APPEAL NO. 92405

On June 24, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), the appellant herein, had not sustained a compensable injury as defined in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. Article 8308-1.03 (10) (Vernon's Supp. 1992) (1989 Act), on (date of injury) while employed as a pumper by (employer). Appellant was represented by his sister, a paralegal.

In a timely filed appeal, appellant argues that the decision of the hearing officer should be reversed because his rights were prejudiced by an impeded discovery process. Appellant notes that he was not able to compel certain documents from the employer; that the hearing officer would not issue interrogatories, in violation of Texas W.C. Comm'n, 28 TEXAS ADMIN. CODE §142.13 (Rule 142.13); that respondent's witnesses would not talk to appellant; that respondent was allowed two hours at the beginning of the hearing to prepare; and that the appellant was rushed through his testimony. Appellant further argues the evidence that he feels was in his favor, essentially contending that the decision of the hearing officer is against the great weight and preponderance of the evidence. Appellant states that respondent did not file a "dispute" until March 17, 1992. Appellant states that respondent's witnesses should not have been allowed to appear at the hearing. Respondent asks that the decision of the hearing officer be affirmed.

DECISION

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

As to the errors asserted for alleged discovery violations, we note that the record on discovery matters is sparse. The hearing officer did indicate at one point that he had not issued a requested subpoena; the respondent's attorney indicated that no interrogatories were ever sent and respondent's witnesses simply did not comply with "informal" discovery. Appellant indicated that he attempted to get letters of support from respondent's witnesses and was unsuccessful. The contention that the hearing officer did not comply with Rule 142.3 regarding interrogatories is unfounded. It is clear from reading Rule 142.13 that a party may issue the interrogatories provided by Rule 142.19 without permission.

Further, objections made by appellant to introduction by respondent of documents (and related testimony) not exchanged as required by the 1989 Act, Article 8308-6.34(d), were sustained by the hearing officer. There was no contention made at the hearing that the witnesses' identities, or their statements, were not exchanged by the respondent. (Statements from two of the witnesses were presented by the respondent at the benefit review conference.) As it appears that the hearing officer properly excluded documents objected to by the appellant as not exchanged, and since there was no other objection made to the testimony of the witnesses, we cannot agree that the record indicates that appellant was prejudiced by the actions of the hearing officer. The record does not indicate that the appellant was rushed through his testimony, or that the respondent did not timely contest

the claim.

Briefly, the appellant stated that he had been employed as a pumper by the employer since April 1991, and had obtained his job through (Mr. L), a friend. He stated that one of his duties included preparation of oil ("rolling" the oil) for sale by treatment with chemicals. On (date of injury), he said that he arrived at a lease called (Lease #1) before lunch, ate lunch in his pickup, and then unloaded two five gallon containers of chemical to treat oil at this location. He stated that as he climbed some stairs with the second container, he lost his footing and slipped down a stair. He did not fall to the ground but was jolted, causing pain to his lower back. During the next two hours, as the oil was being rolled and mixed with the chemical, he stayed in his pickup truck and read a newspaper. He stated that he left the lease at about 2:00 p.m., although on cross-examination he estimated it may have been between 2:30 and 3:00. Appellant stated that the ground at Lease #1 was wet but immediately revised his testimony to say that the ground was dry. He stated that he tried to call the geologist he talked to every day, (Mr. R), to report his injury, at around 3:00 p.m. He tried to call again around 4:45 p.m. He stated that he left messages with Mr. R's answering service. Appellant agreed that Mr. R was not his supervisor, but said he did not attempt to call company headquarters in (city) where his supervisor was located because they would be gone at that time of day.

Appellant stated that, in addition to the lower back pain that occurred as a result of the alleged accident, he had problems with pressure and pain in his legs, migraine headaches, and tingling in the area above his lower back, all of which developed after he had a spinal block procedure performed March 18, 1992. Medical records in evidence show a diagnosis in January of lumbar sprain; x-rays of the lumbar spine taken January 15, 1992 were evaluated as normal. A record of a January 21st visit to Memorial Hospital and Medical Center notes that there are only subjective complaints. The recorded diagnosis on this document is muscle strain.

Appellant stated that he contacted Mr. L, who was not employed by the employer, on the evening of (date of injury) and was then informed he would be laid off. He arranged to pick Mr. L up at the airport the next morning, and they had breakfast. He stated that they went back to his house at around 10:00 a.m., and, at that time, he told Mr. L about his on-the-job injury. He stated that he had already reported the injury to Mr. R at midnight the night before, when Mr. R finally returned his calls. Appellant was terminated on the 14th.

(Ms. M), the office manager for the employer, testified that she talked to appellant in December 1991 concerning the fact that the employer would not be paying Christmas bonuses, and that it did not provide health insurance, and, during the course of this conversation, appellant stated he would file a workers' compensation claim if he were ever terminated.

Mr. L agreed that he was a friend of appellant's. Although not employed by the employer, Mr. L agreed to handle appellant's termination for the company. He said he

called appellant around 5:00 p.m. the night of the (date) and told appellant that he would be laid off. Mr. L stated that he understood that the reason for the termination was that the owner of employer decided to save money by hiring a contract pumper, rather than employing a company pumper. Mr. L stated that appellant first told him that he had an on-the-job injury at 4:30 p.m. on the 14th, when both he and Mr. R were with appellant, and that it had not been mentioned earlier when appellant picked him up at the airport or during breakfast. Mr. L thought appellant said he was injured on Lease #22, although he said he could have misunderstood.

Mr. R stated that the only messages he received from appellant were after 6:00 p.m. the night of (date of injury). No messages were received for him at work that day. When he returned appellant's call at around midnight, he said that appellant wanted to discuss the fact he would be laid off. Mr. R agreed that appellant then told him he had been injured at Lease #1, when carrying a five gallon container of chemicals.

(Mr. C), the pumper under contract to replace appellant, stated that he had talked with employer's owner the week before the alleged injury about coming to work. He said he had worked in oil fields since 1945. In preparation for beginning work on the 14th, he went out to inspect Lease #1 on (date of injury), at around 3:30 p.m. Mr. C stated that everything was shut down and nothing was going on. Mr. C stated with certainty that no one had been at that lease that day because there were no "tracks" in the vicinity. Mr. C said it was part of his job to note tracks at leases to determine if anyone was around the leases, in case anything is stolen or messed up. He noted that the ground around this lease is loose and would show tracks. Mr. C testified that he never had to treat the oil from lease #1 with chemical because of its nature as a "lightweight" oil, which caused water and impurities to separate from the oil. Mr. C stated that in his experience, the nature of oil stayed pretty constant.

(Mr. H), a contract pumper who had worked Lease #1 for another company for seven years, stated that he had never had to treat the oil from this lease with a chemical, and used the circulating pump only to pull water out of the oil. Mr. H indicated his understanding that this well was drilled in the 1950's, and that the time in which trouble could be expected to develop in the well had already passed. Mr. H was employed by another employer, and said he didn't care one way or the other about the outcome of the case.

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.). Generally, medical evidence is not required to prove that an injury occurred, and testimony alone may be sufficient proof. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, a trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The Appeals Panel has said that although medical evidence is not required to prove an injury, it may be considered as to whether it tends to corroborate testimony that an injury did, or did not, occur. Texas Workers' Compensation Commission Appeal No. 92301 (Docket No. redacted) decided August 24, 1992.

There is sufficient evidence from which the hearing officer could find that an injury did not occur in the course and scope of appellant's employment, that the oil on lease #1 did not require chemical treatment, and that appellant was not on Lease #1 for the purpose of so treating the oil. The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge