APPEAL NO. 92249

On April 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether the claimant, (claimant), appellant herein, injured his back in the course and scope of his employment with (employer) on (date of injury). The hearing officer determined that appellant failed to meet his burden of proving by a preponderance of the evidence that he received a back injury on (date of injury), that arose out of and in the course and scope of his employment, and denied his claim for workers' compensation benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant disagrees with certain portions of the hearing officer's statement of the evidence, requests that three affidavits introduced into evidence by respondent be stricken from the record, challenges the evidence supporting Findings of Fact Nos. 4, 7, 8, 9, 10, 11, and 12, contends that the evidence supports his claim, and requests that benefits be initiated without further delay. Respondent contends that the findings, conclusions, and decision of the hearing officer are supported by the evidence and asks that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

Appellant had worked as an estimator for (employer) for six months when on Wednesday, (date of injury), he claims he injured his back at work when he and another employee, (Mr. E) (also known as (J L E A)), lifted a file cabinet onto the employer's truck. Appellant said that the president of the employer, (Mr. S), had instructed him and (Mr. E) to move materials, equipment, and other items, including three file cabinets each weighing about 70 pounds, out of an office on the day of the incident. Appellant stated that he felt a sharp pain in his back when he lifted the file cabinet, but did not think anything about the pain at the time and continued to load the items after a short break. He said he did not tell (Mr. E) about his back pain.

Appellant said he did not report his injury to his employer on the day of the accident. The next day he said he did not work because of car trouble and that he did not report his injury when he called in that day. On Friday, November 1, 1991, appellant testified that he worked all day without reporting his injury, and that he quit his job that day after he had a dispute with (Mr. S) over whether he would have the full time use of a company vehicle. Appellant said that his back pain became worse over the weekend and that he called (Mr. S) on Monday, November 4, 1991, and reported his back injury to him. Appellant admitted that he had moved a piano in August 1991, but denied having injured his back at that time and denied having told anyone he had done so.

Medical records showed that appellant went to (Dr. S), on November 11, 1991, and complained of low back pain after having lifted a file cabinet at work. A CAT scan of appellant's lumbar spine taken on that day revealed a small bulged disc at L3-L4 and mild

spondylosis. From November 11, 1991 to January 9, 1992, appellant went to (Dr. S) six times for complaints of low back pain and on each occasion received physical therapy.

(Mr. E) gave conflicting statements in his affidavit. At first he indicated that both he and appellant carried the file cabinets, but then indicated that appellant only drove the truck and did not carry or lift anything.

(Ms. M) testified that she bought a piano from appellant in August 1991; that she watched appellant and four other men move the piano with the use of a truck and ramp; that the piano was pushed on its rollers and was not lifted in the move; that appellant did not complain of pain or indicate to her that he had any problems that day; and that no one was hurt during the move.

(Mr. S) testified that on (date of injury) he asked appellant to drive (Mr. E) to one of the employer's offices which had various items in it so that (Mr. E) could load the items onto the truck. He said he instructed appellant not to lift or move anything himself. This witness further testified that appellant quit his job Friday, November 1, 1991, over a dispute about whether appellant could have the full time use of a company vehicle, and that appellant first notified him about the injury on Monday, November 4, 1991. This witness also testified that one day in August 1991, appellant reported to work "bent over;" that appellant said he had injured his back moving a piano he had sold; and that appellant went to a chiropractor that day. Appellant denied telling anyone he hurt his back moving the piano and denied going to a chiropractor. No medical records from a chiropractor were adduced at hearing. (Mr. J) and (Mr. S), who worked in the same building as appellant but who did not work for the employer, also stated in their affidavits that appellant had told them he had injured his back while moving a piano.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). The claimant has the burden of proving that he was injured in the course and scope of his employment." Reed v. Casualty & Surety Company, 535 S.W.2nd 377, 378 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.). The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). It is within the province of the trier of fact to weigh all the evidence and to decide what credence should be given to the whole, or to any part, of the testimony of each witness. Gonzales v. Texas Employers' Insurance Association, 419 S.W.2nd 203, 208 (Tex. Civ. App. - Austin 1967, no writ). The trier of fact is not bound to accept the testimony of the claimant, an interested witness, at face value, but it is within the province of the trier of fact to resolve conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2nd 701, 702 (Tex. Civ. App. - Amarillo 1974, no writ).

Appellant contests the following Findings of Fact:

4.Claimant moved a piano in August 1991 and told (Mr. S) that his back hurt the day after moving the piano.

7.Claimant did not work for employer on Thursday, (date), and did not report to employer that he hurt his back on Wednesday, (date of injury).

8.Claimant worked a full day on Friday, November 1, 1991, and did not report an injury to his back.

9.Claimant quit his job with employer on Friday, November 1, 1991, because of a company car dispute.

10.Claimant did not report a back injury to the employer until Monday, November 4, 1991.

11.Claimant did not get medical treatment for his back until November 11, 1991.

12.Claimant was reported as having a mild bulge at the L3-L4 levels of his back on November 11, 1991, but the preponderance of the evidence does not establish that this injury arose out of and in the course and scope of his employment for [employer].

The hearing officer apparently believed that appellant sustained an injury to his back, but apparently disbelieved appellant's testimony that he received the injury while moving file cabinets during the course and scope of his employment with his employer. It was within the hearing officer's function to disbelieve this portion of appellant's testimony if she saw fit to do so. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2nd 936, 939 (Tex. Civ. App. - Texarkana 1961, no writ). Having carefully reviewed the entire record, we conclude that the findings, conclusions, and decision of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Johnson, *supra*.

We have also reviewed the "Statement of the Evidence" portion of the hearing officer's decision and found it to be a fair summary of the evidence adduced at the hearing, contrary to appellant's contention on that matter. We note that a "Statement of the Evidence" is not a required part of the hearing officer's decision. Article 8308-6.34(g); Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE §142.16(a).

Appellant requests that we strike from the record the affidavits of (J L E A), (Mr. J), and (Mr. S), all of which were introduced into evidence by respondent. Appellant did not object to the introduction into evidence of the first two affidavits. It has been held that evidence which is admitted without objection cannot be complained of on appeal. *See* Dicker v. Security Insurance Company, 474 S.W.2nd 334, 336 (Tex. Civ. App. - Waco 1971, writ ref'd n.r.e.). We note that the 1989 Act allows the presentation of evidence by affidavit,

and that the hearing officer is the judge of the weight to be given the evidence. Article 8308-6.34(a) and (e). As to the affidavit of (Mr. S), at the hearing appellant objected to this affidavit on the grounds that it was not timely exchanged, was not relevant, and constituted hearsay. On appeal, appellant does not complain of the hearing officer's determination that there was good cause for failing to timely exchange the affidavit. Therefore, we do not consider the determination of good cause on appeal. Appellant does contend on appeal, as he did at the hearing, that the affidavit is not relevant and constitutes hearsay. Concerning the question of relevancy, since appellant was claiming a work-related injury to his back, evidence concerning a prior back injury had some bearing on the issue to be determined at the hearing. *See* Mayfield v. Employers Reinsurance Corporation, 539 S.W.2nd 398 (Tex. Civ. App. - Tyler 1976, writ ref'd n.r.e.). Concerning the hearsay objection, Article 8308-6.34(a) expressly permits the presentation of evidence by affidavit at a contested case hearing held under Article 6 of the 1989 Act. As to appellant's point concerning the family relationship between the affiant and (Mr. S), the president of the employer, this relationship could be taken into consideration by the hearing officer as bearing on the credibility of the affiant. *See* Lindley v. Transamerica Insurance Company, 437 S.W.2nd 371, 375 (Tex. Civ. App. - Fort Worth 1969, no writ). Although the hearing officer could reject the affiant's statements that were adverse to appellant's claim, she was not required to do so because, as the trier of fact, she is privileged to believe all or part or none of the testimony of any one witness. *See* Taylor v. Lewis, 553 S.W.2nd 153 (Tex. Civ. App. -

Amarillo 1977, writ ref'd n.r.e). Appellant's contentions on appeal concerning the admission into evidence of respondent's affidavits are overruled.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge