APPEAL NO. 92300

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On March 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant, appellant herein, was not injured compensably on (date of injury). Appellant asserts that the finding of no injury on (date of injury) is against the great weight and preponderance of the evidence. He adds that the hearing officer erred in commenting that the appellant failed to produce witnesses and that no objective medical evidence confirmed the injury.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Appellant was on his first day of work for an oil field hauling business. Pipe, approximately 10 inches in diameter and 60 feet long weighing 1500 pounds each, were being placed (stringing) on site, end to end, to be used by the pipe line contractor. Appellant claimed that in late afternoon, as a pipe was being off-loaded from a flat bed truck carrying several sections of pipe, the truck moved backward causing the pipe to strike him in his chest aggravating his old back injury. He said that there were workers around him and that "(R)" was close to him and would have seen it happen; he also said "(P)" was within 35 feet and was looking toward him at the time. Appellant said nothing at the time, but called in the next day to report the injury. His doctor recorded his history of the incident and noted that x-ray showed the old injury. No physical examination findings such as motion or movement restrictions are recorded.

Respondent called (PC) to testify. He agreed that he was about 35 feet away operating the boom that lifted each pipe off the truck. He and the owner of the company described the operation and the implausibility of appellant's story. The boom is designed to lift a pipe straight up, after which the truck moves forward and the pipe is lowered in place. The boom is not capable of swinging the pipe back and forth, except as it gets to within a foot or so of the ground at which time it may be "wiggled" about six inches in either direction. If it hit someone, it would hit an ankle or shin. In addition, PC described appellant as a laborer who strung small lengths of wood for the pipe to rest on, not one who guided the pipe down to its resting place.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act. He could believe that PC, as the boom operator with a clear field of view centered on the movement of the pipe, did not see appellant get hit in the chest with a pipe. He could believe that the movement of the truck would not affect the movement of the pipe once it was lifted off the truck as PC testified. He could question appellant's failure to complain to others, at the time or in a vehicle ride together at the end of the day, that a 1500 pound pipe hit him in the chest. He could observe that the doctor

who appellant saw two weeks later recorded a history and little else. The appeals panel will not interfere with the trier of fact's resolution of conflicts in the evidence or pass on the weight or credibility of witness' testimony. Old Republic Ins. Co. v. Diaz, 750 S.W.2d 807 (Tex. App.-El Paso 1988, writ denied). The evidence sufficiently supported the hearing officer's finding that appellant was not injured on the job on (date).

Appellant also takes issue with the hearing officer's comment that appellant called no witnesses other than himself and cites Brazos Graphics, Inc. v. Arvin Industries, 574 S.W.2d 240 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.). That case also involved whether an independent testing company was biased and what, at that time, was fair comment by counsel. More recently, Caterpillar Tractor Co. v. Boyett, 674 S.W.2d 782 (Tex. App.-Corpus Christi 1984, no writ) and Central National Gulfbank v. Comdata Network, Inc., 773 S.W.2d 626 (Tex. App.-Corpus Christi 1989, no writ) have held that it is not improper for counsel to comment in argument on the failure of a party to call legally available witnesses. For comparison, *see* TEX. R. CIV. EVID. 513, which will not allow comment upon a claim of privilege but does allow comment on a party's own claim of privilege against self-incrimination. The comment was not error.

Finally, appellant says the hearing officer erred in considering that there was no diagnostic confirmation of injury. The appeals panel has written that objective medical findings are not a prerequisite to determine that injury occurred. *See* Texas Workers' Compensation Commission Appeal No 92030 (Docket No redacted) decided March 12, 1992. *Also see*, Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ). We have never held that a hearing officer should not consider whether objective or diagnostic findings were made, whether the medical examination was extensive and documented observations made during the physical examination, or whether the physician devised a treatment plan whose purpose was to speed recovery of the patient rather than to extend the period of treatment by health care personnel. A hearing officer may consider medical evidence and determine that it tends to corroborate and lend weight to testimony of how an accident may or may not have occurred. As stated previously, the hearing officer is the sole judge of the evidence; that includes medical evidence. The hearing officer did not err in carefully reviewing the medical evidence and commenting that no objective confirmation of injury was made.

Affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge