APPEAL NO. 92547

At a contested case hearing held in (city), Texas, on July 17 and August 12, 1992, the hearing officer, (hearing officer), determined that appellant (claimant) did not sustain a back injury in the course and scope of his employment with (employer) on (date of injury). In his request for review, claimant challenges the credibility of some of the carrier's evidence. He also contends the hearing evidence was "one-sided" for respondent (carrier) because his attorney failed to subpoena his "crucial witnesses" and he seeks a remand for another hearing.

DECISION

Finding no reversible error and the evidence sufficient to support the hearing officer's findings and conclusions, we affirm.

Claimant's certificate of service on his timely request for review showed service by certified mail on October 8, 1992, upon the employer and upon "Flahive, Ogden & Latson, (carrier)." The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.41(a) (Vernon Supp. 1992) (1989 Act) requires that a response be filed not later than 15 days after the date on which the request for appeal is served. In its response, carrier states the request for appeal "was received by Respondent on 10/20/92." Carrier filed its response with the Texas Workers' Compensation Commission (Commission) on November 3, 1992, a date not later than 15 days after "10/20/92." However, on November 7, 1992, claimant mailed to the Commission copies of a PS Form 3800, Certified Mail Receipt, and a PS Form 3811, Domestic Return Receipt, purporting to show that his request for review was received on October 12, 1992. The signature of the recipient, while not completely legible, is obviously not the signature of carrier's attorney. Article 8308-6.41(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3) require that service of a request for review be made on the "other party," and Rule 143.1 defines "respondent" as the other party to a contested case hearing who must file a response to the appellant's request. Rule 102.5(b) provides that unless specified by rule, all notices and communications to insurance carriers will be sent to the carrier's (carrier) representative. Since claimant's postal receipts show that the "other party" received his request for review on October 12th, its response was untimely.

Claimant testified that he was employed by employer for four and one-half years as a band press operator, a machine used on employer's assembly line for the manufacture of drums. On (date of injury), before commencing his 3:30 p.m. work shift, claimant said he attended a meeting with union officials (Mr. R) and (Mr. B) to discuss the union's pursuit of his grievance against employer concerning employer's December 1990 decision to terminate claimant's employment for absenteeism. Under employer's "justice and dignity program," claimant had been allowed to continue employment after the termination decision pending resolution of his grievance. According to claimant, (Mr. B) told him at that meeting that claimant could "go to the little table or to the big table." "Going to the big table" meant proceeding to arbitration on his grievance. No explanation was offered as to the meaning

of "going to the little table." He said that coworker (Mr. L) was present when he talked to (Mr. B). Claimant said that (Mr. R) told him at the meeting that the only way he could save his job would be to obtain medical documentation concerning his mother's illness. Claimant said the absenteeism for which he was terminated related to his caring for his mother who was incompetent. Claimant testified that when he left the meeting to begin his work, he believed the union intended to pursue his grievance to arbitration, and he denied then knowing that the union had decided against such action with the resultant consequence that his termination would be immediately effected. He said he was given a letter the next day by (Mr. G), employer's production manager, advising him that the union would not further pursue his grievance. In his prior statement of September 24, 1991, given to carrier's investigator, claimant had said that sometime in July 1991, (Mr. B) told him the union would appeal his grievance.

At approximately 7:30 p.m. on (date of injury), claimant had to adjust the T-bar mechanism on the band press machine he was operating to make a different size drum. This adjustment required his turning an allen wrench or key which had been braised onto the bolt. The allen key would not turn and claimant attempted, unsuccessfully, to turn it by using a closed box wrench as a lever. He said he then called (Mr. P), his acting supervisor, who beat on the allen key with a pipe and could not jar it loose. (Mr. P) then called for the maintenance person, (Mr. W), who came to the machine and watched claimant's efforts to loosen the allen key. Claimant said that (Mr. W) then turned and walked back to his nearby office, apparently to get tools. Claimant continued his efforts in a semi-squatting position and felt the key begin to loosen. He pulled hard on the key towards himself and it broke off. The wrench flew out of his hand and he fell backwards, striking his back against a low handrail about one foot behind him. He said, variously, that when he bent over to find the wrench, or tried to get back up to look for it, he felt sharp pain in his back and right leg. At about that time, claimant said he saw (Mr. O), a coworker, coming towards him, and that (Mr. O) told him he saw the accident. Claimant said he told (Mr. P) he hurt his back and needed to get it checked. He waited in the office until (Mr. G), the production manager, arrived. He told (Mr. G) about the incident but could not demonstrate it because of his back pain. He believed he also told (Mr. W) about the incident.

Claimant said he was seen after the accident and before his shift ended by employer's doctor, (Dr. G), and was x-rayed. According to the hospital records, the x-rays were negative for the lumbarsacral spine. The next day, claimant visited his family doctor, (Dr. I), who took him off work. He treated with Dr. I for four and one-half months receiving physical therapy (PT), and could not work. Dr. I's records stated a diagnosis of lumbarsacral injury and showed claimant had 21 visits between (date)and November 15th for diathermy, ultrasound, and electrical stimulation. On May 28, 1992, he went to see (Dr. S) for a second opinion because he was not getting better. Dr. S's records contained an Initial Medical Report (TWCC-61) stating a diagnosis of cervical strain and lumbar strain. He said he still cannot work because of his injury. Claimant said he had two previous workers' compensation claims in 1989, the first involving pain in his left arm pit area, and the second involving the same area of his lower back. He said he settled those claims for

total of $51,000.00, and could differentiate the lower back pain resulting from the (date of injury) injury.

Claimant called (Mr. W) who testified that on (date of injury) he did not know that claimant was going to be terminated. He said he was paged and went up to claimant's work platform. He saw claimant bent over the T-bar and using the box end wrench for leverage in trying to loosen the allen key. He said he told claimant to leave it alone and turned around to proceed to about 10 feet away to get tools. He then heard claimant say, "its broke," and in a few seconds he turned back around and saw claimant standing up "sort of bent over." He said he did not see the accident, did not recall seeing claimant fall or get up, and didn't think he saw anything. He had no idea claimant was then hurt. After (Mr. W) completed his testimony, claimant again testified, in apparent rebuttal, that more time had actually elapsed before (Mr. W) turned around and saw claimant, and that there had been sufficient time for (Mr. O) to come over there.

Claimant introduced a statement from (Mr. L). (Mr. L) stated he heard claimant and (Mr. B) discuss the grievance and got the impression that the union was going to represent claimant to the fullest and that claimant did not know he was about to be terminated. (Mr. L's) statement did not mention the date of such conversation.

Claimant testified that (Mr. O) had intended to appear and testify at the hearing but encountered transportation problems. However, claimant introduced (Mr. O's) written statement. According to (Mr. O), when he was returning from the water fountain, he saw claimant in a squatting position attempting to loosen the bolt with a wrench. The bolt broke and claimant fell back against the handrail bar.

The carrier called (Mr. P), claimant's acting supervisor, who testified that on (date of injury) he knew the union was not going to pursue claimant's grievance because claimant told him so between 4:00 and 5:00 p.m. that day. (Mr. P) related that claimant then said he had learned of it at his meeting with the union that day. According to (Mr. P), (Mr. O) was present for this conversation. (Mr. P) further testified that when claimant experienced trouble with the allen key, he told claimant to leave it alone while he went to get (Mr. W). He went to the foreman's office nearby and called for Mr. Wells. When he returned to claimant's platform, the allen key had already broken. He said that if claimant had pulled the bolt towards himself, as claimant testified he did, claimant would be tightening the bolt. It could, however, be broken in that manner. He saw no indication that claimant was hurt. He took claimant to the foreman's office and called (Mr. G). When (Mr. G) arrived, he took claimant to the platform, and asked him to reenact the incident, but claimant said he couldn't do it. (Mr. P) saw no objective signs of claimant's pain.

(Mr. H), a coworker, testified that the whole plant knew claimant was going to be fired because claimant had come to work late from his meeting with the union and had complained he was going to be fired. (Mr. H) said claimant told him about it. He further testified that from (Mr. O's) machine the latter could not see claimant as well as (Mr. H) could

and that (Mr. O) would have to stand away from his machine to view claimant. At the very moment the allen key broke, (Mr. H) was walking from his machine to the water cooler and his view of claimant was obstructed by a control panel for about five seconds. However, when he had cleared this obstacle he saw claimant with a wrench in one hand and holding his back with the other. Claimant then stepped down off his platform and walked toward (Mr. H) with no indication of pain or injury. Then he saw claimant bend over to pick up some object on the floor.

(Mr. Go), a coworker, testified that on (date of injury) he operated the same band press machine on the preceding shift and experienced no problem with the allen key. He also stated that before leaving the plant that day and before the commencement of claimant's shift, he had heard that claimant was to be fired.

(Mr. G) testified that although he had denied claimant's grievance, he had granted claimant the "justice and dignity program" status from December 1990 to August 1991. (Mr. G) was told by (Mr. B) on (date)that the union would not pursue the grievance to arbitration. When (Mr. G) was called back to the plant on (date of injury), claimant said he could not show him how the accident occurred because of his pain. (Mr. G) then took claimant to a hospital for examination after which he returned him to the plant to await the end of his shift. Because he questioned the occurrence of the accident, (Mr. G) asked the carrier to investigate, and (Mr. C) came to the plant on (date)and investigated the matter.

(Mr. G) opined, without objection, that if in fact claimant actually injured his back as he maintained, it was an intentional injury. He based that opinion on the facts that claimant had operated the machine for three years and knew which way the bolt turned; and that claimant also knew on (date of injury) that he was fired and intended to "rip this company off one more time before he leaves." (Mr. G) also said, however, there had been "some legitimacy" to claimant's prior claims.

Claimant had the burden to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment. The carrier contended at the hearing that claimant was not credible, and that his injury was not compensable under the exception to liability contained in Article 8308-3.02(2) (1989 Act) which provides, in part, that an insurance carrier is not liable for compensation if the injury was caused by the employee's wilful intention and attempt to injure himself. The hearing officer found that although claimant, on (date of injury), was adjusting an allen wrench on the T-bar on the band press, which he operated as part of his job and which was in the furtherance of employer's business, claimant "did not suffer an injury to his back while adjusting the T-bar on the band press." He concluded that claimant did not show by a preponderance of the evidence that he suffered an injury in the course and scope of his employment. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553

S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.) We will not substitute our judgment for that of the hearing officer where, as here, there is sufficient evidence to support the findings. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ.)

Before taking evidence on July 17, 1992, claimant's attorney moved for a continuance to subpoena (Mr. O), (Mr. W), (Mr. R), (Mr. B), and (Mr. L), and stated she had previously asked her law firm to prepare the motion for the subpoenas and was told it had been done. The hearing officer advised that the Texas Workers' Compensation Commission (Commission) file contained no record of claimant's request for subpoenas, found claimant had not shown good cause for a continuance, and denied the motion. Claimant has not appealed that ruling. After admitting certain exhibits of the parties and taking claimant's testimony, the hearing was adjourned, apparently due to the lateness of the hour and schedule conflicts.

When the hearing reconvened on August 12th, the hearing officer stated that during the period of adjournment claimant requested subpoenas for the same five witnesses. Noting that (Mr. W) was then present, pursuant to carrier's subpoena, and that he understood (Mr. O) may appear voluntarily, the hearing officer refused to issue the subpoenas. Though he did not make claimant's written subpoena request a hearing officer exhibit, the hearing officer did refer to it and stated that it had been mailed after the hearing first convened on July 17th. The hearing officer also observed that the hearing on August 12th was a continuation of the July 17th hearing. He denied the subpoenas because the testimony of the witnesses could have been preserved by affidavit or deposition. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 142.12((b) and (d) (Rules 142.12(b) and (d)) provide, in part, that the Commission may issue a hearing subpoena at the request of a party if the hearing officer determines the party has good cause, that the request shall be sent to the Commission no later than 10 days before the hearing, and that the hearing officer may deny such request upon a determination that the testimony may be adequately obtained by deposition or written affidavit. As recited above, claimant introduced the written statements of (Mr. M). (Mr. W), (Mr. O), and (Mr. L), and called (Mr. W) as his witness for direct examination. Claimant testified that (Mr. O) was going to attend the hearing and testify, but encountered a transportation problem on the morning of the hearing. Claimant did not then request a continuance or other relief to cope with (Mr. O's) absence.

We are satisfied claimant's assertion of error respecting his attorney's failure to subpoena the witnesses is without merit. We will not speculate as to what may have occurred regarding earlier attempts by his hearing attorney to obtain subpoenas. The record does show, however, that the Commission received a written request for the subpoenas on July 21, 1992, prior to the reconvening of the hearing on August 12th, and that the hearing officer considered and denied the request because he determined, pursuant

to Rule 142.12(d), that the testimony could be adequately obtained by deposition or written affidavit. The hearing officer may also have regarded the subpoena request as untimely. In any event, as above mentioned, information from three of the witnesses was adduced by testimony and written statements. Upon denial of their subpoenas, no continuance was sought to obtain the depositions or written affidavits of (Mr. M). (Mr. B) and (Mr. R) who, it would appear, were local union officials. Under the circumstances of this case, we are satisfied the hearing officer did not abuse his discretion in denying the request for subpoenas. *See* Texas Workers' Compensation Commission Appeal No. 92380, decided September 14, 1992, where the hearing officer denied a subpoena request, no complaint of the ruling was made at the contested case hearing, and we regarded the issue as waived. *Compare* Texas Workers' Compensation Commission Appeal No. 92296, decided August 11, 1992, Texas Workers' Compensation Commission Appeal No. 92311, decided August 24, 1992, and Texas Workers' Compensation Commission Appeal No. 92323, decided August 26, 1992.

In his request for review, claimant seeks a remand for another hearing contending that "appellant's witnesses" were not present to testify at the hearing through no fault of his, and that because he was his only witness at the hearing, the evidence was "significantly one-sided in favor of the carrier." He states his attorney told him and the hearing officer that she failed to subpoena the witnesses because a staff member at her law firm, angry over termination of employment, threw away the subpoena paperwork. Claimant's assertion is not supported by evidence in the record of the proceedings developed below to which our consideration is limited. *See* Article 8308-6.42(a)(1).

By his undated letter mailed to the Commission on October 26th and received on October 28, 1992, claimant forwarded a letter dated October 8th from his hearing attorney to another attorney stating that the hearing attorney's law firm took "full responsibility for the clerical errors [unstated] of our secretarial staff" in claimant's case, and would provide evidence if needed. Article 8308-6.41(a) provides that a party desiring to appeal the decision of the hearing officer shall file a written appeal with the appeals panel not later than the 15th day after the date on which the decision is received from the Commission's hearings and review division. The decision was distributed by the hearings and review division on September 22, 1992, and, under Rule 102.5(h), is deemed to have been received by claimant on September 27th. The addition of 15 days to that date establishes claimant's filing deadline as October 12, 1992. Accordingly, his subsequent letter will not be considered. *See* Texas Workers' Compensation Commission Appeal No. 92036, decided March 11, 1992; Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992.

Claimant has attached five documents to his request for appeal. Two of the documents are the written statements of (Mr. M). (Mr. O) and (Mr. W), which were admitted into evidence at the hearing. The remaining documents consist of a post-hearing letter dated October 7, 1992 from Dr. I, the content of which is largely cumulative of his records in evidence, a post-hearing letter dated September 10, 1992 from (Dr. Mc) regarding

claimant's mother's thought disorder, and a letter dated August 8, 1991 to claimant from (Mr. G) advising of claimant's termination on that date upon (Mr. G's) having been informed on that date by (Mr. B), the local union president, that claimant's grievance would not be pursued. Again, this letter is substantially cumulative of testimony given at the hearing. We have previously stated that the fact finder is the hearing officer, not the appeals panel, and we are limited in our consideration of evidentiary matters to the record developed at the hearing below. Texas Workers' Compensation Commission Appeal No. 91132, decided February 14. 1992. Further, claimant does not show that it was not owing to a want of due diligence that the "new evidence" did not sooner come to his knowledge, that such evidence is not just cumulative, and that such evidence would probably produce a different result if a new hearing were granted. *See* Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge