APPEAL NO. 92205

On April 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), respondent herein, had sustained an injury in the course and scope of his employment as a truck driver with (employer). The hearing officer also determined that a fair, just, and reasonable determination of respondent's average weekly wage was $375.00.

The appellant asks that the decision be reviewed and reversed, arguing that the decision of the hearing officer was against the great weight and sufficiency of the credible evidence presented at the hearing with respect to whether an injury occurred in the course and scope of employment. The appellant further contests the average weekly wage amount determined by the hearing officer, essentially arguing that the hearing officer was bound by the wage statement submitted for a "same or similar employee" of the employer.

DECISION

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

Respondent testified that he drove employer's truck into its terminal in (city), Texas, on the evening of (date of injury), during a return trip to (city) from (state). His co-driver, (Mr. O) went into the terminal. Respondent stepped back up into the truck to turn off the ignition. As he stepped back down from the cab, and pivoted, his foot slipped and he fell, striking his back on the steps. He stated that a mechanic named "(Mr. B)" came over to him and asked if he was alright. He said that he thought he was alright because he was wearing a padded thermal jacket and did not think his injuries were that serious. He stated that he mentioned the fall to Mr. O when travel resumed that day. Respondent drove to (city), Texas, where Mr. O dropped him off, and Mr. O drove on to Laredo alone. (It was later established that this was in violation of company policy, but a common occurrence among the drivers). Respondent indicated that when he was contacted over the weekend about driving, he told the dispatchers he was unable to make a drive because he hurt as a result of a fall on the job. On Monday, (date), respondent called and reported the injury to (Ms. R) in (city), who advised him to call (Ms. S) to report the injury officially. Respondent did seek medical treatment for his back, from (Dr. R), but has been unable to keep up with it because of lack of money to pay medical bills. He stated that he had prior back surgery with Dr. R in 1986, which he acknowledged was not disclosed on his employment application, but that the condition operated on had completely resolved.

Respondent testified that he was paid by the mile, and that his average paycheck was in the range of $300-450 per week. Advances were made against this paycheck for meals. If any motel expenses were incurred, these would be reimbursed by the employer over and above the paycheck. There was nothing in the record to establish that respondent had ever received reimbursement for motel expenses. Respondent testified that generally a motel was not needed because the alternate driver would be sleeping in the truck while his partner drove. At the time of his injury, respondent had been employed by employer for

two months.

Through deposition, Ms. R corroborated respondent's testimony as to reporting of the injury, although her recollection was that respondent said he injured his arm and shoulder rather than his back.

Mr. O did not recall ever being told about the fall by respondent. He agreed that a statement he gave to the adjuster for appellant was inaccurate in that he claimed to have taken respondent to (city), rather than dropping him off at (city). The reason given for the inaccuracy was that Mr. O did not want to get in trouble for violating company policy. Mr. O said that his average paycheck would be around $400 per week, based upon payment of twelve cents a mile, and two trips per week to (state). He said a low paycheck was around $175 per week.

(Mr. WS) was a safety inspector employed by employer in the (city) terminal, presumably presented as the person named "Mr. B" who respondent identified as a witness. He stated that he did not recall, one way or the other, seeing respondent fall. Mr. WS said that he saw about 100-150 drivers a day.

(Ms. S) testified that she was employed to handle workers' compensation claims for the employer, and that she merely reported wage figures supplied by the central office. She indicated that it was her impression that the average paycheck for truck drivers was between $300-400 per week. Ms. S stated that respondent was paid 11 cents a mile. According to her, work was available and the size of the paycheck depended upon how much a driver wanted to work. Ms. S stated that truck drivers for employer worked as few as two or as many as seven days a week, and that there was more work available than drivers. The primary business was hauling of auto parts between (state) and (city). She agreed that she had been contacted by respondent about the injury, after referral by Ms. R.

Medical records in evidence from Dr. R indicate that respondent was examined on (date), and had a Magnetic Resonance Imaging (MRI) examination on November 6th which showed disc degeneration with a bulging disc at the L5-S1 level, and a possible small disc herniation. Dr. R recommended that respondent be off work for a period of four to six weeks on conservative management.

The hearing officer is the sole judge of the relevance and materiality, and 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. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). 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.). Corroborative evidence is not necessary, as the testimony of a claimant alone may be sufficient to establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). It is the job of the trier of fact to resolve the inconsistent testimony that is present in this record, and to assess the credibility of the witnesses.

We believe that the hearing officer was correct in applying a "fair, just, and reasonable" standard for calculating average weekly wage, based upon Article 8308-4.10(g), and was not required to revert to the wages of a "same or similar" employee under the facts of this case. It was established through testimony presented by the appellant's witnesses that the nature of employment was irregular, based in large part upon the desire of individual drivers to work certain schedules. The appellant never explained or presented evidence to show that the employee picked as a "same or similar" employee on its wage statement qualified as such. The figure chosen by the hearing officer is in the range of wages actually paid to the respondent, to Mr. O, and to other drivers. In light of the irregular nature of employment, the hearing officer was justified in applying Article 8303-4.10 (g).

We cannot find that the average weekly wage applied by the hearing officer is not computed by a "fair, just, and reasonable" method. Ms. S acknowledged that drivers could work as few as two days a week, or as many as seven days a week, and that the average paycheck was in a range of $300-400 per week. Mr. O testified that he averaged around $400 per week. In light of this testimony, and the slightly lower mileage rate paid

to respondent as compared to Mr. O, the average weekly wage of $375.00 is reasonable, and supported by the evidence as applied to the statute.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge