APPEAL NO. 92217

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On April 20 and 21, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. A benefit review conference was held on March 6, 1992, and two issues were identified as the result of that conference:

(1)Whether the appellant (claimant below) injured his back in the course and scope of his employment on (date of injury), or did he suffer his back injury under other circumstances;

(2)Assuming the injury is compensable, for what period are temporary income benefits payable.

The hearing officer held that the preponderance of credible evidence did not substantiate that the appellant sustained an injury in the course and scope of his employment with his employer on (date of injury), pursuant to Article 8308-1.03(12), and that the preponderance of the credible evidence substantiated that the appellant has been unable to obtain or retain employment since May 28, 1991, due to a noncompensable injury, thus the appellant has no disability as that term is defined in Article 8303-1.03(16).

DECISION

Finding that the decision of the hearing officer is supported by sufficient evidence and is not against the great weight and preponderance of the evidence, we affirm.

Appellant raises the following points on appeal. First, he alleges that credible evidence would show that he injured his back in the course and scope of his employment on (date of injury). He claims that his burden of proof was met by showing that the employer had submitted a notice of injury and paid benefits for two weeks; however, when it became apparent that the injury was a serious low back injury, the employer "began a campaign to intimidate his other employees into making statements that could have been made at the time the injury was reported" by appellant. Appellant alleged that the employer's own witnesses testified that all records, diagrams, and trial exhibits were prepared solely for the hearing and were not a part of records kept in the course of business.

Second, appellant says that his own testimony and medical records demonstrate that his injury is such that would prevent him from getting and keeping employment.

Third, appellant alleges that the testimony of (Mr. R) "has been shown to be an after-the-fact conjecture attempt to please employer," and that (Mr. R) in taking the information for the notice of injury and completing the form had the time to do the investigation and preparation necessary to dispute the incident.

Finally, appellant alleged that the hearing officer failed to take into account the fact that the biases of employees, the inconsistencies of their testimony, and the overall climate of the hearing (including one witness' testimony by teleconference) amounted to "a forum for the benefit of the employer." Appellant further alleges that the hearing officer engaged in a "very friendly conversation" with respondent's (carrier below) representatives and the employer after the first day of hearing, and that such conduct was offensive to the claimant, leading him to believe that the outcome was pre-decided.

Appellant testified that on (date of injury), he was an employee of (employer) of (city), Texas (employer), a subscriber to workers' compensation. In that capacity, he worked on landscaping jobs, doing a variety of tasks including planting trees, removing trees, planting flowers and grass, and unloading trailers. His supervisor was (Mr. P). He began work around 7 a.m. on (date of injury), working at a landscaping job at "(employer)." Later on, he and Mr. P returned to employer's office to get a landscaping trailer. There, he was instructed by Mr. P to pick up a "walk behind" and unload it from the trailer to the ground, a distance of approximately three feet. Appellant defined a "walk behind" as a large lawnmower weighing more than 200 pounds. Normally equipment such as this was removed from trailers by use of rails which could be let down to create a ramp. Appellant said he did not want to pick up the "walk behind" because, he told Mr. P, he did not want to get hurt. However, he said of Mr. P, "[h]e's my foreman, my boss; whatever he says, I do." He also said Mr. P asked if he (appellant) was a "wimp." He said that (Mr. R) walked up and asked Mr. P why they didn't wait for help. Mr. R was the landscaping manager and Mr. P's supervisor; however, he did not reprimand Mr. P in any way. Appellant and Mr. P proceeded to lift the "walk behind." Appellant said he squatted and grabbed one side, then had to step down to the ground. He felt a pinch in his back, but thought it was a pulled muscle. He said nothing to anyone and continued to do work the remainder of the day, including picking up bags of topsoil. It was not until after he went home and took a shower, he said, that he felt pain.

Appellant said he called Mr. R the next day (date) and received permission to see a doctor. He said he told Mr. P the following day that he felt he had gotten hurt.

He went to (Dr. F), a chiropractor, because he thought he could go to any doctor. When Dr. F tried to verify this with the employer on May 29th, she was told the employer would not cover the visit.

On May 30th appellant said he went to Mr. R to complete the employer's first report of injury. Mr. R assisted appellant in filling out this form but did not question appellant about the injury or whether there were witnesses. Appellant said because Mr. R was there when the accident happened, he more or less knew what had gone on; therefore, the two of them just figured out the appropriate dates. After the report was filled out, Mr. R sent appellant the same day to see (Dr. G), the physician the company used. Dr. G. examined appellant and released him to light duty work May 30 through June 2; however, appellant received permission from Mr. R to take the rest of the day off. The next day, June 1st, he said he was unable to get out of bed without assistance; he called Mr. R and said he wanted to get

a second medical opinion. He went back to Dr. F, who said she thought he had a herniated disc and ordered an MRI. The MRI showed herniated discs L4-L5 and L5-S1. Dr. F continued treating him until respondent wanted him to see its physician, (Dr. N). Dr. N examined appellant and said he thought he had a herniated disk and wanted further x-rays; however, respondent's adjuster refused to pay for the tests. Since that time, appellant said he has had no medical treatment and has not had any medication prescribed. He said he has attempted to continue medical treatment, but it has been denied by employer and respondent. He said his condition has gotten worse since the injury; he has fallen several times and has trouble sitting and lying down. He no longer works and has moved to (city) to live with his wife's mother.

On cross-examination appellant said his problems with walking and bending over started the day he was injured, but he kept working because he needed the job. However, he said, he was in pain for the next several days and could not bend over any more, which he was required to do to plant flowers and dig holes. He said the injury interfered with his work in that he could no longer work fast. He said no one complained about his work, probably because there were enough workers there to help him out.

He testified that the landscaping crews were separate and different from the maintenance crews. The landscaping crews did not use "walk behinds," or mowers, and he said he did not know why such a piece of equipment was on one of the landscaping trailers.

Appellant said he was never offered light duty work by his employer; he never asked about it and was not aware that it was an option.

Respondent called four witnesses, all of whom worked for employer during the time in question: (Mr. D); Mr. R; Mr. P; and (Mr. HR).

Mr. D, who testified through an interpreter, said he worked on the same landscaping crew with appellant and Mr. P. He said he worked the majority of the time with appellant and was not aware that he had been injured. He said he did not notice appellant having any trouble doing his job. Mr. D said he himself had been injured on the job while working for employer, that he had reported the injury and had been given light duty work, such as sweeping, taking out the trash, and planting little plants, when he returned.

Mr. R testified that he was employer's landscape manager and that his duties included, among other things, keeping up with employees' work schedules, including making out daily work sheets for the employees and weekly work schedules for himself. On (date of injury) he was at (employer) and other job sites and was not at the office when appellant and Mr. P went to get the landscaping trailer. He said he first learned of appellant's injury on May 29th, when his secretary received a telephone call from Dr. F's office. It was at that point that appellant was asked to come to the office and file an injury report, in order that he could see a doctor. Mr. R said he helped complete the report and took down the information appellant gave him. He said he had no reason at that time to question appellant's injury

claim; that the claim was later investigated because of the confusion regarding appellant hurting himself with a large mower and the fact that Mr. R was supposedly present when, as he testified, he was not.

Testifying from a chart he had prepared for the hearing, Mr. R said appellant worked from May 15th through May 18th (Thursday through Saturday), and then worked the following week, May 20th through May 24th (Monday through Friday). He said no one worked that long weekend, May 25-27, because it was a holiday (Memorial Day). Appellant did not work May 28th, and May 29th was the day Dr. F's office called about payment. Appellant's last working day was May 24th.

Mr. R said it was employer's policy to give an employee light duty work if a doctor recommended it. He said this offer was made to appellant but not accepted, and that appellant did not come back in after May 30th. On that date, Mr. R said, appellant's appearance had changed from the prior week and he appeared to be in pain. Prior to that time, Mr. R had not noticed any changes in appellant's appearance or in his work habits or ability to do work.

Mr. P, who testified via a long distance call to (state)a from a speaker telephone in the hearing room, said he was a foreman on the same crew with appellant and as such was with him the entire day. On (date of injury), he recalled himself and appellant leaving (employer) to go back to the office and pick up a trailer to haul excavation. He said they hooked up the trailer, which was empty, and loaded it up with bags of bark mulch. Mr. P said Mr. R, his supervisor, was not present at the time. After they loaded the mulch, they drove back to the job site. Mr. P said appellant did not appear to have any difficulty unloading the mulch or loading grass and dirt when they got to the job site, and he did not observe any changes in appellant's habits subsequent to the (employer) job. He testified he had never unloaded a mower from a trailer by lifting it, nor had he ever ordered an employee to do so. He said he first heard of appellant's injury from Mr. R, after appellant had quit.

Mr. HR said he was working as a landscape manager at the (employer) on (date of injury). He did not recall appellant and Mr. P going to pick up mulch. He could not remember seeing appellant working on the job, but he was not told by appellant that he had been injured, nor had he observed any changes in how appellant worked. He testified that he had never lifted a lawn mower off a trailer; that the landscape crew didn't use those machines; and that he knew of no one having to do this.

The claimant in a workers' compensation case has the burden to establish by a preponderance of the evidence that an injury was sustained in the course and scope of his employment. Washington v. Aetna Casualty and Surety Co., 521 S.W.2d 313 (Tex. Civ. App.-Fort Worth 1975, no writ). Article 8303-6.34(e) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence presented. In this case, appellant's testimony was contradicted by testimony by respondent's witnesses. Appellant appears to allege, however, that respondent's evidence is not credible because of witness

bias and inconsistencies between respondent's witnesses. The trier of fact has several alternatives available when presented with conflicting evidence or with noncredible witnesses. It may believe one witness and disbelieve others. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561 (Tex. 1952). As trier of fact, the hearing officer may believe all, part, or none of any testimony; judge credibility; assign weight; and resolve conflicts and inconsistencies. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. Civ. App.-Amarillo 1988, writ denied).

Appellant also appears to argue against respondent's credibility because of Mr. R's submitting the notice of injury, then later contesting appellant's claim. Article 8308-5.05 provides that if an injury results in the absence of an employee from work for more than one day, the employer shall file a written report with the Texas Workers' Compensation Commission (Commission). Article 8308-5.05(b) also says that the report is not evidence where facts are disputed by the employer or carrier. Article 8308-5.21 provides that a carrier shall initiate compensation under the Act promptly. However, that section also provides that the initiation of payments by a carrier does not affect the right of the carrier to continue to investigate or deny the compensability of the injury during the 60-day period.

Appellant also claims that respondent's witnesses testified that all records, diagrams, and trial exhibits were prepared solely for the hearing and were not a part of the records kept in employer's course of business. Respondent's documentary evidence included the following: Exhibit A: notarized statement of Mr. P; Exhibit B: chart showing weekly schedule for periods May 7th through June 3rd, including jobs, foremen, and days worked by crew members; Exhibit C: four weekly schedules covering the weeks May 6-12, May 13-19, May 20-26, and May 27-June 2, showing schedules of crews during those periods of time; Exhibit D: time cards for appellant; Exhibit E: phone log showing call from Dr. F.; and Exhibit F: time cards for other employees. Of these, Exhibits A and B were clearly prepared for this hearing. Neither was objected to by appellant. The parties stipulated that Exhibits D and F, which respondent claimed were the underlying data behind the chart (Exhibit B) were business records of employer's. Mr. R testified that Exhibit E was kept and maintained by the secretary as part of the usual course of business. Appellant did not object to the admission of Exhibit E. There is nothing to indicate that this evidence was not credible.

Appellant contends that his own testimony and his medical records show that his injury is such that would prevent him from getting and keeping employment. This statement appears to go to the issue of disability, which would not be addressed where no compensable injury is found. The act defines "compensable injury" as one that "arises out of the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). An employee is entitled to income benefits to compensate the employee for a compensable injury. Article 8308-4.21. An employee is entitled to temporary income benefits where he has sustained disability and has not reached maximum medical improvement. Article 83-8-4.23. "Disability" is defined as "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). Thus a finding of compensable injury is a

threshold issue and a prerequisite to consideration of the issues of income benefits and disability.

Finally, appellant says the overall climate of the hearing, which included Mr. P's testimony by telephone, amounted to a forum for the benefit of the employer. This included, he alleges, a "very friendly conversation" between the hearing officer and representatives of the carrier and the attorney, which was offensive to appellant.

At hearing appellant objected to Mr. P's testimony by long-distance teleconference, saying that he had the right to observe the witness's demeanor, and that respondent did not let him know that this witness would testify by telephone. Respondent replied that he only knew the previous week that the witness would be out of town and that, in addition, respondent had a sworn statement of this witness. While we agree it is important that a hearing officer be able to form an opinion about a witness's demeanor, we do not believe that error was committed by the speaker phone testimony, for several reasons. First, both sides had the opportunity to ask questions on direct and cross-examination, and to raise objections. Second, Article 8308-6.34 allows the presentation of evidence by affidavit. It would be incongruous to reject the live testimony of a witness, albeit by long distance connection, when the same witness's sworn statement would be admissible. Finally, that same witness had prepared a sworn statement which was admitted without objection and which contained basically the same position as his live testimony. Under the circumstances of this case, no error was committed by allowing Mr. P to testify in this manner.

Regarding appellant's contention that the hearing officer was biased, the record in this case, including tape recordings of the proceedings below, does not indicate that the hearing officer acted in any but a fair and even-handed way toward both parties. We note that appellant raised no grounds for disqualification at the hearing and that no motion for recusal was filed. In short, the record does not illustrate conduct on the part of the hearing officer that would in any way taint the findings and conclusions made.

The decision and order of the hearing officer are thus affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge