APPEAL NO. 92361

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On June 11, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She found that claimant, respondent herein, injured his back in a fall in an attic while working with insulation, gave adequate notice, and has disability. Appellant asserts that the testimony of respondent was so vague and conflicting as to constitute no or insufficient evidence upon which to base findings and conclusions of injury and notice.

DECISION

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

Respondent had worked for (employer), for approximately one year when he was fired. He had been previously warned when he used an employer's credit card to put gasoline in his private vehicle. His testimony characterized the gasoline incident as not stealing even though he did not have permission and was not about to use the car for company business. When fired, he had been caught in the employer's office (he said he had a key because he was "trusted") using the telephone to talk long distance for over an hour to, he first said, his wife in (city); then, he later said, to his girl friend in (city). There was evidence that this occurred after midnight and that approximately two six-packs of beer containers were on the scene.

When questioned about the accident, which he described as falling backward across a two-by-four/six stud in an attic he was insulating, he testified that the accident occurred either in (month) or (month) of (year). He also placed the time of injury as about 20 or 25 days before the day he was fired. The evidence is compelling that he incurred some injury to his back somewhere at some time. According to a telephone interview purportedly taken on November 27, 1991 with the owner of the company, respondent showed the bruise on his back to him on the day he was fired; doctor's reports also allude to the bruise on his back. Whether he was injured at work was a fact question for the hearing officer to determine. Article 8308-6.34(e) of the 1989 Act. As trier of fact, she assigned weight and judged credibility of the evidence. The respondent did not waiver in either his statement or testimony about his fall across a two-by-four/six in an attic while at work. The evidence was sufficient to support a finding that injury occurred in the course and scope of employment.

Respondent's evidence concerning when the accident happened and when respondent told his supervisor, (Jr.), of his injury was not consistent. In a telephone interview, purportedly conducted on October 30, 1991, respondent said his back injury occurred around (date of injury), but said he didn't really remember. He added that he told Jr. the next day. In written interrogatories, respondent said that the accident occurred 20 days before he was fired on October 7, 1991, and that he told Jr. three days later--the accident happened on Friday and notice was on the following Monday. In testimony,

respondent said he told Jr. two or three days after the accident and also said he told him "the next day." He testified that the accident was in (month) or (month), but also stated that it was 20 and 25 days before he was fired. Respondent added that Jr. "played" a lot on the job and didn't take it seriously. He told him of the injury on several occasions, but has seen Jr. use marijuana on the job. Respondent also said he told a fellow worker of the injury.

Jr. testified that respondent never told him of the injury, but admitted that he had used marijuana. (Mrs. H), a co-owner of the company, testified that on the day he was fired, respondent told them of his back injury and said it happened "two or three months ago."

Appellant states the hearing officer erred in finding that respondent was injured on the job on (date of injury) and told Jr. on or about (date). Conclusions of law that respondent was compensably injured on (date of injury) and timely reported the injury, were also objected to. In addition, appellant took issue with a conclusion that found disability to the date of the hearing. Finally, while not defining it as an issue, appellant in argument asserts that the evidence of Jr.'s marijuana use should not have been allowed.

While respondent's answers at hearing were at times not responsive, we note no confusion when respondent referred to the way the accident happened. Conversely, respondent contradicted himself concerning the date of the accident. Respondent's testimony is so vague and contradictory in some areas as to severely strain the ability of the fact finder to determine that the injury was compensable. Incidents involving the wrongful appropriation of gasoline and wrongful use of the company telephone could also raise a question of his trustworthiness. Nevertheless, the hearing officer is the sole judge of the evidence. Article 8308-6.34(e) of the 1989 Act. She could believe part of respondent's evidence (that he was hurt approximately 20 days prior to being fired) and not believe that he was hurt on a Friday, or in (month), or 25 days before he was fired. The Appeals Panel will not interfere with the trier of fact's resolution of conflicts in the evidence and will allow the hearing officer to assign weight and credibility to testimony. *See* Old Republic Ins. Co. v. Diaz, 750 S.W.2d 807 (Tex. App.-El Paso 1988, writ denied). While the respondent described several possible dates of injury, part of his testimony at hearing directly supports the hearing officer's finding of the date of injury. The testimony of the respondent alone is sufficient for the trier of fact to use as a basis for finding a date of injury and when notice was given. *See* Texas Gen. Indem. Co. v. Thomas, 428 S.W.2d 463 (Tex. Civ. App.-Tyler 1968, writ ref'd n.r.e.). *Also see* Texas Workers' Compensation Commission Appeal No. 92182 (Docket No. redacted) decided June 24, 1992, which acknowledged that a version of events claimant disavowed at the hearing but which was attributed to claimant prior to hearing could be used to uphold a decision for the claimant.

The hearing officer's decision that the accident occurred on (date), was based on sufficient evidence of record. The hearing officer could believe respondent's testimony of when he reported the injury, whether or not respondent's supervisor's demeanor on the job was questioned. *See* Thomas, *supra*. While respondent testified that he had seen Jr. use marijuana on the job "every day," he said he did not observe him smoke it the day of the accident but, "(h)e was like that every day." While we believe that evidence of use of

marijuana at work by a supervisor at the time he was told of an accident is relevant, if it is not, its admittance would not be reversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In addition, since (date) was the date of the accident, a co-owner of the company admitted that respondent reported the accident on October 7, 1991, so Jr.'s testimony that respondent did not report an injury would not affect whether the accident was reported within 30 days as required by Article 8308-5.01 of the 1989 Act.

The respondent also testified that he has not been able to obtain employment since the injury because of his back and named several companies that would not hire him because of his condition. The testimony of the respondent is sufficient upon which to base a determination of disability. *See* Texas Workers' Compensation Commission Appeal No. 92167 (Docket No. redacted) decided June 11, 1992.

The findings and conclusions to which the appellant asserted error are based on sufficient evidence of record, and the determination and order of the hearing officer are not against the great weight and preponderance of the evidence. The decision is 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