APPEAL NO. 92362

On June 29, 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 making certain findings and conclusions, and requests that we reverse the hearing officer's decision that appellant did not sustain a compensable injury to his left knee and is not entitled to benefits for his claimed left knee injury under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Respondent, the employer's workers' compensation insurance carrier, responds that appellant has not presented a basis for disturbing the hearing officer's decision and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The benefit review conference (BRC) report indicates that there were two issues raised but not resolved after the BRC: (1) whether an injury occurred on (date of injury); and (2) whether appellant injured his knee on (date of injury) when he sustained an injury to his ankle. At the contested case hearing, respondent acknowledged that the ankle injury was "well-documented," and that medical benefits and temporary income benefits had been paid for the ankle injury. The parties agreed that the issue before the hearing officer was whether appellant's claimed knee injury arose out of the accident of (date of injury) in which his ankle was injured. The hearing officer determined that appellant did not sustain a compensable injury to his left knee and that he was not entitled to workers' compensation benefits for the claimed left knee injury, but decided that appellant remained entitled to benefits for his left ankle injury, if and when such benefits accrue. Appellant contends that the hearing officer erred in finding that he did not introduce any evidence, other than his own testimony about left knee pain, to show that an injury occurred to his left knee, and in finding that appellant's left knee injury, if any, was not caused by his accident of (date of injury). Appellant also contends that the hearing officer erred in concluding that he did not suffer an injury to his left knee arising out of his accident of (date of injury), and therefore, did not sustain a compensable injury.

The parties stipulated that appellant was employed by (employer) on (date of injury), and that respondent was the employer's workers' compensation carrier on that date. Appellant testified that on (date of injury) he injured his left ankle and left knee when he stepped on a rock at the bottom of a ladder he had just climbed down. He immediately told his foreman that he injured his left ankle and he was sent to (Dr. L). Appellant said that although he had pain in his left knee continuously from the time of the accident, he did not tell anyone at work that he had injured his left knee in the accident until November 18, 1991, because his ankle pain was worse than his knee pain and because he was afraid of being fired. Appellant testified that on November 18th he told the general foreman and the plant manager that he had hurt his left knee in the accident of (date of injury), and that he was filing a workers' compensation claim for his knee injury. Documents in evidence showed

that on or about July 22, 1991, appellant filed a claim for compensation for an ankle injury sustained on (date of injury), and that on or about January 15, 1992, appellant filed another claim for compensation claiming that on (date of injury) he hurt his ankle and his knee. Appellant said that he had never had any pain or problems with his left ankle or left knee prior to his accident of (date of injury). An accident report from a prior employer indicated that appellant had previously sustained a sprained left ankle when he stepped on a rock at work in 1989 and that he was off work for two weeks for that injury. Appellant did not introduce into evidence any medical reports.

Medical reports introduced into evidence by respondent showed that appellant was treated by (Dr. L), from (date) to September 3, 1991. (Dr. L) recorded the history of the injury as "stepped on a rock, twisted his left ankle," found significant swelling in the left ankle, reported that x-rays of the ankle showed no signs of fracture or dislocation, diagnosed a severe left ankle strain, and saw appellant several times for treatment of his ankle injury. He referred appellant to (Dr. C), an orthopedist, who did not find any significant injury to the ankle and advised that appellant could return to work on July 9th. (Dr. L) released appellant to full duty work on August 19, 1991, and discharged him from medical care on September 3, 1991, stating at that time that appellant's left ankle sprain had resolved. There is no mention in the medical reports introduced into evidence at the hearing of any complaints of knee pain by appellant or medical treatment for a knee injury.

Appellant's foreman testified that in January 1991, approximately six months before the accident, appellant had complained to him about leg pain and that at that time he had helped appellant wrap an ace bandage around his left knee. This witness said that on (date of injury) appellant told him he had twisted his ankle at work, but that appellant never mentioned to him anything about his knee.

The general foreman and the plant manager both testified that they were aware that appellant had reported a work-related left ankle injury on (date of injury) and that he had been treated for the ankle injury and released to return to work in August 1991, but that it was not until November 18, 1991, that appellant told them he had knee pain and that he wanted time off work to see a doctor for his knee. These witnesses said that when they asked appellant on November 18th whether his knee pain resulted from the accident of (date of injury), appellant said it did not and that he indicated that his knee pain was due to rheumatism or arthritis. These witnesses also said that on November 18th they explained to appellant that if his left knee pain was related to his accident of (date of injury) workers' compensation would pay for it, but that if it was not due to a work-related injury then the employer's group health insurance policy would cover it. These witnesses related that appellant said he wanted to use the group policy. The plant manager added that appellant went back to (Dr. L) and that around December 5th, (Dr. L) informed the employer that appellant needed a week off work for a sprained knee. The plant manager acknowledged that the employer had a safety bonus incentive program, but disavowed that his testimony was in any way influenced by that program.

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 in a case such as this, 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 instant case, it is evident that the hearing officer did not believe that part of appellant's testimony relating to injuring his left knee in the accident of (date of injury). Circumstances shown by the evidence tended to cast some doubt on appellant's testimony. For instance, appellant said he had continuing knee pain from the time of his accident, but the medical reports of the two doctors appellant saw did not mention any complaints of knee pain nor did those doctors diagnose a knee injury. Also, the earliest date that appellant said he reported knee pain to his employer was five months after the accident and three months after he was returned to full work duty. His testimony about telling his supervisors in November that his knee pain was related to his (month) accident was contradicted by the supervisors. In addition, appellant said he had not previously suffered an ankle injury, but other evidence showed that he had. Weighing all the evidence in support of as well as against the complained of findings and conclusion and the determination that appellant did not sustain a compensable injury to his left knee in the accident of (date of injury), we conclude that the findings, conclusion, and decision are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Reed, *supra*; Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App. - Waco 1980, no writ). *See also* Texas Workers' Compensation Commission Appeal No. 92347 (Docket No. redacted) decided September 3, 1992.

Appellant attached two documents to his request for review: the employer's first report of injury which was made a part of the hearing record (it indicates a left ankle sprain on (date of injury) but does not mention anything about the knee), and a letter from (Dr. L) dated January 28, 1992, which was not offered into evidence nor made a part of the hearing record. We decline to consider on appeal the letter from (Dr. L) because our review of the evidence is limited to the record developed at the hearing. Article 8308-6.42(a)(1); Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. redacted) decided April 27, 1992. Furthermore, appellant has not shown that the letter has come to his knowledge since the hearing, nor that it was not

owing to a want of due diligence that it did not come to his knowledge sooner. *See* Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge