APPEAL NO. 92545

On September 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the appellant (claimant) purposely fell or threw himself down a flight of steps injuring himself and that the fall and injury were not sustained in the course and scope of claimant's employment. The hearing officer ordered that the carrier is not responsible for benefits pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act). Claimant appeals on the basis that the findings and the conclusions of the hearing officer were not supported by the evidence. Respondent (carrier) filed a response requesting the appeals panel to affirm the decision of the hearing officer.

DECISION

We do not find merit in the contentions urged by claimant. The evidence being sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

The issue framed at the contested case hearing (CCH), and presently before us, is whether the claimant sustained an injury in the course and scope of his employment on (date of injury), or was the injury caused by claimant's willful intention to injure himself. The evidence is about equally split, with the claimant presenting his version and (BL), an eyewitness, presenting evidence to the contrary. The primary focus of the case is the divergence of testimony regarding exactly what occurred on the morning of (date of injury). The claimant appealed the hearing officer's decision basically on insufficiency of the evidence to support the hearing officer's findings and conclusions.

The claimant testified that he was employed as a phlebotomist by (employer). At approximately 9:00 a.m. on (date of injury), claimant was at work and preparatory to the beginning of the day's activities he was going down some concrete stairs from the second floor to the first floor. BL was on the second floor and was going from the donor room to the screening room and had a full view of the stairs. Claimant had a 32 ounce mug in his hand and was going downstairs to get some coffee. Claimant asked BL if she wanted some coffee. When he reached a landing midway claimant states he slipped and fell down the remaining seven or eight steps. Claimant sustained a broken collar bone, injured left shoulder and back.

BL testified she was at work at 9:00 a.m. on (date of injury). Claimant came by on his way down to the canteen as BL was going from the donor room to the screening room. Claimant said something about coffee and as claimant reached the top of the landing, he said "[w]atch this s__t," squatted down, crossed his wrists in front of his forehead and "tumbled" in a somersault motion down the stairs. BL said, "[o]h, my God, (B's) fallen." At the time, BL gave a simple statement that claimant had fallen. On May 4, 1992, approximately nine days after the incident in question, BL told the employer claimant's injury

was not an accident. BL testified that she had not related the true cause of the injury at the time because she was afraid of the claimant and she had become physically ill and could not sleep because she felt she should disclose the true cause of claimant's injuries.

The hearing officer's statement of evidence and the testimony disclosed that shortly before the incident in question, claimant had been suspended one week without pay, demoted and placed on probation for 90 days for violation of company policy relating to drinking on duty. After claimant served his one week suspension he was sick three days and the date of the incident was his first day back on the job after the suspension.

Disputed evidence includes BL's testimony that claimant had told her of a friend who had apparently faked an injury and received a $200,000 settlement. Additionally, BL testified claimant had told her he was supposed to start a new job at Doctor's Hospital the following Tuesday, April 28, 1992. BL also testified claimant had called her at home and inferred there could be money in this claim for BL. Claimant denied all of these allegations.

Facts disclosed in the testimony which might have had a bearing on the case one way or the other, were that claimant was a Green Beret in Viet Nam and had paratrooper training, that claimant had a somewhat checkered past in scrapes with the law to include dynamiting fish, that claimant was discharged from his position with the employer in May 1992 for falsifying his employment application, that claimant was generally cordial and had taken his suspension and demotion very well, and the fact that somersaulting down concrete stairs is "absolutely crazy."

Claimant's appeal emphasizes the contradictions in the testimony and stresses the points which would appear to support claimant's version. Claimant asks the rhetorical question whether it is reasonable to believe that the claimant would intentionally risk grave injury in front of a witness in order to collect workers' compensation benefits. The carrier responds to the claimant's contentions citing Article 8308-6.34(e) and points out that "the hearing officer is the sole judge of relevant materiality of the evidence offered and of the weight and credibility to be given to the evidence." The carrier points out some contradictory points in the claimant's testimony and argues for BL's version of the events.

Article 8308-3.02 provides for certain exceptions when a carrier is not liable for compensation. Subsection (2) provides that the carrier is not liable for compensation if "the injury was caused by the employee's willful intention and attempt to injure himself . . ." This was the exception cited at the benefit review conference and the carrier's position as cited in the CCH.

The hearing officer had the opportunity to hear the witnesses and observe their demeanor. As the carrier points out, the hearing officer is the sole judge of the weight and credibility to be given to the evidence. When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986).

There was evidence presented on both sides of the issue and the hearing officer had the opportunity to assess the credibility of the witnesses appearing before him. Obviously the hearing officer chose to believe the version BL presented. There is sufficient evidence to support such a finding. We will reverse the hearing officer, based on insufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight 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.); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). There being ample evidence to support the hearing officer we cannot say the decision was so weak or the findings so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. The hearing officer, for whatever reasons, did not believe claimant's version. We will not substitute our judgment for the hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge