APPEAL NO. 92185

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 March 31, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that claimant, respondent herein, was injured in the course and scope of employment on (date of injury), and found appellant liable for benefits. Appellant asserts that the evidence is insufficient to support the decision and says also that the decision is internally inconsistent.

DECISION

Finding that the decision is sufficiently supported by the evidence, we affirm.

Respondent had been a truck driver for at least 16 years and had been hired in April 1991 by (employer). He hauled material such as gravel and rock for use in asphalt and concrete plants. The truck he used was an 18-wheel, open bed truck that is loaded from above. He worked long hours and hauled between different sites. No one disputed that on (date of injury) the respondent drove his empty truck into the (city) site of Texas Industries to get a load of pea gravel, which must be washed before departure. Respondent described getting his load, having it weighed, driving a short distance to where spray bars are located that wash the load, and then driving up a slight grade provided so that remaining water can drain out the back of the trailer. He also said the gravel is sprayed until the water running out the bottom of the truck is clear. As the truck was parked with the trailer on the incline to complete draining, respondent described getting out of his cab and using a golf club to scrape excess gravel off the rails of his truck. As he descended the truck when finished, he stepped down onto loose gravel and turned his left ankle. He states he took his shoe off and sat there for awhile. He talked to some other drivers about his foot and said over his CB radio that he would try to drive. This happened at approximately 8:00 to 8:30 a.m. and he showed his foot to a fellow trucker named (Mr. G) that day. He worked that day, and at the end of the day, told others about and showed them his swollen foot when he returned to the work site. The people who saw his ankle at the end of the day on (date of injury) were (co-workers). He said he worked the next two days and was able to do so because he wore unlaced tennis shoes and used his heel instead of his toe on the clutch, and did not use the clutch each time he changed gears. He said that in addition to showing his boss his ankle on (date of injury), he talked to him about filling out a workers' compensation claim on (date), but was told a form was not available. On (date), at the end of the day, (Mr. D) told him he was fired for fast and reckless driving. He said he had never been reported before for such conduct and had never had an accident. He opined that he was fired for getting hurt. He said he contacted his family doctor, (Dr. S), the night of the accident but he did not see him until July 11th. He added that he told him the accident occurred on (date of injury), not (date). He said he did not go to any lake on (date) but stayed at home off his foot. Since the injury, he has had arthroscopic surgery on the left ankle, as shown by Respondent's Exhibit No. 6, and he says his treatment has not been completed. He had torn ligaments and cartilage. During cross-examination respondent

said, in answer to a question as to why the initial medical record says you have "a contusion, a cut or a scrape or whatever," that he had no cut but was bruised. While appellant, in closing argument, pointed out that the initial medical visit recorded no bruise, Dorland's Illustrated Medical Dictionary, 27th Edition, page 378, states after "contusion," "a bruise."

Mr. G testified that on (date of injury) he met respondent for breakfast at a cafe on Interstate 20 at about 9:00 a.m. Respondent told him of hurting himself while cleaning off his truck at the end of the washing process. (Mr. G) saw the ankle, which was swollen and discolored. He was present at the end of that day when respondent showed the foot to others at the work site. He did not see the accident. He was fired in the fall of 1991, after he fell asleep and wrecked a truck. He did receive some workers' compensation benefits from that accident, and (Mr. D) insisted at the time that he go to the doctor. He agreed that there is loose rock on the incline where water drains out of trucks although the area is packed by truck wheels in places.

(Mr. M) testified that he is an independent trucker and has been self-employed for 30 years. He has a long friendship with respondent's father and knows respondent. He recalls seeing respondent at a scale for weighing trucks walking with a limp, but cannot remember when this occurred, not even to the year. He, too, described loose rocks on the drainage incline.

Carrier called (Mr. D), (Mr. S), and (Mr. W) of (employer). (Mr. D) described calls he received relating to respondent's bad driving habits, his corroboration of these reports by clocking respondent driving 70-75 m.p.h. on (date), and his firing of respondent for such driving on (date). He said respondent never showed him his swollen ankle and did not report the injury to him until July 11th, when respondent appeared in a swimsuit with a clean ace bandage on his ankle, as he picked up his last check. He said that after he fired respondent on (date), respondent apologized to several people for his conduct. He had workers' compensation forms available and did not put respondent off by saying he did not. He opined that respondent would need to use the clutch 150 times each day and did not think that was possible in the condition he ascribed to himself. He also said that truckers use the clutch with each change of gears. He gets no bonus for safety excellence. He also said the surface at the drainage incline is hard packed stone.

(Mr. W) is with (employer) and said he called (Mr. D) to relay two calls of reckless driving about respondent.

(Mr. S) identified himself as the dispatcher and said he supervises respondent. He stated that respondent did not show him his ankle on (date of injury) nor did he say anything about an injury prior to being fired. He saw him walk on (date of injury), (date), and (date) and saw no limping. Respondent was said to have apologized to him on (date). Respondent, on July 11th when he got his check, said, to the effect, "by the way I injured myself on (date of injury)." He said truckers have to walk around their truck a lot in the hauling process and that respondent wore lace-up boots, not tennis shoes. He said

respondent would have to use the clutch approximately 150 times a day, but that drivers do shift some gears without using the clutch. He stressed that in raising the trailer, for instance, a driver had to hold the clutch in for an extended period which would take stout pressure. He said that when pea gravel is washed, the pressure of the water washes rocks off the rails of the trailer. He then said, though, that truckers used a golf club or something similar to wipe off excess rock. He said the incline was solid, but it is possible for rocks to fall onto the slope. He does not think that (Mr. D) would fire a worker for getting hurt.

Appellant introduced a clinic record of respondent which was said to show that respondent reported that his injury occurred on (date). The date of injury written on this record can easily be interpreted to be (date of injury), which was a question for the hearing officer to consider in making her decision. Exhibit 2 was a statement taken by phone with (Mr. Si), who said he cannot remember respondent telling him of his injury or showing him the swollen ankle. Exhibit 3 was a telephone interview of (Mr. M) in which he had similar problems with dates as later shown in his testimony. He related seeing respondent limp around the truck he was driving. Exhibit 4 is a signed statement of (Ms. H) who said she cannot recall respondent saying his foot was hurt or showing it to her.

Appellant takes issue with the wording of Finding of Fact No. 4, which read:

4.While on the job on (date of injury), claimant slipped and fell while washing off a load of rock in his truck.

It is said that the finding is not consistent with the Statement of Evidence. The Statement of Evidence reads in part:

> The claimant was issued truck number 768, and as part of his job duties, he would be involved in reporting to the (plant) in (city) and involved in washing the rock load in his truck. On (date of injury), he was performing these job duties when he got out of the truck and slipped and fell twisting his left ankle and foot.

There is no requirement in the 1989 Act that the Statement of Evidence recite each relevant fact that came before the hearing officer. While Finding of Fact No. 4 does not reflect exactly what is contained in the Statement of Evidence, it is consistent with it. Clearly, Finding of Fact No. 4 could and should have been better and more precisely drafted. More important, however, than whether the finding strictly follows the wording of the Statement of Evidence, the finding as written is sufficiently supported by evidence of record. The Appeals Panel considers the record, the appeal and the response in reaching a decision. Article 8308-6.42(a) of the 1989 Act. In addition, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 91048 (Docket No WF-00007-91-CC-1) decided December 2, 1991, has looked to the record and decision as a whole to confirm the meaning of a conclusion of law and its consistency with the law. The finding in question leaves no reasonable doubt that the respondent slipped and fell while on the job on (date of

injury).

Article 8308-6.01 and Tex W. C. Comm'n, 28 Tex Admin Code § 142.1 (rule 142.1) apply only section 14(n) of the Administrative Procedure and Texas Register Act (APTRA), TEX. REV. CIV. STAT. ANN. art. 6252-13a, to contested case hearings and review thereof. The 1989 Act does not impose APTRA standards on findings of fact. In addition, the case cited by appellant, Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.), does not indicate that the finding of fact in question, as worded, constitutes reversible error.

Appellant also states that Finding of Fact No. 5 is not based on the Statement of Evidence. It reads:

5.Claimant's left foot and left ankle were twisted in the fall and hit the rock.

As stated, findings do not have to mirror a Statement of Evidence. The evidence from respondent was that as he stepped down from the truck, he stepped on loose rock. The loose rock shifted, his ankle twisted, and he fell on a surface of loose pea gravel. This finding also is consistent with the evidence and supported by sufficient evidence of record. The hearing officer could reasonably infer from the testimony that when respondent fell on a surface of loose pea gravel (rocks), he would hit rock. *See* Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.)

The evidence sufficiently supports the findings of fact and the findings support Conclusion of Law No. 2 that said respondent was injured in the course and scope of his employment. The hearing officer is the sole judge of the weight and credibility of evidence. Article 8308-6.34(e) of the 1989 Act. She could believe respondent and (Mr. G) in determining that respondent told his superiors on (date of injury) of the accident. She did not have to believe appellant's witnesses who stated no report was made on (date of injury). *See* Ashcraft v. United Supermarkets Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). Similarly, she could believe that the incline, where trucks drained excess water, had loose gravel on it, as was stated by respondent and his witnesses and is also consistent with the testimony of (Mr. S), who appeared for appellant. She could believe that the initial doctor's report of July 11th referred to an accident of (date of injury), recited that respondent "continued to work on it" and referred to old bruising. She could believe respondent when he said he fell and injured himself at the job site and refuse to believe that he injured himself after being fired, perhaps on (date) at a lake. She could accept respondent's testimony that he could drive with the bad ankle, in the manner described, for three days. She also could conclude that the firing on (date) did not infer that respondent hurt his ankle after termination. Ashcraft and Harrison, *supra*. Although, on review, different inferences and conclusions than those drawn by the hearing officer find support in the evidence and can be drawn from the evidence, this is not a firm basis to reverse or set aside the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92174 (Docket No. HO-91-107792-01-CC-HO41) decided June 10, 1992.

The decision of the hearing officer is supported by sufficient evidence of record and is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge