APPEAL NO. 92192

On April 7, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to resolve the sole disputed issue, to wit: whether appellant (claimant below) suffered a compensable injury in the course and scope of his employment with (employer). The hearing officer, though finding that appellant was involved in an accident on the job in a foundry on (date of injury), while pushing a flat rail cart stacked with "bottom boards," concluded that appellant failed to prove by a preponderance of the evidence that his injuries arose out of and in the course and scope of his employment pursuant to the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-3.01 (Vernon Supp. 1992) (1989 Act). Appellant challenges the sufficiency of the evidence to support that legal conclusion as well as the factual findings that no "bottom board" was discharged from the stack backwards into appellant's abdomen, and, that appellant did not fall onto his back but instead sat down clutching his stomach. Appellant also asserts as error the hearing officer's consideration of the testimony of a nurse not qualified as an expert witness, and his admission of an unauthenticated videotape of a reenactment of appellant's accident. Respondent urges that we affirm.

DECISION

Finding no error and sufficient evidence to support the challenged findings and conclusion of the hearing officer, we affirm.

Appellant, testifying through a translator, said that on (date of injury), while working at the foundry of employer, he was pushing a stack of "bottom boards" ("boards") on a flat cart along rails when the cart stopped suddenly and the boards fell off the cart. The boards, stacked shoulder high, were made of wood and metal, weighed approximately 30 to 45 pounds, and were used in the pouring process. When the cart stopped moving forward, the boards at the top of the stack pitched forward while some in the middle came backward striking appellant in the upper stomach and causing him to fall backward onto a mold. Appellant insisted that his injuries were caused by his being struck in the upper abdomen by one or more of the boards as they fell from the cart. A nearby supervisor, (Mr. V), helped appellant to his feet and took him to the nurse's office where his upper abdomen was examined and he was sent to a doctor. Mr. V testified that while he didn't actually see the incident, he heard the noise of falling boards and turned his head to see appellant sit down on a board behind him holding his chest. Mr. V said the boards fell forward and away from appellant and he saw no boards fall towards him. He acknowledged it was "possible" that boards in the middle came back and struck appellant. Appellant was alone when the incident happened and there were no "direct" witnesses.

According to Ms. D, employed by employer as a nurse for over 14 years, appellant said he had been struck by something and was holding his upper abdomen. She checked his stomach and chest area for abrasions, cuts, redness, and bruising and saw none. Appellant, however, stated that there was some breakage of the skin visible on his upper stomach area and that anyone could see it. She did notice right below his sternum a

swollen knot about the size of a walnut which felt like a cyst under the skin. Based on the history appellant provided she would classify his injury as a "contusion." Appellant said he told the nurse that he was hurt in the arm, back, waist, foot, and stomach. According to the (Ms. D), however, he complained only of his upper abdomen and mentioned no other injuries. Appellant denied having any prior problems or treatment to his upper abdomen before the incident and said he had no swelling in the upper stomach area before coming to work that day.

On the date of this incident (date of injury), appellant was seen by doctor at a medical group whose report indicated appellant could return to work that day with a restriction against repetitive bending from the trunk and could return to his regular work without restriction on August 12th. On (date), (Mr. B), employer's safety manager, together with (Mr. V) and (JP), visited appellant at his residence to find out why he had not returned to restricted duty and to see if they could help him. According to (Mr. B's) testimony, appellant was asked and denied hurting any other part of his body. He told them he had pain in his abdominal area and felt like he was cut inside. He also said he thought he had a hernia and needed surgery. On (date), appellant was seen at a follow-up visit by another doctor with the same group and was scheduled to see a general surgeon later that day. Appellant said he was told by a doctor the day after the accident (sic) that he had a hernia (presumably at the site of his upper abdominal injury), that he didn't know what a hernia was, and that the men visited him before the doctor so advised him. Along with other conflicts in the evidence, respondent argued the significance of appellant's stating on (date) he had a hernia before he had been so advised by a doctor.

An Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), signed by appellant on August 9th, described his accident and affected body parts thusly: "[w]hile working, I was pulling rails and I fell causing injury to my stomach, back, right shoulder, neck, and my body in general." This form indicated that appellant's doctor was (Dr. N). An Initial Medical Report (TWCC-61), signed by the doctor who saw appellant on (date), referenced his visits of (date of injury) and (date) and indicated that x-ray of the abdomen was normal, that the diagnosis was "Contusion R. Abdominis Rectus", and that the treatment plan was ice, light duty, and referral to a general surgeon. A report from (Dr. N), dated August 13th, mentioned, in addition to a fall at work, that appellant had hurt himself two months previously "when he suffered a direct impact to his left leg [for which] [h]e was treated medically, but never recovered completely, but since this fall he has been complaining of pain in the neck, back and abdomen." According to (Dr. N's) report, appellant had been told "he needs abdominal surgery for a growth in the mid portion of the abdomen" and his neck and back pain had not been checked. (Dr. N's) impression was "(1) On the job injury; cervical and lumbar syndrome. . . . (2) Trauma to the left leg. (3) Abdominal trauma with a questionable midline hernia." (Dr. N) wanted appellant evaluated by a surgeon for a "possible midline hernia" and took him off work until further notice. Subsequent reports from (Dr. N), prepared throughout the period from September 10, 1991 through March 11, 1992, indicated that appellant had significant degeneration of the lumbar spine and disc space reduction at L5-S1. As of March 11, 1992, surgical repair of

appellant's abdominal hernia, a CT of the cervical spine and back, and an MRI of the right shoulder had not been yet been accomplished due to lack of approval by the insurance company. Appellant testified that he needs the surgery but doesn't have the money and that "[w]hen I went to the company, what happened is that instead of them taking care of my medication, they fire me."

After the hearing officer denied appellant's motion in limine to exclude it, respondent introduced a videotape purporting to be a reenactment of the accident. It featured an employee, apparently (Mr. B), interviewing several employees and pushing a stack of boards on a rail cart with a subsequent sudden stop and the falling of the stack of boards. (Mr. B) testified that he recreated the accident as appellant had described it, that it was accomplished under his direction and control, that the tape was a true and accurate depiction of what occurred, and that the accident couldn't have happened any other way. The point of the demonstration was to show that boards fall forward and that none eject backwards from the falling stack. Appellant testified that the reenactment wasn't accurate because the stack of boards was smaller and was pushed more from the side whereas he pushed the cart more from the rear. Also on the tape were several apparently unsworn interviews conducted by (Mr. B). The statements made by (Mr. V) were essentially the same as the testimony he provided at the hearing. Another interviewee was (JP) who went to appellant's residence on (date) to translate for the other employees. He said appellant described what had happened and didn't mention leg pain. He had never seen an accident happen as appellant described it. Another interviewee showed the position in which appellant was purportedly seen after the accident seated on the floor with the boards in front of him and molds to the rear. A fourth interviewee, (Mr. P), who translated when appellant visited the nurse after the accident and who accompanied him to the doctor, recited appellant's description of the accident. He also said, with reference to the hernia, that it seemed as though appellant knew before seeing the doctor that something was wrong with him. As for appellant's description of how the boards fell, Mr. P had never seen boards fall in that manner before and he called it "almost an impossibility."

Appellant had the burden of proving by a preponderance of the evidence that his injury occurred within the course and scope of his employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.). In a contested case hearing, the hearing officer, as the trier of fact, must sift through and resolve conflicts in the evidence. Article 8308-6.34(e) vests in the hearing officer the sole responsibility for judging the relevance and materiality of the evidence offered as well as its weight and credibility. An accident does not have to be witnessed to be compensable and a claimant's testimony alone can establish the occurrence of an injury. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, the hearing officer is not required to accept a claimant's testimony at face value, even if it is not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621, 625 (Tex. Civ. App. - Amarillo 1980, no writ). The hearing officer here was privileged to believe all, part, or none of appellant's testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.). The Texas courts have

frequently addressed the nature of the discretion given the factfinders in evaluating and accepting or rejecting evidence. In Aetna Ins. Co. v. English, 204 S.W.2d 850, 855-856 (Tex. Civ. App. - Dallas 1947, no writ), the following guidance was provided:

> Jurors may accept some parts of a witness' testimony and reject other parts, when the testimony given is inconsistent, contradictory, contrary to established physical facts, or from the manner and demeanor of the witness creating a doubt of its truthfulness, or because of the interest the witness has in the fact sought to be established or discloses a prejudice or bias on his part prompting what he has said. In such instances the jury may form its verdict upon that part accepted along with any other testimony of probative value tending to support the same fact. . . .

The hearing officer found that "[o]n (date of injury), [appellant] was involved in an accident on the job while pushing a stack of `bottom boards' on a flat rail cart," and, that "[t]he accident caused the `bottom boards' to fall forward and away from the [appellant]." The hearing officer was free to reject appellant's testimony that one or more boards ejected backwards from the stack, struck him in the stomach, caused him to fall backwards to the floor, and resulted in an abdominal hernia and injuries to his neck, back, right shoulder, and foot. We will not substitute our judgment for that of the hearing officer if the challenged findings are supported by some evidence of probative value and are not against the great weight and preponderance of the evidence. Texas Employers Insurance Ass'n v. Alcantara, 764 S.W.2d 865, 868 (Tex. App. - Texarkana 1989, no writ). Since we are not fact finders, we may not pass upon the credibility of witnesses or substitute our judgement for that of the hearing officer, even if the evidence would support a different result. National Union Fire Insurance Company v. Soto, 819 S.W.2d 619, 620 (Tex. App. - El Paso 1991, no writ).

Appellant asserts that in his determination of whether an injury occurred, the hearing officer erred in considering the "medical testimony" of (Ms. D), a registered nurse for 15 years, in that she was not qualified as an expert. Appellant posits the following argument: "[w]hile medical testimony regarding the recitation of the history of the injury is admissible to show the basis of the medical opinion it is not competent evidence that an injury did occur. It stands to reason that it is also not competent evidence that an injury did not occur." We first note that contested case hearings are not constrained by conformity to the legal rules of evidence. Article 8308-6.34(e) (1989 Act). We next note that appellant voiced no objection to any of Ms. D's testimony and that Ms. D was not presented as an expert witness. Most of Ms. D's testimony stated factual matters including the history of the accident and symptoms as related to her by appellant as well as her observations of the condition of his upper abdomen. Opinion testimony appeared when respondent asked the witness whether the lump below appellant's sternum appeared to be "trauma induced" to which Ms. D replied she could not tell. On cross-examination appellant immediately pursued that question. Since Ms. D couldn't state the matter positively, appellant asked her whether the injury could have been induced by trauma to which she responded that it was possible. Ms. D also testified that while being hit in the chest with boards, as appellant described, would

not necessarily have broken the skin, she would have expected to see redness appear within the 45 minutes she was with appellant. We find no merit to this appealed issue.

In his final appealed issue appellant asserts that the hearing officer abused his discretion in admitting the videotaped reenactment. While primarily focusing his objection on the lack of "authentication," appellant also complains that the videotape couldn't be accurate without his participation since he was the only person present, that it contained several unsworn statements, and that it was prejudicial, lacking in probative value and resulted in an improper decision. Even were we to find error in the hearing officer's consideration of the videotaped interviews, we would not conclude that such error requires reversal because it probably did not result in the rendition of an improper decision by the hearing officer. Such conclusion is amply demonstrated by the hearing officer's own assessment of that evidence as follows:

> A video-taped `re-enactment' of the accident was admitted into the record over the objection of the Claimant's counsel. Although the tape was accepted as relevant demonstrative evidence, it did not affect the outcome of the case because it had relatively little probative value. The tape does not depict an accurate recreation of the accident because without the Claimant's participation it could not (1) reflect the exact height and configuration of the bottom boards at the time of the accident; (2) it could not reflect the speed at which the cart was traveling at the moment of the accident; (3) it could not reflect the exact position of the Claimant's body in relation to the bottom boards; and, (4) it could not reflect the exact position of the Claimant's hands.

The hearing officer is authorized to "accept documents and other tangible evidence" and "may permit the use of summary procedures, if appropriate, including witness statements, summaries, and similar measures to expedite the proceedings." Article 8308-6.34(a) and (b) (1989 Act). We have already observed that contested case hearings need not conform to the legal rules of evidence. We do note, however, that the Texas Rules of Civil Evidence provide that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Tex. R. Civ. Evid. 901(a). Mr. B quite adequately authenticated the videotape. Appellant himself addressed a shortcoming of the reenactment when he pointed out that he was pushing a taller stack of boards and more from the rear. The videotape contained both the scenes of Mr. B several times pushing a stack of boards on a cart and their falling, as well as his apparently unsworn interviews. The 1989 Act does not require that witness' statements be sworn. Sworn witness statements are included among the summary procedures set forth in a rule of the Texas Workers' Compensation Commission. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §142.8(a)(1). That rule, however, is merely permissive since it provides that the hearing officer "may allow summary procedures, including but not limited to the use of [sworn witness statements]."

"To obtain reversal of a decision based upon error in the admission of evidence, the appellant must first show that the hearing officer's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause the rendition of an improper decision. (Citation omitted). Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. (Citation omitted.)" Texas Workers' Compensation Commission Appeal No. 92068 (redacted Docket No.) decided December 20, 1991.

We find no error and further find the evidence sufficient to support the challenged findings, conclusion, and decision of the hearing officer.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Joe Sebesta
Appeals Judge