APPEAL NO. 92385

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 30, 1992, a contested case hearing was held in (city), Texas, with (hearing officer), presiding. He found that claimant, appellant herein, was not injured compensably on (date of injury). Appellant asserts that findings of fact that said appellant had decided prior to his dismissal from work to injure himself or appear to be injured, that appellant intentionally fell, and that appellant did not show he was injured were in error.

DECISION

Finding sufficient evidence in support of the decision, the decision and order are affirmed.

Appellant worked for (employer) for less than one year when he was fired on (date of injury). He worked in the "Receiving" section of the (city) warehouse where he became acquainted with a (employer) guard named (MW). Appellant had been late on several occasions and had been warned twice. MW testified that appellant told her, "(i)f they try to fire me today, I'm going to fall on them." MW said she questioned such a prediction and appellant said, "watch me". MW said she worked as a guard at the entrance to the warehouse next to where appellant worked; they talked all the time. That morning she saw him come in late and told him that would be it because he had said that if he missed any more time he would be fired. She said that appellant then made his statement about falling.

Appellant said his fall was accidental. After being fired by the personnel manager, a supervisor named (JH) was escorting appellant to pick up his personal possessions. Appellant said he was not paying attention where he was walking and his foot caught on a skid of a pallet and he fell. He added that he fell backwards hitting his head and back on the concrete floor. He disagreed that he told anyone he would fall if fired. He was taken to a hospital and has a sprain and a strain of the neck and back which have caused him to be unable to work to the present time.

JH said he was escorting appellant in a walkway marked by yellow lines through the warehouse when appellant fell. No pallets or debris extended into the walkway marked by the yellow lines. Appellant was familiar with the area and each of them had approximately two feet between the nearest pallet and where they walked. Appellant appeared to trip and JH caught him as he was falling, breaking most of the fall. He described appellant as going down on one knee and then lying down the rest of the way and rolling over onto a skid. He said that there was no impact to the fall and although appellant said his back hurt, he believes appellant purposely fell.

Appellant called a private investigator who stated that he had reviewed material from the assassination of President Kennedy which included firing a bullet at a sheep skull. Unpredictably, the skull, when shot, fell toward the rifle, not away from it as one would expect. Comparing that "oddity" to appellant's fall, the witness opined that it was possible

for appellant to fall backward even though a trip would appear to cause a forward fall. In addition, appellant introduced two statements of other employees. (HP) wrote,"(appellant) and JH passed Post 4 at 15:19 and proceeded to go into warehouse. I witnessed (appellant) trip over a skid of power drives and fall down. Security Officer A and I ran to the scene. Officer A stayed at scene while I phoned Emergency 911 . . . . (Appellant) was complaining of pain in the spinal area." A statement from Sgt. (SP) said, "(appellant) tripped over a pallet of power drives. He fell to his knees and was caught by another employee temporarily but fell onto his back. He lay motionless complaining of his spine . . . area was safe with adequate room to walk around. Walking over pallets is unnecessary."

The hearing officer is the sole judge of the weight and credibility of the evidence. He could believe JH and MW in finding that appellant intentionally fell and did not suffer an injury. *See* Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). He was not compelled to accept the testimony of appellant, who was an interested witness, as being true. *See* Lopez v. Assoc. Employers Ins. Co., 330 S.W.2d 522 (Tex. Civ. App.-San Antonio 1959, writ refused). The evidence is sufficient to support the findings of fact asserted to be in error, and the decision and order of the hearing officer that appellant failed to establish that he was compensably injured is not against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 91047 (Docket No. redacted) decided November 20, 1991, for a discussion of the burden of proof in relation to Article 8308-3.02(2) of the 1989 Act. That article imposes no liability if: "the injury was caused by the employee's wilful intention and attempt to injure himself or to unlawfully injure another person."

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