APPEAL NO. 92225

On April 2 and May 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), the respondent herein, had sustained an injury by aggravating a pre-existing knee condition on (date of injury), in the course and scope of his employment as a laborer with (employer).

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 argues that the hearing officer erred in admitting an affidavit from respondent's father, which had not been exchanged.

DECISION

After reviewing the record and finding the evidence sufficient to support the determination of the hearing officer, we affirm.

(Mr. P), the respondent, suffered a volleyball-related injury to his left knee, a torn meniscus muscle and torn anterior cruciate ligament, on June 17, 1991, for which he received arthroscopic surgery June 24th or 25th, performed by (Dr. S). Dr. S also prescribed an "ACL" brace for respondent to wear. Respondent was off work for a few weeks and then released back to work; however, his employer at the time laid him off. On (date), the respondent began working for (employer). That morning, because it was raining, the employees were unable to work, but were paid for the hour they spent waiting in the trailer at the site. The next day, respondent reported to work at 7:00 a.m. He went out to the job site, where fireproofing was being stripped from some columns. A scaffold was built along side the columns, and a ladder was bolted into the scaffold in accordance with OSHA requirements. The first "floor" of the scaffold was between 5-6 feet off the ground.

Respondent testified that he used an air-powered chipping gun to remove the fireproofing on areas of columns which had been marked off by an on-site supervisor, (Mr. WC). Respondent said that he worked on a column at the level of the first "floor" of the scaffold, and, three times, his air gun broke and he had to go to a ground-level supply trailer to get a new gun. He stated that on his third trip up the scaffold ladder, as he stepped out on the scaffold, his knee essentially gave way and he experienced a clicking in the knee. This occurred after he had been on the job around an hour and a half. He stated that he took a break to tighten his brace, but his knee remained shaky, and he was limping and feeling pain. He stated that he approached Mr. WC and told him about the incident, and also told him he had previous knee surgery, and asked if he could work on a task that would not entail going up and down the scaffolding steps. Respondent was assigned to help a welder on the ground level, and he also assisted in moving some airhoses. He said that at the mid-morning break, around 9:30 a.m., he told foreman (Mr. NH) what had happened.

Respondent stated that Mr. NH told him that if he couldn't do the job, he should leave. Respondent then called his father to come pick him up.

A termination slip in the record indicates that respondent was terminated for not disclosing a previous injury on his job application. Respondent states he did not disclose it because he had been fully released to work by Dr. S. Respondent stated that he had no trouble with his knee prior to (date of injury), but thereafter had problems with swelling and discoloration. Respondent filed a claim for compensation on September 24, 1991. Respondent stated that he never received safety or injury prevention training from employer.

The respondent presented a letter from Dr. S dated October 8, 1991, which states that he treated respondent on (date), and observed discoloration of the knee, and recites that respondent was concerned about reinjury at work.

The appellant presented records from (Dr. H), who performed reconstructive surgery on March 27, 1992, on respondent's knee. Dr. H's records recap some of Dr. S's records, indicating that the prior surgery resulted from Dr. S's finding that respondent had a torn meniscus and a tear in the anterior cruciate ligament. These records indicate that a magnetic resonance imaging (MRI) examination of the knee, performed in December 1991, showed that the anterior cruciate ligament was no longer existent, but was a clump of tissue. This, coupled with Dr. S's findings after the volleyball accident, leads to the strong inference that the previously torn anterior cruciate had become completely severed, resulting in the need for full reconstructive surgery.

Dr. H's records note a pre-operative impression that respondent has chronic anterior cruciate ligament disruption of the left knee with recurrent instability. Dr. H's notes on the history of the injury reports only the volleyball injury. Respondent stated that he intentionally did not tell Dr. H about the on-the-job injury. He stated that he had qualified for Medicaid to pay for this surgery, after being rejected for treatment by several doctors when he indicated that he had an on-the-job injury.

Appellant presented testimony from Mr. WC, and adjuster statements from Mr. NH and foreman (Mr. GS). Mr. WC and Mr. NH stated that, although respondent said he had previous knee surgery and asked to be reassigned to a duty that would not involve climbing the scaffold, he never stated he was injured. Mr. GS said that an injury was not reported to him. Mr. WC stated that respondent's air gun broke once. He agreed that respondent had been assigned ground-level work. All three indicated that respondent had likely received the orientation and safety training usually given to new hires. Because respondent said he had previous injury to his knee, Mr. NH reviewed his employment application and terminated him for not disclosing the injury.

Respondent offered an affidavit from his father, over objection by appellant, who argued that it should be excluded because it was not exchanged in accordance with the 1989 Act, Article 8308-6.33(d). Respondent's attorney stated that the father was in the hospital. The identity of this witness had been disclosed, and respondent's attorney indicated that it was not known he could not be personally present until the Friday before the Monday, May 4th hearing. Thus, there was clearly good cause established in the record for admission of this affidavit, whether or not the hearing officer made an express finding. However, even if the hearing officer erred, such error would be harmless, as the affidavit, which is merely cumulative of facts brought out in respondent's testimony, plainly was not the evidence upon which the hearing officer's decision is based, and was not even noted in the recitation of the facts.

The hearing officer is the sole judge of the relevance and materiality, 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). An employer takes an employee as he finds him, and an on-the-job accident which causes a strain or rupture will be a compensable injury even if an employee's pre-disposing condition or bodily infirmity was a contributing factor. Traders & General Insurance Co. v. Rooth, 268 S.W.2d 539 (Tex. Civ. App.- Waco 1954, writ ref'd n.r.e.); Gill v. Transamerica Insurance Co., 417 S.W.2d 720 (Tex. Civ. App.- Dallas 1967, no writ). 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 here, and to assess the credibility of

the witnesses. There is sufficient evidence to support the decision of the hearing officer that the respondent aggravated a pre-existing knee injury on (date of injury).

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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Robert W. Potts
Appeals Judge