APPEAL NO. 92289

On May 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), appellant herein, is not entitled to workers' compensation benefits from respondent under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant asks that the hearing officer's decision be reversed and remanded for a new hearing. Respondent asks that the decision be affirmed but states that it disagrees with Conclusion of Law No. 3. We have considered that portion of respondent's response which responds to appellant's request for review, but we have not addressed respondent's contention concerning Conclusion of Law No. 3 since that is in the nature of an appeal and it was not timely filed as an appeal in accordance with Article 8308-6.41(a).

DECISION

The decision of the hearing officer is affirmed.

(Mr. L), appellant's brother, works as an independent contractor installing carpets. He does not carry workers' compensation insurance. He did about six jobs for (employer), between December 1990 and September 1991. Appellant worked on and off for (Mr. L) for about six months in 1991 and was working for him in (date of injury). (employer) hires other independent contractors to install carpets, and arranges for workers' compensation insurance coverage for an independent contractor who does not have coverage while the independent contractor is performing a job for (employer). Respondent is (employer) workers' compensation insurance carrier.

Appellant testified that he injured his right knee while working for (Mr. L) installing carpet at the (the "Village") on (date of injury). The accident was not witnessed; however, appellant's sister said that appellant came home with a swollen knee on (date of injury) and related to her that he hurt his knee at work. On September 25, 1991, appellant went to the hospital and had fluid aspirated from his knee. He was later diagnosed as having a contusion of the right knee and traumatic arthritis of the right knee. Appellant claimed that the work he was doing at the Village when he was injured on (date of injury) was being done by (Mr. L) for (employer), and therefore, respondent is liable to him for workers' compensation benefits since (employer) arranged for workers' compensation insurance for (Mr. L) and his employees. Appellant said he reported his injury to (Mr. L) on the day he was injured and then reported his injury to the wife of the owner of (employer) about two weeks later.

(Mr. L) testified that appellant told him he had injured his knee prior to September 1, 1991. However, this witness said that he assumed appellant had been injured in a fight due to appellant's history of fight-related injuries. This witness said that he had done some work at the Village, but he could not remember the dates of the work and said he would have to rely on the records of (employer). He also said that he contracts to do carpet work

for other companies besides (employer).

(Mr. K), the owner of (employer), testified that if appellant sustained an injury while working for (Mr. L) on a job for (employer), he would be covered by workers' compensation. Mr. Keller said that his company has installed carpet at the Village for about sixteen years, but added that other companies also install carpet there. He said that while (Mr. L) had installed carpet for him at the Village on one or two occasions, (Mr. L) had not installed carpet for him at the Village in (date of injury) as claimed by appellant. He said that according to his business records, (Mr. L) did only two jobs for him in (date of injury), and neither job was at the Village. The records were in evidence and they corroborated this witness' testimony on this point. This witness further testified that he first became aware that appellant was claiming an injury in the middle of October 1991.

The issues at the hearing were: (1) did appellant's knee injury of (date of injury), occur in the course and scope of his employment or under other circumstances; and (2) did appellant give timely notice of the injury to the employer (employer) is referred to as the employer in the hearing officer's decision).

The hearing officer made findings of fact to the following effect:

1.In (date of injury), appellant was employed by (Mr. L) as a floor installer and (Mr. L) was his supervisor.

2.(Mr. L) was an independent contractor and did not subscribe to workers' compensation insurance.

3.(employer) extended workers' compensation insurance to independent contractors and their employees.

4.(Mr. L) completed two jobs for (employer) in (date of injury); those jobs were in a home on (street), and a location on (F S H).

5.(Mr. L) did not contract with (employer) to install carpet at the Village in (date of injury).

6.Appellant injured his knee while installing carpeting at the Village on a date that cannot be determined from the evidence presented.

7.Appellant notified his supervisor, (Mr. L), of the injury to his knee on the same unknown date that he injured his knee.

The hearing officer made the following conclusions of law:

1.Appellant was injured in the course and scope of his employment with (Mr. L).

2.Appellant gave (Mr. L) timely notification of his injury.

3.Since (Mr. L) did not contract with (employer) to install carpet at the Village in (date of injury), respondent is not liable for the injury.

Respondent did not dispute that if appellant was injured while working on a job for (Mr. L) for which (Mr. L) had contracted for with (employer), that it would be liable for workers' compensation benefits to appellant due to the arrangement for workers' compensation insurance coverage between (employer) and (Mr. L). The real question was whether appellant was injured while doing a job for (employer). Appellant said that he was injured while doing a job for (employer) at the Village on (date of injury); (Mr. K) said that he was not, and showed through business records that (employer) had not contracted with (Mr. L) to do a job at the Village in (date of injury), as claimed by appellant. Because appellant was not covered by respondent for any work except that which was done for (employer), the site where the injury occurred is not, as appellant asserts, "immaterial." We note that in light of (Mr. L)' testimony that he worked for other companies and (Mr. K's) testimony that other companies installed carpet at the Village, it does not necessarily follow from the hearing officer's finding that appellant was injured at the Village on an undetermined date, that appellant was doing work for (employer) when injured. Appellant had the burden to prove that he was injured in the course and scope of his employment with (employer) on or about the date alleged. Washington v. Aetna Casualty and Surety Company, 521 S.W.2d 313 (Tex. Civ. App. - Fort Worth 1975, no writ); Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.). The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). It is the hearing officer's responsibility as the trier of fact to resolve conflicts and inconsistencies in the evidence. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App. - Austin 1967, no writ). Having reviewed the record, we conclude that the hearing officer's determination that since (Mr. L) did not contract with (employer) to install carpet at the Village in (date of injury) (and given appellant's attribution of his injury to that month and location), respondent is not liable for the injury, is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

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 Panel

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Susan M. Kelley
Appeals Judge