APPEAL NO. 92332

A contested case hearing was held at (city), Texas, on June 18, 1992, (hearing officer) presiding as hearing officer. He determined the appellant did not prove, by a preponderance of the evidence, that he sustain an injury in the course and scope of his employment. Appellant urges, in essence, that the evidence is sufficient to establish that the appellant was injured in the course and scope of his employment and cites four reasons (some of which are supported by evidentiary matters that do not appear in the record) for the respondent's principal witness not to tell the truth. Respondent urges that the appeal was not timely filed and, alternatively, that the decision of the hearing officer was correctly based on a preponderance of the evidence. Respondent also asks that we reject the new evidence raised in the appeal and which was not presented at the hearing because the respondent had no opportunity to cross examine.

DECISION

Finding the evidence sufficient to support the findings, conclusions, and decision of the hearing officer, we affirm.

We have reviewed the pertinent dates in this case and determine the appeal was timely filed. A copy of the decision of the hearing officer was mailed to the appellant on June 29, 1992 and the appeal was filed on July 10, 1992. This was clearly within the 15-day time limit. In addition, we have rejected the new evidentiary items contained in the request for review. The Appeals Panel considers only the record developed at the contested case hearing, the request for review and the response thereto. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., Art.8308-6.42(a) (Vernon's Supp. 1992) (1989 Act); Texas Workers' Compensation Commission Appeal No. 92147 (Docket No. redacted) decided May 29, 1992.

This case involves the diametrically opposing testimony of a truck driver and his partner. The evidentiary summary contained in the hearing officer's Decision and Order fairly and adequately sets forth the pertinent evidence of record and is adopted for purposes of this review. Succinctly, Mr. RM was driving a large rig in the early morning hours of (date of injury) in (city), (state), when he was involved in a minor accident while going at a very slow speed. He states the appellant was in the passenger seat beside him at the time and that he, the appellant, did not jerk or fall and that there was no slamming of brakes or quick stop. The appellant, on the other hand, testified that he was in a sleeper area behind the seats when the brakes were slammed on causing him to fall on the floor of the truck cabin. He claims he sustained a back injury. A witness involved in the accident (the truck's tire hit against the witness's car door as the truck started to turn from a stop light) signed a statement indicating that the driver of the truck did not even realize he had made contact with the car and that she stopped him a couple of blocks away. This witness also stated that the police were called and that no one said they were hurt. Mr. RM testified that the appellant indicated to him that "anytime you have an accident you're supposed to get something." Mr RM told the appellant "there wasn't anything happened to you and I ain't

gonna lie for you." Mr. RM notified his supervisor of the accident the same night. The appellant did not report any injury but states that he indicated to Mr. RM he was going to get checked out when he got back home to (city). He saw a doctor on (date), in (city). The doctor's report indicates impressions of acute lumbar, dorsal and cervical strain and post-traumatic HAC. The appellant also has a foot cyst which he feels is part of his injury.

As indicated, there was total conflict in the testimony of the appellant and Mr. RM as well as a considerable degree of acrimony. The one witness, the lady in the automobile involved in the accident, tends to corroborate the version of the accident as stated by Mr. RM. In any event, the hearing officer saw, observed and heard the testimony of the two key witnesses. It was for him to assess credibility and to weigh the evidence and arrive at findings of fact. Article 8308-6.34(e) and (g), 1989 Act. As the fact finder, he resolves conflicts and inconsistencies in the testimony and other evidence. Texas Workers' Compensation Commission Appeal No. 92252 (Docket No. redacted) decided July 27, 1992. A claimant has the burden of proving an injury occurred in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 765 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer concluded that the appellant had not proven, by a preponderance of the evidence, that he sustained an injury in the course and scope of his employment. This conclusion, and the finding upon which it rests, is sufficiently supported by the evidence and, clearly, the determination of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge