APPEAL NO. 92303

On June 11, 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, did not sustain an injury in the course and scope of his employment with his employer, (employer), on (date of injury), and denied him benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 et seq. (Vernon Supp. 1992) (1989 Act).

Appellant requests review of the hearing officer's decision and asks that we enter a decision in his favor. Respondent asserts that the decision is supported by the evidence and asks that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The only issue at the hearing was whether appellant sustained an injury to his back in the course and scope of his employment with his employer on (date of injury). The parties agreed at the benefit review conference that appellant gave timely notice of injury to his employer. Respondent's position at the hearing was that inconsistencies in the evidence affected appellant's credibility and cast serious doubt on his workers' compensation claim. Appellant has worked for the employer for 16 years. At the time of the claimed injury he was an electrician. Appellant testified that on (date of injury), he felt back pain while carrying a ladder and a 40-pound tool box at work and that he dropped these items because of the pain. The incident was not witnessed. He did not report the injury to anyone that day. He said he was aware of the employer's policy to report work-related injuries to the employer's medical department and to the immediate supervisor. The next day, (Dr. C), he said he reported to Nurse (W), the nurse at the medical department, that he had been hurt at work the day before. He also said that he "thought" he had told (HR), who was one of his supervisors, about his back problem on (Dr. C). Appellant went to (Dr. C), on (Dr. C) and continued treatment with him until about October 18th. Appellant explained that since he was able to obtain one week of free treatment from (Dr. C), he and (Dr. C) did not fill out forms indicating his injury was work-related until October 10th or 11th. (Dr. C) referred him to (Dr. H) who referred him to (Dr. Cl). The medical records indicate that appellant recited a history of a work-related injury on (date of injury), to his health care providers. Appellant said he called Nurse (W) on October 11th and told her he wanted to file for workers' compensation, but that she denied his request.

(Dr. C) said that no specific precipitating cause for appellant's low back pain and leg pain could be found, but that appellant's lumbar syndrome is consistent with that received by some type of trauma. He opined that repeated trauma over a period of time on an already weakened lumbar spine precipitated appellant's lumbar discopathy. Several diagnostic tests were performed on appellant's back. (Dr. Cl) diagnosed "lumbar stenosis, L3-L4, possible L3-L4 disc fragment, possible L4-L5 disc." On October 23rd appellant had

surgery consisting of a total laminectomy of L3, partial laminectomy of L2, and partial laminectomy of L4.

(HR) testified that he was not at work on (Dr. C) and that appellant never told him about a work-related injury occurring on (date of injury). He said that on (date) appellant asked for time off work for "personal business" in order to see a doctor, but that appellant did not say he was injured at work. On (date), he said appellant told him that he (appellant) was going to the employer's medical department because his back was hurting him but again did not indicate that his back problem was work-related. Appellant's other supervisor, (RB), confirmed that appellant asked for personal time off to see a doctor on (date) and that appellant did not mention a work-related injury at that time. He said that appellant never reported to him a work-related injury occurring on (date of injury). This witness further testified that on (date) appellant told him that his back was hurting but did not indicate that his back problem was work related. The employer's payroll records showed that appellant was given 5.5 hours off work on (date) for "personal business." Appellant acknowledged that he knew on (date) that he would not be paid for taking time off of work for personal business, but that he would be paid by the employer for taking time off of work to see a doctor for a work-related injury. Appellant said that he thought he had told his supervisors that he was going to a chiropractor on (date) for an on-the-job injury. Although both supervisors said that appellant was a truthful employee and that they would believe him if he told them he had an on-the-job injury, (RB) made it clear that he did not believe that appellant was hurt at work because appellant was a long time employee who knew the reporting procedures yet failed to report the incident to one of his supervisors.

In a sworn statement Nurse (W) contradicted appellant's testimony concerning his reporting of a work-related injury to her on (Dr. C). She said that the first time appellant complained to her about back pain was on (date). She said that on that date appellant told her he was under a chiropractor's care but that he did not indicate he had hurt his back at work. She said that appellant next contacted her on October 11th and at that time told her for the first time that he had hurt himself at work, that he was going to have an MRI that day, and that he asked how to file for workers' compensation. Medical records showed that appellant had an MRI of the lumbar spine taken on October 11th and that it revealed, among other things, significant disc degenerative changes at all levels and facet degenerative changes at most levels. Nurse (W) said she told him that he could not file for workers' compensation because there was no accident report for the injury. She further stated that appellant told her he had reported the injury to (HR) on (Dr. C). This witness said that when she asked (HR) about the accident, he said he knew nothing about it. Notations in the records of the employer's medical department corroborated this witness' testimony.

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). An injury does not have to be witnessed

in order for it to be compensable because the testimony of the claimant, if believed by the trier of fact, can support a finding of an on-the-job injury. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). However, the hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness, and resolves conflicts and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ); Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer is not bound to accept the testimony of the claimant, an interested witness, at face value. Garza, *supra*. The trier of fact may believe that a claimant had an accidental injury, but disbelieve the claimant's testimony that he received an accidental injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). In this case, portions of appellant's testimony were directly contradicted by respondent's witnesses and by documents of the employer. In particular, appellant's testimony that he saw Nurse (W) on (Dr. C) and reported the injury was contradicted by Nurse (W) and the employer's medical department records. The evidence also raised a question as to why appellant would take off work for "personal business" on (date) to see his chiropractor when he knew that he would not be paid for that time but would be paid by the employer to take off work to see the chiropractor for a work-related injury which allegedly occurred four days before he asked to take off work for personal business. Although the hearing officer could have believed appellant's testimony concerning a work-related injury on (date of injury) despite these apparent contradictions and inconsistencies, she was not required to do so. *See* Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ); Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). We conclude that the decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Johnson, *supra*.

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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Lynda H. Nesenholtz
Appeals Judge