APPEAL NO. 92194

On April 10, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), appellant herein, was not injured in the course and scope of his employment with (employer) on or about (date of injury), and denied benefits to appellant under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.03 (Vernon Supp. 1992) (1989 Act). Appellant contends that he established by a preponderance of the evidence that he sustained a compensable injury. Respondent, the employer's workers' compensation insurance carrier, asserts that the hearing officer's decision is supported by the evidence.

DECISION

The decision of the hearing officer is affirmed.

The parties agreed at the hearing that the issue to be determined by the hearing officer was whether appellant sustained a compensable injury to his back in the course and scope of his employment with the employer on or about (date of injury). The hearing officer determined that appellant was not injured in the course and scope of his employment with the employer on or about (date of injury).

The employer installs reinforcement steel on highways. Appellant testified that just before lunch on Friday (date of injury), his third day at work, he felt a sharp pain in his lower back when he and three or four coworkers were lifting four steel bars which weighed a total of 360 pounds. After he and his coworkers carried the bars to where the bars were to be installed, he said the coworkers dropped their end and that the bars "snatched me" which resulted in more pain. Appellant said that after lunch he told his foreman, (GS), that he had hurt his back and that his legs were numb, and that he needed to see a doctor. His foreman drove him to his car about 30 minutes later. Appellant said he went home, took medication, and soaked in a tub of hot water. Appellant testified that after he got home he called (Mr. L), the employer's vice president, and told him he was injured. He further stated that he again called (Mr. L) on Monday, October 14th, and told him that he was taking medication and trying to get better. Appellant said that (Mr. L) told him the employer had workers' compensation coverage, that he should go to the hospital, and that the employer would pay for the medical bills. Appellant said that he did not work on Monday, October 14th, or Wednesday, October 16th, but that he did work on Tuesday, October 15th. He said the employer tried to lay him off on Tuesday but that he was never terminated. On direct examination appellant said he went to the hospital on the day he "indicated he was hurt." However, on cross-examination he acknowledged that he first went to the hospital on October 22, 1991. Appellant said that he currently has pain in his lower back and between his shoulders and that he feels he is not able to return to work.

(GS) testified that appellant worked on his crew on October (dates), 1991. He said that appellant was not a good worker and that appellant left work early on (date) because

appellant said he had something to do at home. The witness said that after lunch on (date of injury), appellant said he needed to go home because he had a leg cramp or a pulled leg muscle, and because he had something to do at his farm or ranch. He said he drove appellant to appellant's vehicle and that appellant left work. The witness testified that appellant did not mention an injury to his back, neck, or shoulders from lifting the steel bars, nor did appellant tell him he was going to the hospital. He said that the nature of the employer's work was strenuous so it is not unusual for a new employee to have a leg cramp from the walking, bending, and stooping that is required in the work.

(Mr. S), testified that during October 1991 he worked as a foreman for the employer. He said that appellant did not work on Monday, October 14th or Tuesday October 15th, but that appellant did work on his crew on Wednesday, October 16th. On that day, he said appellant did not mention a back injury, did not limp, and that appellant appeared to be able to do his job tying steel bars. The witness said that appellant was not a proficient worker, was a slow worker, and that he did not display any enthusiasm in his work. The witness said he complained to the employer's superintendent, (JW), about appellant, and that the superintendent fired appellant on October 16th or 17th.

(Mr. L) testified that the first he knew that appellant was claiming a work-related back injury was on October 17th when he overheard a telephone conversation between appellant and the president of the company, (Mr. T). (Mr. T) related the conversation to the witness. He said that (Mr. T) told appellant that he was terminated and that appellant said the employer was prejudiced. When (Mr. T) told appellant that the employer's work force consisted of 80 percent minority workers, appellant told (Mr. T) he was injured on the job. The witness said that appellant was terminated because his work habits were not up to par. He also said he conducted an investigation into appellant's claim and that he found that no one had knowledge of appellant sustaining an on-the-job back injury. The witness denied telling appellant that the employer would pay for his medical treatment for his alleged back injury, but did indicate that (Mr. T) told appellant that the employer had workers' compensation coverage and to send his medical bills to the employer to forward to the carrier. In a written statement, (Mr. T) confirmed (Mr. L's) testimony concerning the October 17th telephone conversation he had with appellant. He also said that leg cramps are normal for new workers and that appellant was terminated because he was not "production oriented."

A medical record from the (hospital) at (city) revealed that appellant was treated in that hospital's emergency room on October 22, 1991. The emergency room doctor noted in the history section of the record that appellant related that he had injured his back lifting steel on (date of injury). The emergency room doctor diagnosed a low back strain. Other medical records and reports revealed that appellant was subsequently seen by (Dr. M) on October 24, 1991, and that he has continued treatment with that doctor. (Dr. M) records also recite a history of an on-the-job injury from lifting steel on (date of injury). (Dr. M) diagnosed lumbar radiculopathy, cervical radiculopathy, and post-concussion syndrome. He took appellant off work and recommended physical therapy. (Dr. Mc), Ph.D, who is a

clinical psychologist, conducted pain evaluation testing on appellant to discover whether there were psychological factors involved in the pain symptoms appellant reported to (Dr. M). (Dr. Mc) reported that "overreporting must be considered along with serious psychological disturbance."

In considering a challenge to the sufficiency of the evidence, we recognize that the function of the hearing officer, as the trier of fact, is to judge the credibility of the witnesses, assign the weight to be given the testimony, and resolve conflicts and inconsistencies in the testimony. Article 8308-6.34(e); Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). We do 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 so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Alcantara, *supra*; Texas Workers' Compensation Commission Appeal No. 92166 (redacted Docket No.) decided June 8, 1992.

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 (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 occurred at work on (date of injury), and as to what transpired in the ensuing days. Given the conflicting testimony, the hearing officer could choose to believe the testimony of respondent's witnesses over the testimony of appellant. *See* R.J. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1987). Appellant was an interested witness and the hearing officer was not required to accept his testimony that he sustained a back injury at work on (date of injury). *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611, 613 (Tex. Civ. App.-Texarkana 1977, no writ). Furthermore, a doctor's recitation of the history of an injury as reported to the doctor by the claimant, although admissible for showing the basis of the doctor's opinion as to the cause of the injury, is generally not considered competent evidence that the injury in fact occurred on the date alleged. Presley, *supra*. The hearing officer had the responsibility to assign the weight to be given the evidence. Article 8308-6.34(e).

Upon a careful review of the entire record developed at the hearing, we conclude that there is sufficient evidence to support the hearing officer's finding that appellant did not injure his back while working for the employer on (date of injury), and that such finding is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. That finding supports the hearing officer's conclusion that appellant was not injured in the course and scope of his employment on (date of injury).

Appellant incorporated into his appeal an investigative report which was not offered

into evidence at the hearing. Since our review is limited to the record developed at the hearing, we decline to consider the investigative report. Article 8308-6.42(1); Texas Workers' Compensation Commission Appeal No. 92136 (redacted Docket No.) decided May 15, 1992. Furthermore, appellant has not shown that the investigative report was unknown or unavailable to him at the time of the hearing, and that it was not owing to a want of diligence that it was not offered at the hearing. *See* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

Having ruled in respondent's favor, respondent's cross-point alleging error in the admission of appellant's documentary evidence is moot.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Susan M. Kelley
Appeals Judge