APPEAL NO. 92347

On June 15, 1992, a contested case hearing was held in (city), Texas, with (hearing officer), presiding as the hearing officer. The claimant, (claimant), appellant herein, contends that the hearing officer erred in finding that he was not injured when he jumped or dropped from his employer's truck on (date of injury). Appellant requests that we reverse the hearing officer's decision that he did not sustain a compensable injury and is not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act) and render a decision in his favor, or in the alternative, reverse the decision and remand the case for further consideration and development of the evidence. Respondent, the employer's workers' compensation insurance carrier, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The employer is in the roofing business. During (date of injury), appellant was working as a laborer on a crew replacing a roof on an 18-story building. Material from the old roof was put into a container and lowered by crane into a dump truck. Chains connecting the container to the crane cable were then unhooked by whomever was in the back of the truck allowing the container to be emptied.

Appellant testified that on (date of injury), (there was some uncertainty as to the exact date of the alleged injury) he was working by himself in the back of the truck, and that the truck did not have a ladder. He said he injured his right ankle, right leg, and back when he jumped from the side of the truck after he unloaded the container about 9:00 a.m. He said he was afraid of being fired so he did not report the accident when it happened, but instead, went and sat in a car the rest of the day. He said no one came looking for him. Appellant said that while he was working at another job site for the employer on January 3, 1992, he told a supervisor that his leg hurt and that he could not work the rest of that day. On January 6, 1992, appellant gave a written statement to the owner of the company which indicated that he had hurt his ankle not on (date of injury) as he testified to at the hearing, but rather on (date of injury), when he jumped from the truck. Appellant went to (Dr. G), M.D., on January 6, 1992, with complaints of ankle pain. (Dr. G) diagnosed acute gouty arthritis and prescribed medication for gout. Notations in (Dr. G's) records indicate that when appellant took the gout medication his pain stopped, but when he failed to take the medication his pain returned. Later in January, appellant went to (Dr. K), D.O., and (Dr. W), M.D., with complaints of back, hip, and leg pain. X-rays of appellant's lumbar spine, hip, and right ankle were normal, as were a CT scan of his lumbar spine and a nerve conduction study of his lower extremities. (Dr. K) diagnosed "sprain/strain lumbar region, sprain/strain hip and/or thigh, sprain/strain ankle and/or foot."

Appellant's notices of injury indicate a date of injury of (date of injury). Medical reports indicate that he told his doctors that he was injured on (date of injury). After appellant heard the owner of the company testify from time records that he did not work on (date of injury), appellant said he was not sure about the date of injury, but believed the date of injury was (date of injury), a day he did work. Time records also showed that appellant worked a number of days after (date of injury) up until at least January 3, 1992. Appellant's job-site supervisors testified that appellant did not report any injury to them, complain of pain, or appear to be hurt during this period. One supervisor said that appellant left work early on January 3, 1992, complaining of stomach problems.

Appellant's supervisor on the (date of injury) job testified that three men, including appellant, were assigned to unload the container into the dump truck so that appellant would not have been working by himself doing that job. He said the city required one worker to look out for traffic because the truck partially blocked the street, and that it took two men to get the chains off of the container to empty it into the dump truck. Contrary to appellant's testimony, he also said that the dump truck had a ladder welded onto its side so that workers could climb up and down the truck. This was confirmed by another witness. The two other workers that were said to be assigned to the truck were not called as witnesses by either party.

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 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). While the testimony of a claimant alone can support a finding of a compensable injury, Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ), the hearing officer is not bound to accept the testimony of the claimant, an interested witness, at face value, Garza, *supra*.

In the present case there were conflicts and inconsistencies in the evidence relating to the date of the alleged injury, the physical circumstances surrounding the unloading of material into the truck, and the medical diagnoses. In the face of these conflicts and inconsistencies it is apparent that the hearing officer chose not to believe appellant's testimony. Weighing all the evidence in support of as well as against the determination that appellant did not sustain a compensable injury on (date of injury), we cannot say that such finding is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. *See* Reed, *supra*; Griffin v. New York Underwriters Insurance Company,

594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ).

Appellant requests that we review Texas Workers' Compensation Commission Appeal No. 91123 (Docket No. redacted) decided February 7, 1992, in making our decision in this case. In Appeal No. 91123 the employee's notice of injury gave a date of injury of February 9, 1991. However, she testified at the hearing that she was unsure of the date of injury, but could relate it to the time of her co-employee's vacation which was the last week of February. There was also testimony that the employee did not enter the date of injury on her notice of injury. We held that the hearing officer's finding that the injury occurred in the period February 18th through the 22nd was sufficiently supported by the employee's testimony. In the present case, it is apparent from the hearing officer's findings and conclusions which recite the dates of (date of injury), that the hearing officer did not restrict appellant to only the date of injury given in his notice of injury, but considered the date testified to at the hearing as a possible date of injury. The fact that appellant waited until after he heard the owner's testimony that he had not worked on (date of injury) to change the date of injury to (date of injury) was a matter for the hearing officer to consider in assessing appellant's credibility. The hearing officer could choose to believe him or not believe him.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge