APPEAL NO. 92418

On June 23 and July 15, 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) or (date of injury) while employed as a field supervisor by (employer).

Appellant argues that the decision of the hearing officer should be reversed because, as a matter of law, the evidence was insufficient to show that the appellant did not suffer a compensable injury on or about (date of injury). Appellant further argues that the hearing officer abused her discretion by noting appellant's failure to notify his employer the same day of the injury as an element of her decision. Appellant further asserts that, contrary to what the hearing officer noted, there were no inconsistencies in appellant's testimony. Appellant argues that he sustained his burden of proof that a compensable injury occurred. The appellant argues that the hearing officer failed to give sufficient weight to items stated in a letter report of an exit examination conducted by the employer's clinic (a copy is attached to the appeal). Finally, the appellant asserts that the hearing officer disregarded the testimony of the company owner that corroborated that 80 percent of appellant's job would be lifting, carrying and manual labor activities.

Respondent notes that the decision of the hearing officer is supported by sufficient evidence and recites evidence that supports the decision. Respondent points out inconsistent testimony and statements given by appellant, and contained in the record, about how the accident occurred.

DECISION

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

The appellant stated that he had been employed since May 1991 as a field supervisor for employer, a hazardous waste disposal company. He characterized the position as that of a working supervisor, which meant that he was called upon to work alongside other members of his crew in shoveling or lifting when necessary. At the benefit review conference the date of injury was listed as (date of injury). On the claim for compensation appellant listed both (date of injury) and (date of injury) as dates of injury. At the contested case hearing his attorney asserted that no claim was being made for any injury on the (date), but only for an aggravation on the (date). The appellant stated that he believed he injured himself on the (date), a Thursday, when he was lifting large drums in (city) at a (employer) site and this was aggravated while tipping drums of gravel on the (date) at (High School). He stated that he told coworker (TW), on the same day, that his back hurt. He was told, he said, to quit or keep working. Later in the afternoon of Friday, (date of injury), the appellant was laid off by his supervisor because there was not enough work. Appellant also theorized that he was laid off due to a mix-up in chemical drums at the (employer) job. He stated that he was shocked by the layoff, and questioned how the company could do this to him at a

time when his spouse was expecting a child. Appellant said that he did not mention at this time that he was injured. The following Monday, September 16th, he went into the office and saw the company president, (Mr. H), and asked to report an injury. He stated that (Mr. H) became angry.

Appellant confirmed that he had sustained a previous job-related back injury in July 1990; he admitted (and his job application indicates) that he did not list the company where he had been injured in his application for work with the employer, because he thought it would hurt his chances of being hired.

No medical records were entered into evidence. Appellant stated that he saw a few doctors, including (Dr. A), who told him that he had a back strain, but he was generally unable to receive medical treatment due to the respondent's failure to authorize same. He stated that he still received medications prescribed by Dr. A from a (state)-based pharmaceutical company. Appellant stated he had an "exit examination" by a clinic used by the employer, and stated that this clinic would not examine his back, even though he asked about it, because it was only an exit examination.

(Mr. L), another supervisor who had worked with appellant (but was not employed by employer at the time of the hearing), stated that he recalled an incident in which appellant had told him he received workers' compensation. When Mr. L asked him how he was hurt, appellant replied that he had not been hurt, but had been able to receive compensation because of a "shyster lawyer" and a "crooked doctor." (Appellant denied this statement when asked about it.) Mr. L said that appellant never indicated to him that he had been hurt on the job.

(Mr. M), a former coworker who had himself been injured on the job, stated that he worked at the (employer) site with appellant on Tuesday, (month) (date) and Thursday, (date of injury). He stated that the work consisted of moving several 55 to 85 gallon drums of contaminants. Mr. M said a "drum dolly" was used to move the drums around, which had special snaps to catch the drum rims; then, a push-down bar on the dolly was used to move the drums onto the dolly while the operator pulled back on it. The drums would then be transported on the dolly. Mr. M did not work with appellant on (date of injury) because appellant was sent to a school job site. Mr. M indicated that appellant was a witness to Mr. M's own on-the-job injury.

A transcribed statement recorded by coworker (Mr. A) states that he recalled working with appellant on (date of injury) at (employer) "chucking" drums into a backhoe driven by Mr. L. He stated that appellant said that Mr. L had raised the bucket up on him. Mr. A recalled working at a school called (school) on the (date). He stated that appellant was pushing a drum and that others went over to help him. He said that appellant acted like he had hurt his knee. Mr. A stated, however, that based on his experience he felt that appellant was faking, because appellant in the past complained of injuries or aches in order to get out of doing such work along with the rest of the crew.

(Mr. H), the company president, testified that the employer was down to a single employee, his wife, and was in Chapter 11 bankruptcy. Mr. H confirmed that appellant would do lifting and manual labor as part of his duties. He stated that it was the employer's policy that job-related injuries should be reported the same day, but acknowledged that he would not protest a claim solely for failure to report it the same day. Mr. H indicated that he reviewed company records prior to the hearing and determined that appellant had not worked at (employer) on (date of injury or (date of injury) (the records themselves are not in evidence). Mr. H said that the records also showed that appellant had an "office day" at the headquarters on the (date), and had worked at the (high school) on the (date). Mr. H stated that appellant was laid off due to declining business; he said that the company determined that a mix-up of chemical drums that occurred at (employer) was (employer)'s fault, so that this was not a factor in laying off appellant. He stated that appellant was very angry at being laid off, and, when he came in Monday, September 16th, he threatened Mr. H with reporting the employer to OSHA, EPA, and various state regulatory agencies, and claimed, in addition to a back injury, exposure to benzine and lead and other chemicals.

Mr. H said he especially asked the employer's clinic to check appellant for a back injury at the exit examination. Mr. H expressed distress at having to go through the contested case hearing, and stated that workers' compensation was a big issue with him and something for which the company paid a lot of money, which is why he stressed the importance of reporting injuries on the day of occurrence.

In appellant's answers to respondent's interrogatories, as well as supplemental answers, the appellant stated that the injury occurred on (date of injury) while lifting and emptying drums of contaminated dirt into a backhoe in (city), Texas.

The letter from the medical clinic that is attached to the appeal was not entered in the evidence in this case by either party, and therefore cannot be considered for the first time on appeal. Art. 8308-6.41(a)(1). As noted previously, there was no medical evidence tendered. Appellant did testify as to what various doctors told him. He stated that the clinic in question did not really examine his back at all during the exit examination. We cannot agree that the hearing officer erred by not considering matters not in the record before her.

Notwithstanding the appellant's contention that there were no inconsistencies, there was conflicting testimony from all witnesses, including the appellant, about the location of the appellant on the day in question, as well as what happened. These were matters for the trier of fact to weigh and resolve, and the decision should not be set aside because different inferences and conclusions may be drawn on review, even when the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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). 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. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). 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).

There is sufficient evidence to support the hearing officer's determination that an injury did not occur within the course and scope of employment as alleged by the appellant. Although an injured party has 30 days to report an injury to the employer under the "notice" provisions of the 1989 Act, Art. 8308-5.01, it is not an abuse of discretion for a hearing officer to consider, under the facts of a particular case, that an injured worker would have been more likely than not to report an injury when it occurred, rather than after an adverse personnel action was taken. In light of the fact that the hearing officer mentioned in her statement of the evidence that up to 80% of appellant's job entailed lifting and manual labor, we cannot agree with appellant that this fact was not weighed along with the other evidence.

The decision of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge