APPEAL NO. 92486

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On August 17, 1992, a contested case hearing was held in (city) Texas, after an earlier hearing on July 20th was unsuccessfully recorded. (hearing officer) presided and determined that claimant, appellant herein, was not injured in the course and scope of employment. Appellant appealed contending that he was injured on the job and asserting that a coworker had not given a truthful statement because of personal problems between them.

DECISION

Finding that the decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm.

Appellant had worked at a rock crushing operation for about two months when he asserts that on (date of injury) he was struck and rendered unconscious by a rock which fell from a screen located above him. He described the rock as approximately two feet by eight to 10 inches. Appellant had trouble describing the exact purpose of conveyor belts in his vicinity of work and was not clear as to the height of the screen from which the rock may have fallen. He did not report that the blow harmed him until after he was fired on October 24, 1991. He did not see a doctor until November 20, 1991. At that time, he apparently reported that the blow of (date of injury) was first painful a month prior to the visit (October 20th approximately).

Appellant's supervisor, in a statement given on December 12, 1991, said that when he walked through appellant's work area on (date of injury), appellant mentioned that a rock had fallen and hit him on the shoulder. Appellant neither said he was knocked out nor did he say what size rock hit him. The supervisor said the rocks varied from six inches in diameter down to one and one-half inches in diameter. He added that appellant was a worker who repeatedly referred to having small problems, such as a bent finger, but knew that he, the supervisor, would take him, the appellant, to a doctor if needed, since he had taken appellant to the doctor before when appellant thought his back was hurt. To his knowledge, no one witnessed the rock incident. The appellant did not miss any work because of an injury from the time of the incident until he was fired. He indicated that appellant was fired for not obeying safety rules.

Three statements were provided by the respondent from coworkers of the appellant. Each is short and says that appellant did not tell the writers thereof about a falling rock at the time of the incident, but each heard of it later; none, however, addresses whether he saw or did not see appellant hit by a rock. A statement obtained by appellant from a coworker indicates that the coworker, CS, saw appellant stumbling and appellant told him a rock hit him.

While not specifically addressed on appeal by appellant, at the hearing respondent

asserted that the hearing officer should restrict himself to "clarifying" the evidence put forth by either party. This point was raised as the hearing officer asked questions of the pro se appellant through an interpreter. Article 8308-6.34(b) says, "[t]he hearing officer shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made." Tex W. C.Comm'n, 28 Tex Admin Code §142.2 (rule 142.2), then says, "[t]he hearing officer is authorized to: (12) examine parties and witnesses, and permit examination and cross-examination of parties and witnesses . . ." Neither reference contains any language restricting a hearing officer to "clarifying" when that officer is developing facts.

The medical documents introduced raise a question of whether appellant was hurt by a rock on (date of injury). The first doctor's entry relating to this incident is dated November 20, 1991, and is made by Dr. P. He says appellant developed pain four weeks before this visit. He notes "I think the time span is a little unusual in terms of the development of symptoms. I think it is curious of course that he had a blow hard enough to knock him unconscious for a few moments and did not go and see a physician at the time but nevertheless, I think we have to take the symptoms seriously . . ." Dr. P referred appellant to Dr. H, a neurologist, who, on December 4, 1991, also took a history relating to falling rock on (date of injury). Dr. H also notes "[h]e has not returned to work since his injury and states that the pain is too severe to go to work." No acute distress was found and Dr. H, in letters to the respondent in late December and January 1992, says first that the problem could be chronic, and later, after learning that appellant has been seen medically for neck stiffness before the incident, says that it is a chronic problem. He adds "I cannot say for sure that it is aggravated by the boulder, but more than likely it is something that has gradually been getting worse." He said he told appellant that he did not feel his neck pain was caused by the boulder but was more of a chronic problem.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e) of the 1989 Act. He could give little weight to appellant's statement to his doctors and at the hearing that he was knocked unconscious in light of his supervisor's statement that appellant did not tell him of that loss at the time of the incident. While the appellant is not required to designate from which belt or screen a rock fell in order to be compensated if injured, the hearing officer could view skeptically appellant's testimony about the size of the rock when the supervisor's statement indicates that the rocks varied from one and one-half inches to six inches in diameter. He could question the credibility of appellant further when the medical records show that appellant said he was not able to work after the incident, but in fact did work for two months without injury-related absences. While some inconsistencies could be attributed to language, Dr. P made a point of recording that he called in his Spanish speaking assistant to assure an accurate history was taken. In addition, the hearing officer could choose to give some limited weight to the cursory statements of appellant's coworkers. Finally, even if the hearing officer believed that appellant were truthful when he told his supervisor that a rock hit him, he could believe that appellant was not injured by it based on his work record thereafter and the medical opinion of Dr. H. The hearing officer, as the trier of fact, could weigh credibility and believe part of what appellant said but not all of his testimony. *See* Sifuentes v. TEIA, 754 S.W.2d 784

(Tex. App.-Dallas 1984, no writ). The testimony of appellant, as an interested witness, was not required to be taken at face value. *See* Lopez v. Assoc. Employers Ins. Co., 330 S.W.2d 522 (Tex. Civ. App.-San Antonio 1959, writ refused). The Appeals Panel will not reverse the decision of the hearing officer in regard to factual matters unless it is against the great weight and preponderance of the evidence. *See* In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge