APPEAL NO. 92254

On May 15, 1992, a contested case hearing was held in (city), Texas, to determine whether the claimant, (claimant), appellant herein, was injured in the course and scope of his employment with his employer, (employer), on (date of injury). The hearing officer, (hearing officer), determined that appellant was not injured in the course and scope of his employment, and that respondent, the employer's workers' compensation insurance carrier, is not liable to appellant for 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 the hearing officer's decision and has filed an appeal contesting certain findings of fact and the designation of certain exhibits as appellant's exhibits. Respondent asserts that the decision of the hearing officer is correct.

DECISION

The decision of the hearing officer is affirmed.

The entire proceeding was translated from English into Spanish for the benefit of appellant, and appellant's testimony was translated from Spanish into English. The parties stipulated that appellant was employed by (employer), a janitorial service, on (date of injury), and that respondent was the employer's workers' compensation insurance carrier on that date. The sole issue at the hearing was whether appellant was injured in the course and scope of his employment.

Appellant testified that on the evening of Thursday, (date of injury), he and (Mr. H), a coworker, were waxing and buffing the floors at a (DHS) building when he tripped and fell over a cord to the buffer machine and landed on the floor. He said he experienced pain in his low back, waist, and legs. He said he was walking forward at the time of the incident but fell backwards. Appellant stated that he and (Mr. H) were separated when the accident occurred and that he immediately went to (Mr. H) and told him that he had fallen and injured himself. Appellant further testified that he continued to work that evening finishing the job at DHS and then proceeding to the next job at the (CAS) with (Mr. H) which they also completed. Appellant said he reported his injury to (Mr. N), the owner of the company, the next day, Friday, (date), and that (Mr. N) told him to rest and not to worry. Appellant acknowledged that his next scheduled work day after Thursday, (date of injury), was Monday, February 10th, but denied that he reported for work that day. On Thursday, February 13th, appellant said that he called (Mr. N) to report that he was sick and was told that the employer had no more work for him. Appellant said that on February 15th he went to the Texas Employment Commission to obtain unemployment compensation benefits but was given the address of the Texas Workers' Compensation Commission (the Commission) because he was injured. He said he filed his claim for workers' compensation benefits the same day. Appellant said he has not gone to a doctor for the injuries he sustained on (date of injury) because he is in a very difficult financial situation. Appellant denied drinking beer while working at the DHS building on (date of injury), and denied admitting the same to (Mr. N).

(Mr. H) testified that he and appellant waxed and buffed the floors at the DHS building on (date of injury), and that except for one occasion when he ((Mr. H)) waxed the floor in another aisle, appellant was always in his presence when appellant used the buffing machine. (Mr. H) said that other coworkers were also cleaning the building on (date of injury). This witness said that appellant did not tell him he was injured and that appellant did not exhibit any signs of pain that evening. In a written summary of a recorded statement introduced into evidence by appellant, (Mr. H) is said to have stated that he did not see appellant injure himself. (Mr. H) further testified at the hearing that after completing the DHS job, he and appellant completed their next job at CAS and appellant did not exhibit any signs of injury at that job either. This witness said he next saw appellant the following Monday, which was February 10th, when appellant reported for work. This witness also stated that he saw appellant drink a beer while working at the DHS building and again while on the way to the CAS job.

(Mr. N), the owner of the employer, said that he did not talk to appellant on Friday, (date), that appellant never told him he was injured on the job, and that he first became aware of appellant's alleged injury when he was notified by the Commission that appellant had filed a claim. On (date), (Mr. N) said he was reprimanded by (Mr. M) at DHS because a security guard had caught appellant drinking a beer inside the DHS building and was told that appellant was not to be allowed back on the premises. (Mr. N) said that when appellant reported to work for his next scheduled shift on Monday, February 10th, he confronted appellant with a letter from the security guard and appellant admitted that he had drunk beer while working on (date of injury). (Mr. N) said he explained to appellant that drinking beer at work was a violation and that he then fired appellant. He said his conversation with appellant on February 10th was translated for appellant by a Spanish speaking coworker. (Mr. N) also stated that the next day, February 11th, appellant called him and asked if he had work for him, to which (Mr. N) responded that there was no more work. (Mr. N) said that appellant did not mention any injury in the conversations of February 11th and 12th. (Ms. N), the employer's bookkeeper, said that the employer was first notified of appellant's alleged injury of (date of injury) by the Commission on February 18th.

In a transcribed recorded statement introduced into evidence by respondent (a summary of which was introduced into evidence by appellant), (Mr. M), a security guard at the DHS building, stated that he saw appellant drinking beer in the DHS building on the evening of (date of injury), that he told appellant that drinking beer on state property was prohibited, and that he made a written report of the incident.

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.2d 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). 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.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ). The trier of fact resolves conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ).

Appellant contests the following Findings of Fact:

4.On (date of injury), claimant was observed by at least two people to be drinking beer while on the premises at DHS.

5.Claimant did not tell anyone he had been injured on (date of injury).

6.Claimant completed his job on (date of injury), without any difficulty or complaints.

7.Claimant has never been seen by a health care professional for any injuries incurred on (date of injury), so there is no medical evidence to substantiate an injury.

The finding that appellant has never been seen by a health care provider for any injuries incurred on (date of injury) is supported by appellant's testimony. It has been held that where there is sufficient lay testimony of an employee's injury, testimony of a medical expert as to his opinion concerning the nature and extent of an injury is not necessary to entitle the employee to compensation under the workers' compensation law. *See* Travelers Insurance Company v. Stretch, 416 S.W.2d 591 (Tex. Civ. App.-Eastland 1967, writ ref'd n.r.e.); Texas Employers Insurance Association v. Hevolow, 136 S.W.2d 931 (Tex. Civ. App.-El Paso 1940, error dis., judg. correct). Consequently, the fact that there was no medical evidence to substantiate that appellant sustained an injury is not necessarily dispositive on whether appellant in fact sustained an injury. However, in this case, it is clear to us from the other fact findings that the hearing officer did not believe appellant's testimony that he sustained an injury at work on (date of injury), regardless of the fact that there was no medical evidence to corroborate his testimony. The hearing officer could believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The evidence was conflicting on the matters of appellant's drinking, reporting of the injury, and completing the job without complaint. When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). It is apparent that the hearing officer believed the testimony of respondent's witnesses on these matters and disbelieved appellant's testimony as she was entitled to do. The hearing officer as the trier of fact was the judge of the credibility of the witnesses and of the weight to be accorded their respective testimonies. *See* Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212,

213 (Tex. Civ. App.-Waco 1980, no writ). After reviewing all the evidence of record, we conclude that the challenged findings, and the hearing officer's determination that appellant was not injured in the course and scope of his employment, are supported by sufficient evidence, and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See* Griffin, *supra*.

We agree with appellant that intoxication was not an issue at the hearing. However, appellant was the first party to present evidence at the hearing concerning the reason for his termination and that evidence included the matter of his drinking beer while at work on (date of injury), which evidence appellant then sought to contradict through his own testimony. As we view it, Finding of Fact No. 4 concerning beer drinking while at work is not necessarily related to an intoxication defense that was not raised (there is no finding on intoxication), but is instead tied to the reason for appellant's termination which respondent asserted was appellant's motivation for filing his claim. Since appellant first raised the matter at the hearing concerning beer drinking at work, and a substantial portion of his testimony was directed at refuting the evidence he presented on that matter, and considering respondent's theory as to the motivation for filing the claim, we cannot say that there was any error on the part of the hearing officer in making Finding of Fact No. 4.

We find no merit in appellant's contention that the hearing officer mislabeled respondent's exhibits as appellant's exhibits at the hearing. The record clearly reflects that appellant and not respondent offered into evidence Claimant's Exhibits 1, 2, and 3 which are summaries of recorded statements of the security guard and (Mr. H). Although Claimant's Exhibit No. 3 is simply the second page of the summary of the recorded statement of (Mr. H), the first page being Claimant's Exhibit No. 2, there is nothing in the record to indicate that the hearing officer's failure to combine the two pages as one exhibit had any effect whatsoever on her decision.

However, appellant is correct in pointing out that the decision does not correctly reflect the exhibits that were actually introduced into evidence by respondent. The decision lists a TWCC-1 (Employer's First Report of Injury) and a TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim) as Carrier Exhibits 1 and 2. The record reflects that neither of these exhibits were offered by respondent and they are not a part of the record. Respondent introduced into evidence only one exhibit, that being the transcribed recorded statement of the security guard, (Mr. M). That exhibit is part of the record and has been reviewed on appeal. Appellant has not advanced any reason for reversal of the decision on the basis of the mistake in the listing of respondent's exhibits, and our review of the entire record convinces us that in this case that mistake was harmless and is not ground for disturbing the hearing officer's decision.

Appellant attached several documents to his request for review, some of which were made a part of the record at the contested case hearing and some of which were not. Since our review of the evidence is limited to the record developed at the contested case hearing, we decline to consider any document attached to the request which was not made a part of

the hearing record. Article 8308-6.42(1); Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. redacted) decided April 27, 1992. It is apparent that the documents which were not made part of the record were either available to appellant at the time of the hearing or with due diligence would have been available to him. *See* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge