect that respondent sustained a compensable back injury on (date of injury) while loading lumber purchased by a coworker into the latter's truck during respondent's work period. No response was filed by respondent.

DECISION

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

Respondent had been employed for a number of years by (employer) where he worked at various times as a forklift operator and a strapper operator. On (date of injury), employer prepared an "employment change record" which reassigned respondent from the day shift to the evening shift. Respondent testified that a few days after this shift change, he injured his back in the following manner: he "was hauling [apparently with a forklift] a load of plywood around to the warehouse where we stack it out there, and I was taking 4 X 4s off the rack and placing them on the ground. When I came back up, I thought I had pulled a muscle in my back while putting 4 X 4s down." These "4 X 4s" were described as posts whose dimensions were 4 inches by 4 inches by 4 feet in length. He said no one witnessed this event but insisted he notified his supervisor, Mr. W, of his injury later on during that shift and showed him how the injury occurred. Mr. W, however, had no recollection of any such notice nor did he notice any back injury symptoms in respondent. Respondent continued to work since he didn't think his injury was serious. Approximately one week later, on (date), respondent severely lacerated his finger at work, went to Dr. W for suturing, and returned to work for a few days. Apparently, the initial repair of his finger wound was not successful and he later underwent a surgical repair by Dr. E during day surgery at (Hospital) on August 15, 1991. While preparing to leave the hospital that day, respondent went to a restroom to dress to go home and there his back "went out." He was admitted to the hospital for five days and treated with traction, medications, massage, and heating pads. After being at home for a while respondent apparently hurt his back again getting out of a car and had to go to the emergency room at Hospital.

Respondent acknowledged telling (Dr. I), with whom he consulted on August 16th concerning his back, that he had had prior back trouble off and on for years and that the

onset of his severe back pain was the event in the hospital restroom. However, he also said that his job with employer had always involved pulling and lifting and that he also told Dr. I that he had lower back pain and had hurt himself at work. Respondent testified that Dr. I did an MRI examination and determined that respondent had two herniated discs. According to Dr. I's consultation report of August 16th, an MRI was done which revealed "a grade II to III paracentral disc herniation at L4-5 and a grade III at L5-S1 . . . " An "Initial Medical Report" of Dr. V reflected respondent's emergency room visit on August 23rd, contained a history reciting that respondent was released from St. Mary Hospital on August 19th, had a great deal of discomfort in his low back due to two herniated discs, and that respondent said they "went out getting out of a car."

Employer's personnel supervisor, Mr. C, testified that he called respondent while he was in the hospital on August 16th, the day after his finger surgery, to inquire about his back. According to Mr. C, respondent advised that he hurt his back while at work on an employees' sale day when he helped a fellow employee load some plywood into the back of an employee's pickup. The employer did conduct employee sales days on Wednesdays and permitted employees to purchase products at wholesale prices. While respondent denied giving such an explanation of his back injury to Mr. C on August 16th, Mr. C testified to that version of the injury three times during the hearing. Mr. C was asked the following: "In your opinion, Mr. C, is someone who is on his shift at the time who is helping another employee load that employee's purchase acting within the course and scope of his employment?" Mr. C responded: "Yes, if they're on duty at that time." Mr. C went on to testify, after reviewing an "Employer's First Report of Injury" (TWCC-1), that it was on August 29, 1991 that he first became aware that respondent contended he hurt his back while either moving or standing up after moving the 4 X 4s. The TWCC-1, signed by Mr. C on September 3, 1991, stated in response to the question "How and why Accident/Injury Occurred" that "Employee alleges to have been moving 4 X 4s in warehouse." Mr. C also described the injury reporting system and said that no back injury was reported by any of respondent's supervisors.

Respondent said he wasn't sure that (date of injury) was the date he hurt his back but that he was told to "pick a date" and he picked (date of injury). He was insistent, however, that the injury occurred a few days after he was assigned to the evening shift and other evidence showed his shift change was effective July 22nd. The evidence also showed that an employee sale day was conducted on Wednesday, (date of injury), and respondent didn't disagree with Mr. C's testimony concerning employee sales days. There was also in evidence respondent's handwritten statement, dated September 3, 1991, the same date that Mr. C signed the TWCC-1, which recited that he hurt his back on (date of injury) when he was hauling plywood and got off a forklift to remove some 4 X 4s.

Appellant challenges the hearing officer's Conclusion of Law that respondent was an employee of employer at the time of his injury. The apparent basis for this contention is the evidence that respondent hurt his back in the hospital after his finger surgery and again when getting out of a car. In this regard, we find sufficient evidence to support this

challenged finding, no matter which of the two injury scenarios led to respondent's back injury, since both events would have occurred in August after injuring his back at work in (date of injury).

Appellant also challenges the hearing officer's conclusions that respondent was injured in the course and scope of employment and that his injury is compensable under the 1989 Act. Appellant focuses its challenges on the factual finding that respondent injured his back on (date of injury) while assisting another employee load lumber into his vehicle. This factual finding, upon which is footed the challenged legal conclusions, would appear at first blush to be against the great weight and preponderance of the evidence for it was certainly not respondent's explanation of his back injury. Respondent consistently contended that he hurt his back several days after changing shifts in the process of placing the 4 X 4s on the ground and then straightening up. Both his written statement of September 3rd and the TWCC-1 of that same date state that version of his injury, albeit that respondent provided the information for the TWCC-1. Respondent next insisted under oath at the hearing on April 15, 1992 (and presumably at the earlier hearing on March 11th) on that version and denied telling Mr. C over the phone from the hospital on August 16th that he hurt his back helping a coworker load his lumber purchases into a pickup. However, Mr. C similarly insisted that respondent told him he hurt his back helping load the plywood in the pickup truck on employee sales day conceding such activity would be in the course and scope of employment. In its appeal the appellant observes that the hearing officer predicates all her findings and conclusions on her finding that respondent injured his back on (date of injury) helping load lumber into a coworker's vehicle and posits the situation thusly:

> This finding lacks foundation in the evidence. First [respondent] denies that he injured his back in this manner. (Citation omitted.) Thus, if [respondent] is to be believed, the alleged accident did not occur in this manner. On the other hand, if the alleged accident occurred in this manner, then [respondent] is lying to the Commission. If [respondent] is telling the truth, then the [Decision and Order] is at odds with the facts and the evidence and, therefore, cannot stand. On the other hand, if [respondent] is lying, then there is no evidence to support the finding of an injury occurring at any time. Without his testimony, there is no evidence of any injury. No eye witnesses exist.

We suggest there is a third alternative available here and that is that the hearing officer was entitled to believe Mr. C's testimony that respondent reported to him on August 16th the version of his injury as testified to by Mr. C, notwithstanding respondent's denial of such at the hearing. While simply repeating testimony doesn't make it true, Mr. C three times testified to having been given by respondent the version involving the loading of plywood in the coworker's truck. Mr. C's testimony is corroborated by the evidence that an employee's sale day did occur a few days after respondent was assigned to the evening shift. The hearing officer clearly had conflicting evidence before her as to which version caused respondent's back injury. However, even were we to agree with appellant that the

evidence established the version of the injury as testified to by respondent, we would nevertheless affirm the hearing officer's decision since there was sufficient evidence to support both versions, they were not mutually exclusive, and under either version respondent sustained a compensable injury. Article 3808-6.34(e) (1989 Act) vests in the hearing officer the sole responsibility for judging the relevance and materiality of the evidence as well as its credibility and weight. It was her responsibility to resolve the evidentiary conflicts and find the facts. *See* Texas Workers' Compensation Commission Appeal No. 92168 (Docket No. HO/91060850/01-CC-HO41) decided June 12, 1992, and cases cited therein. The hearing officer was free to believe all, part, or none of the testimony of any one witness including the respondent. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e).

> When reviewing a [factual finding] to determine the factual sufficiency of the evidence, we consider and weigh all the evidence and set aside the [decision] only if it is so contrary to the overwhelming weight of the evidence as to be wrong and unjust. (Citation omitted.) In considering a challenge to the sufficiency of the evidence, we recognize that the function of the [hearing officer] is to judge the credibility of the witnesses, assign the weight to be given their testimony, and resolve any conflicts or inconsistencies in the testimony. (Citations omitted.) We may not substitute our judgment for that of the [hearing officer] if the challenged finding is supported by some evidence of probative value and is not against the great weight and preponderance of the evidence. (Citations omitted.)

Texas Employers Insurance Ass'n v. Alcantara, 764 S.W.2d 865, 868 (Tex. App. - Texarkana 1989, no writ).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge