APPEAL NO. 92229

On May 7, 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 on (date of injury), in the course and scope of his employment as a forms builder with (employer).

The appellant asks that the decision be reviewed and reversed, arguing that the decision of the hearing officer was so against the great weight and preponderance of the evidence as to be manifestly unjust, and constitutes an abuse of discretion. In particular, the appellant complains of Finding of Fact No. 4 and Conclusion of Law No. 4. Appellant further argues that "claimant's disability, if any, is a consequence of an injury outside of the course and scope of his employment." No response has been filed.

DECISION

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

(Claimant), the respondent, who was assisted by the ombudsman for the Texas Workers' Compensation Commission (Commission) at the hearing, stated that he was not able to read and write more than a little. He was employed by the employer in early November, 1991, and on (date), stated that he reported for work at 7:00 a.m. According to him, he was not feeling well. It was raining, and, as the rain increased, the workers were unable to do their jobs. Respondent stated that the workers took shelter under an overpass, sitting on the sloping concrete. He states that when the workers left this area, he stayed behind a little longer because he was not feeling well. As he arose to leave, he slipped and fell on his back and shoulder. He stated that no one witnessed the accident. Respondent said he attempted to inform his supervisor, (Mr. D) about the accident, but was "waved off."

The respondent stated that he waited for his ride, (Mr. R), and they left the job site at sometime after 11:00 a.m. He said he told Mr. R about his slip and fall, and Mr. R asked if he needed to go to the hospital, which he declined. A statement from Mr. R admitted over appellant's objection (not complained about on appeal) agrees that respondent told Mr. R about slipping and falling, although Mr. R does not recall the date.

Respondent filed his workers' compensation claim on December 20, 1991. An initial medical report for a visit on December 24, 1991, from (Dr. B), verifies contusions and strains to the shoulder and back.

In a nutshell, appellant's defense consisted of pointing out that respondent failed to disclose a conviction and two prior work related injuries (in 1979 and 1983) to his back on applicable portions of his employment application. Further, Mr. D testified that he had no conversation with respondent on (date) and says that all workers were discharged from work by 8:30 a.m. Mr. D was the last person to leave the job site by 10:00 a.m. that day. Mr. D

said that respondent had been laid off before Christmas, although he could not recall the specific date.

Notwithstanding the appellant's assertion on appeal that claimant's disability is a consequence of an injury outside of the course and scope of employment, this contention isn't supported by a scintilla of evidence in the record. We would note that this defense does not appear on the benefit review conference report, nor was it asserted or argued at the contested case hearing. If this statement is not made in the appeal only for purposes of argument, but is intended as an assertion of a "sole cause" defense, it would appear to have been long since waived. *See* Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-5.21 (Vernon's Supp. 1992) (1989 Act).

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. Article 8308-6.34(e), 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 here, and to assess the credibility of the witnesses. As we have noted before, the fact that a claimant may have not been accurate in filling out a job application bears only scant relevance to whether or not an injury arose out of employment. Texas Workers' Compensation Commission Appeal No. 91065 (Docket No. redacted) decided December 16, 1991. As against such facts, and the supervisor's differing recollection of the time that the workers left the job site, the respondent's evidence is not only sufficient, it is a preponderance. No abuse of discretion is indicated in ruling for the respondent under these facts.

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