APPEAL NO. 92482

On August 19, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether the claimant, (claimant), appellant herein, sustained a compensable injury on (date of injury), while employed by his employer, (employer). The hearing officer determined that appellant did not sustain a compensable injury to any part of his body in the course and scope of his employment with his employer on (date of injury), and ordered that appellant is not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

In his appeal, appellant reviews evidence which he contends supports a determination that he sustained an injury in the course and scope of his employment, asserts that the hearing officer misstated the claimed date of injury, asserts that he became confused on cross-examination, complains of respondent's failure to produce certain witnesses at the hearing, asserts that he did not retain an attorney for the hearing because respondent was not represented by an attorney at the benefit review conference, and asserts that he did not know how to have a subpoena issued. Appellant requests that we set aside the decision of the hearing officer and remand the case for a new hearing in which the correct date of injury would be reflected. Respondent, the employer's workers' compensation insurance carrier, responds that the evidence supports the decision of the hearing officer and asks that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

Appellant was not represented at the hearing, but is represented by an attorney on appeal. Appellant testified that he felt a pain in his belly when he and two coworkers were lifting a 25-foot section of pipe at work. Appellant gave two dates as to when the incident occurred which we discuss in a later portion of this decision. Appellant said that he told his coworkers that his belly was hurting after picking up the pipe. The coworkers did not testify nor were written statements from them offered into evidence. Appellant said that on the Monday following the incident he told the employer's general manager that he had pain in his belly and that he was going to see a doctor. He said he did not mention the pipe lifting incident to the general manager. Appellant, who is 5' 4" and weighs 240 pounds, acknowledged that he has been told by doctors that he needs to lose some weight because his weight is causing him stomach problems. Appellant said he saw (Dr. J) on (date), and later saw (Dr. S) and (Dr. R). Appellant had an inguinal hernia repaired in 1984 and an umbilical hernia repaired in 1986.

The general manager testified that on Monday, (date), appellant said his "gut was hurting" and that he was going to a doctor. This witness said that when he asked appellant if there was an accident, appellant said "No. It just started hurting." This witness said that

he first heard that appellant was claiming a work-related injury when a person from a pharmacy called him to verify workers' compensation coverage for the purpose of filling prescriptions (Dr. J) had written for appellant. This witness further testified that when he investigated appellant's claim he did not find anyone who knew of appellant being hurt on the job. He said that one of the coworkers appellant identified as being with him at the time of the pipe lifting incident told him that appellant had complained of stomach pain, but the coworker did not remember any particular lifting incident when appellant said anything about being hurt, and did not remember appellant getting hurt at work.

In a letter dated August 11, 1992, (Dr. J), M.D., wrote that he had seen appellant repeatedly for the past few weeks with a history of recurrent generalized abdominal pain, that upper G.I. studies showed a small refluxing hernia, that a sonogram of the abdomen and intravenous pyelogram were unremarkable, and that appellant's prior umbilical hernia was in good repair without recurrence. (Dr. J) said that appellant was noted to have "divarication of recti, (ventral hernia), on upper abdomen." He also stated that it is possible that separation of the muscle can occur with lifting heavy weight repeatedly.

(Dr. S) reported in June 1992 that appellant has a ventral abdominal hernia which is mostly related to appellant's weight. (Dr. R) examined appellant on June 19, 1992, and reported that appellant has a diastasis recti which he said is actually a thinning or attenuation of the midline abdominal fascia and is not a true hernia, but is a thinning and weakening of the tissues. (Dr. R) stated that appellant does not have a hernia at the belly-button which he can identify. He further stated that the diastasis recti can cause some abdominal discomfort and can be repaired by removing the weakened tissue and then "reapproximate" healthier tissues together. (Dr. R) reported in progress notes in July that appellant would not benefit from surgical repair of his diastasis recti because it could be fraught with postoperative complications. (Dr. R) noted that with appellant's obesity appellant is at risk of developing a hernia through the incision used to correct the diastasis recti.

The hearing officer found that on (date of injury), appellant's lifting of the pipe did not cause an abdominal injury, and that on (date of injury), appellant did not sustain an injury to any part of his body. The hearing officer concluded that on (date of injury), appellant did not sustain a compensable injury.

We find no merit in appellant's assertion that the hearing officer erred in using (date of injury), as the date of the claimed injury. The unresolved issue from the BRC which was to be resolved at the hearing was whether appellant sustained a compensable injury on or about (date of injury) while employed by the employer. Neither party objected to the issue as stated in the BRC report. When the hearing officer asked appellant if he was claiming an injury date of (date of injury), appellant answered in the affirmative. Later, on cross-examination, appellant claimed that he was injured on April 24, 1992. However, he then testified that the first chance he had to report his injury to his employer was on Monday, (date) because no one was in the office when he finished work on Friday, (date of injury), and he was off work during the weekend. This latter testimony was more consistent with a

claimed date of injury of (date of injury) than of April 24th. When presented with conflicting evidence, the trier of fact may resolve inconsistences in the testimony of any witness. R.J. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1987).

Appellant admits that he understood that he had the right to retain an attorney to represent him at the hearing, but appears to assert that he did not do so because respondent was not represented by an attorney at the benefit review conference. Article 8308-6.41(b) provides that a request for appeal must clearly and concisely rebut the decision of the hearing officer on each issue on which review is sought. In our opinion, appellant's assertion does not state a sufficient ground of appeal. The hearing officer made no findings of fact, conclusions of law, or decision respecting appellant's representation by an attorney. *See* Article 8308-6.34(g). Appellant knew he had the right to retain an attorney but chose not to. His reason for not seeking representation is simply not germane to our review of the hearing officer's decision.

Appellant admits he was informed that he had the right to subpoena witnesses for the hearing, but asserts that he did not understand how to have a subpoena issued. The letter from the Chief Benefit Review Officer transmitting the BRC report to the parties clearly states that the Texas Workers' Compensation Commission has adopted rules regarding subpoenas and discovery. Tex. Workers' Comp. Comm'n, TEX. ADMIN. CODE Sec. 142.12(c)(2) provides that an unrepresented claimant may request a subpoena by contacting the Commission in any manner, and may also request the Commission to arrange for service, if service will be at no cost to the Commission. Appellant testified at the hearing that he had not, at any time, contacted the Commission to issue subpoenas. In light of appellant's testimony and Rule 142.12(c)(2), we conclude that appellant's assertion is without merit.

Appellant appears to assert that he is entitled to a reversal of the hearing officer's decision because respondent did not produce at the hearing testimony or statements of appellant's coworkers. As the claimant of workers' compensation benefits, appellant had the burden of proving that he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Appellant had the right to contact the Commission and request that subpoenas be issued, but did not do so. The burden was not on respondent to prove that an injury did not occur while appellant was lifting pipe. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Appellant's assertion is not a basis for disturbing the decision of the hearing officer.

Cross-examination of appellant was very limited and appellant was given the opportunity to testify and did testify before and after cross-examination. In addition, the hearing officer asked appellant a number of questions in order to ensure the full development of facts required for the determination to be made. Article 8308-6.34(b). Appellant's assertion that he was confused on cross-examination does not present a ground for reversal of the hearing officer's decision.

The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). 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. The general rule is that evidence given by an interested witness, even though uncontradicted, presents an issue to be determined by the trier of fact. Reed, *supra*. In the present case, the hearing officer did not have to believe the testimony of appellant, an interested witness, which related his claimed injury to a work-related incident. In addition, the hearing officer had before him evidence that appellant's stomach problems were mostly related to his weight, that doctors had told appellant that he should lose weight because his weight was causing his stomach problems, that appellant does not have a true hernia but instead has a thinning out and weakening of the tissues referred to as a diastasis recti, and that it would be the surgery to correct the diastasis recti which could cause a hernia. There was, of course, conflicting medical evidence as to the nature of appellant's claimed injury; however, the hearing officer as the trier of fact is responsible for resolving conflicts and inconsistencies in the medical evidence. *See* Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We note that several factual assertions in the request for review are not supported by the record. The decision of the hearing officer will only be set aside if the evidence supporting the hearing officer's determination is so weak or against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92398 (Docket No. redacted) decided September 18, 1992. Having reviewed the record, we conclude that the hearing officer's decision is sufficiently supported by the evidence and is not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge