APPEAL NO. 92234

A contested case hearing was held May 6, 1992, before (hearing officer). The sole issue in dispute was whether claimant (respondent herein) suffered an injury to his left knee in the course and scope of his employment on (date of injury). The hearing officer held that respondent injured his knee on that date while working for (employer), and that employer had timely notice of the injury. Appellant (employer's insurance carrier below) disputes the findings and conclusions relative to injury and notice, claiming there is no credible evidence to support any job related injury. Respondent contends that the preponderance of the credible evidence adduced at the hearing supports respondent's contentions.

DECISION

We affirm the decision and order of the hearing officer.

Respondent testified that he was employed as an automobile mechanic for employer, and had been so employed for about seven months at the time of the accident. On (date of injury), while doing a front end alignment, he slipped on steps coming up out of the alignment pit and hit his left knee. There were no witnesses to the accident. He continued to work until the end of the day, which was half an hour to an hour after the accident. He did not tell his supervisor, (Mr. S), about the incident that day, but said he reported it near the end of the day to (Mr. K), the assistant service manager, and (Mr. T), a service writer (dispatcher). He said Mr. K was on the telephone and did not respond to him, but Mr. T told him he should see a doctor if it continued to bother him.

That evening, because his leg continued to bother him, he went to the emergency room at (Hospital). He was examined and x-rayed and given a leg brace. The emergency report found no swelling, deformity, or warmth of the knee. The X-ray report disclosed an "essentially negative left knee." He said employer later sent him to a (Dr. L), but no evidence was offered regarding that doctor's findings or diagnosis. He said he was not continuing to see a doctor because he could not afford it.

Respondent had injured both his right and left knees in earlier incidents. He testified that his right knee was the subject of a workers' compensation claim in 1983, although in answers to interrogatories in this case he denied that he had ever received workers' compensation benefits. He also said in an unsworn, transcribed statement, this portion of which was made a part of the record, that he had never before injured his right knee. His left knee had been operated on in 1983 as a result of a motorcycle accident. He denied that this knee had been bothering him before the injury on (date of injury). He said he had missed a week of work shortly before the accident and that he was planning to quit as a result, but that he had stayed on at Mr. S's request. At the time of the hearing, he was working for another employer.

(Mrs. P), respondent's wife of four years, testified that on (date of injury) her husband left work at 1:00 p.m., went home to eat lunch, and then picked her up from her job at 2:00

p.m., leaving the car with her. She said this was their usual routine. She said he was not complaining about his left knee that morning when he got up, nor did he mention it when he picked her up at 2:00 p.m. When she picked him up from work that afternoon, he was limping and said he had slipped off the step in the alignment pit and had hurt his knee an hour before. Because he continued to complain about his knee, she took him to the emergency room. She said she was aware of the earlier injury from the motorcycle accident, but that she did not know he had ever hurt his right knee.

Mr. K testified that "flag sheets" from employer's records show that respondent was paid 2.8 hours (book time) working on a truck and that it was another employee who did a front end alignment. He said that when his technicians finished a job, most of them would help someone else with their job, to get the work out. He said he recalled that on (date of injury) respondent came to him around noon and asked him, "What do you do for a leg that hurts?" Mr. K said he knew the conversation occurred around noon because he was talking on the telephone about lunch to his wife, who he said brought him lunch every day. He said he stays at work until 6:00 p.m. or later, and that respondent did not tell him he had hit his knee on the job.

Mr. S, employer's shop manager, testified that respondent had a high absentee rate, and had missed a week of work (the week ending November 16th) before the accident. He said he had had discussions with respondent about his absences, to see if he could help him get back and perform his job. He said a work order from employer did not show respondent doing a front end alignment the week of his injury, but that respondent's time card showed him being paid for 4.8 hours that week. Mr. S said that he found out about respondent's injury on (date) when he got a call from a doctor's office. A day or two later, he said, respondent called him.

Mr. T, who was a dispatcher for employer, said that on (date of injury) respondent came into the dispatch office and, in casual conversation, said he had fallen and hurt his knee but did not say he had hurt it on the job. Mr. T could not recall at what time of day the conversation occurred, but thought it was in the morning.

A transcribed, unsworn statement of a former employee of employer, (Mr. I), said when respondent came to employer's business to pick up his tools on Christmas Eve he was wearing an orthopedic splint on his right leg rather than his left. The statement also said Mr. I had observed respondent outside at his house, working on trucks and playing with his children, but not limping or wearing the splint. He said the last time he saw respondent was March 2nd.

The appellant contends that no credible evidence supports the claimed injury to the left knee in the course and scope of employment, and that the clear, positive and credible evidence disputes any on-the-job injury on the date and time alleged. It is the hearing officer's duty as fact finder to act as sole judge of the weigh and credibility of evidence. Article 8303-6.34(e). He is to judge credibility and resolve conflicts, and he may believe

some but not all of appellant's testimony or any other evidence. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. App.-Amarillo 1980, no writ). In determining sufficiency of the evidence, we will consider and weight all the evidence in the case and set aside the verdict of the fact finder only if we conclude that the verdict is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, regardless of whether the record contains some evidence of probative force in support of the verdict. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951).

In this case, the only evidence of a work-related injury was contained in the testimony of respondent and his wife, and in the fact that he was seen at the emergency room on (date of injury). The medical evidence in the record was not overwhelmingly persuasive as to the existence of an injury; however, case law has held that an injury may be established by the claimant's testimony alone, and that the trier of fact may accept lay testimony over that of medical experts. Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. App.-Texarkana, writ ref'd n.r.e.). While, in this case, the testimony of respondent and his wife was that of interested parties, that testimony raises an issue of fact for the fact finder, Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. App.-Amarillo 1973, no writ), who had the responsibility of judging the credibility of these witnesses and the weight to be given their testimony in light of the other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. App.-Amarillo 1978, no writ). While evidence of respondent's inconsistent statements regarding prior injuries were introduced for impeachment purposes, the hearing officer may believe part of the testimony of a witness and disbelieve any other part. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983 writ ref'd n.r.e.). Likewise, there was testimony, although controverted, that respondent timely informed Mr. K that he had hurt his knee on the job. There was nothing in the record to indicate that Mr. K, as assistant service manager, was not an employer who holds a supervisory or management position. *See* Article 8308-5.01(c). There was also evidence showing that Mr. S, respondent's supervisor, was informed of the injury, and that he had actual notice. Article 8308-5.02(1).

Given the foregoing, we are unable to find that the hearing officer's decision was so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. We thus may not substitute our judgement for the fact finder's even where the

evidence could have resulted in a different conclusion. Garza v. Commercial Isurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. App.-Amarillo 1974). The hearing officer's decision is accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge