APPEAL NO. 92371

On June 22, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), who is the appellant, did not sustain an injury on (date of injury), in the course and scope of his employment as a heavy equipment operator with (employer). Because of this finding, the second issue, whether disability resulted from such injury, was not addressed.

Appellant asks for reconsideration by the Appeals Panel. Appellant argues that the evidence supports that he was hurt on the date in question, and that the main witness against him lied. Appellant also contends that the respondent's attorney perjured himself by testifying that an ambulance took away another worker who was injured on that day, and that no ambulance in fact came. Respondent replies that the decision of the hearing officer is supported by the evidence.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The appellant, who had suffered a previous work-related injury to his back resulting in surgery the summer of 1991, stated that he was injured (date of injury), around 1:00 p.m., when he was lifting one end of a bundle of two-inch diameter, 40-foot long pipes. He stated that he was helping coworker (Mr. C) and supervisor (Mr. D) load these pipes into a truck. Mr. D was driving a cherry picker and was attempting to lift the bundle of pipes with a cable and hook attached to the middle of the pipes. One end of the bundle was stuck in the mud, and appellant stated that he was lifting this end up, and felt a sudden burning sensation in his lower back. He was directly opposite from Mr. C, who was securing his end of the pipes with a rope tug line. He stated that, because the pipes were too heavy, the cherry picker soon overturned. Appellant denied he had ever complained about back pain to any coworker prior to (date of injury), and stated that his back was fine between his surgery and the date of the alleged injury. He stated he had been released with restrictions after his surgery by his doctor, (Dr. L); those restrictions were no prolonged standing, no bending, and no lifting over seventy pounds.

Mr. C agreed that appellant had lent some assistance when Mr. D attempted to lift the bundle of pipes with the cherry picker. He stated that the assistance, however, was to help put a cable around the bundle that would be attached in turn to the cherry picker. Mr. C denied that appellant ever stood at the other end of the bundle of pipes, and further noted that no one would have a reason to stand there because that end of the pipes would be spread out, and bouncy, and thus present a hazard. He said that the cherry picker, and not appellant, extricated the pipes from the mud. Mr. C described two, rather than one, attempts by Mr. D to lift the bundle of pipes; after the second, the cherry picker overturned. Mr. C stated that appellant stood behind him during these attempts, and he both saw him and talked with him. Mr. C stated that appellant had complained about back pain prior to (date of injury). He also agreed that appellant complained that his back hurt after the cherry

picker had overturned, but he understood this was given by appellant as a reason not to assist others in picking up the scattered pipes.

A statement given by Mr. D to respondent's adjuster corroborates Mr. C's statement that appellant and Mr. C were located at the same end of the bundle of pipes, rather than at opposite ends.

Dr. L, by letter dated February 21, 1992 to respondent's adjuster, states that he believes that all of appellant's problems are related to his initial problem for which he received surgery, and that there was no new traumatic injury. He later explained in a letter dated March 27, 1992, that he believes that the accident of "(date)" aggravated the appellant's preexisting back condition. Both letters indicate a strong desire to have appellant in a work hardening therapy program.

Appellant stated that he missed the day of work after the accident, but was sent by the employer to a clinic on (date). An initial medical report filed by the clinic for that visit indicates a diagnosis of lumbar strain. The second claim for compensation that the appellant filed, dated February 3, 1992, states that the cause of accident was a fall, resulting in injury, generally, to his entire body.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). A claimant must link any contended physical injury to an event arising from his employment. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-1961, no writ). Any conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336 (Tex. Civ. App.- Corpus Christi 1973, no writ).

There is no evidence that Mr. C was untruthful, and his testimony is supported by other parts of the evidence. It is up to the hearing officer to resolve conflicting testimony. On the last point raised by appellant, we note that the statements of an attorney are not testimony, and, in any case, whether an ambulance came for Mr. D is irrelevant to the issue of whether appellant was injured in the course and scope of employment.

There being sufficient evidence to support the decision of the hearing officer, we

affirm her decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge