APPEAL NO. 92578

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 September 18, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that the respondent, claimant herein, injured his back while working as a roofer and had disability through (date of injury). Appellant, carrier herein, asserts error in certain findings of fact and argues that the incident was staged. Claimant replied that the evidence in support of the hearing officer was credible, and his decision should be affirmed.

DECISION

Finding that the decision is sufficiently supported by evidence of record, we affirm.

Claimant was 51 years old and had worked for the employing roofing company about two months when he was injured on September 6, 1991. Claimant was on a metal roof, estimated to be pitched at approximately 30 degrees when he started sliding down it. The roof was on a three or four story building, but about four feet below it was a flat roof of another part of the building, not the ground. Claimant states that he slipped and slid down the roof. At one point he indicated that he landed on the roof below; he also said that another worker stopped him before he fell from one level to the next. An employee, JR, who was called to translate for claimant when he stopped sliding somewhere above the ground, said claimant told him that he had broken his nose and that he had blood on his face. He said that claimant also told the nurse they went to see at the site that the red on his face was blood. JR said that he accompanied claimant to the hospital and that he saw a container of rouge in claimant's pants. At the hearing, JR was not sure that it was rouge.

RW testified as the safety officer of the roofing company. He said that claimant wore a soft soled shoe as is required by the company to prevent slipping. He also said that the metal roof could be slippery when warm but that it was not warm on September 6th.

The nurse, DS, who claimant saw at the site, was not employed by the roofing company. She is a registered nurse with experience in the emergency room of a large metropolitan hospital. She testified that claimant, through the interpreter, JR, said he had abdominal pain, nose pain, and back pain. She said she asked claimant what was on his shirt. She stated, "(i)t was on his nose, his face, and his shirt. It looked almost like he had eaten something and vomited." She also described it as "bright pink stuff." She said claimant said it was blood. She saw no lacerations or abrasions. Claimant testified that he ate red candy to try to keep from smoking.

Exactly what claimant's testimony was in regard to candy is difficult to describe. At one point, in responding to his counsel, the following exchange took place:

Q.Okay. But you do eat red candy sometimes; is that right?

A.Always.

Q.Do you think it's possible that you were eating candy on the day of your injury?

A.Yes.

Q.Okay. Do you recall what color it was?

A.Red.

Shortly thereafter, on cross-examination, the following took place:

Q.So now you are saying that you did have candy on your face after you slipped, correct?

A.Well, I eat candy. They might have seen that.

Q.I was asking you if you had candy on your face after you fell?

A.No.

Several of claimant's answers to questions were not directly responsive. An example is provided:

Q.You did not fall to the ground, did you?

A.There was a floor on top.

Emergency room records of claimant on September 6, 1991 indicate that he complained of pain in the neck and upper lower back. He gave a history of slipping on a roof and sliding down it but stopping in time to keep from falling. The "impression" stated by (Dr. J) in the emergency room was acute cervical and upper lumbar strain. The discharge note from the emergency room states that he should stay in bed for two days and not return to work until Monday, September 9, 1991. On September 9th, claimant saw Dr. C. That doctor also lists a back and neck injury, but he says claimant slipped and fell 15 feet to the ground; Dr. C estimates recovery in six weeks. Then on December 18, 1991, Dr. C says that claimant can return to work on (date of injury). (Claimant testified he did not tell Dr. C he fell 15 feet to the ground.)

A statement of JE, submitted by carrier, indicates that JE was near the bottom of the same area of roof that claimant was on when he heard a thump and saw claimant about one-fourth of the way down the roof sliding down. "He was helping himself down as he went down." JE said he stopped him and added "[h]e tried to push himself the rest of the

way down, but I was right there." As he was leaving claimant to get the foreman, claimant called to him and he saw something that appeared to be blood on his face. As JE came back toward claimant, his statement reads, "I saw right away that it was not blood." A September 6th nurse's note by DS at the site records that DS observed "pink" on claimant's face and that he stated it was blood.

The issue as to disability is framed as a question of whether claimant has disability. Claimant testified that he had not worked since the injury. He did not testify that he could not work or how his pain, if any, affected him at the time of the hearing, but his counsel did point out in closing argument that Dr. C's reference to a return to work on November 30th was conditioned on the results of an MRI and a CAT scan. Neither of these tests was in evidence and no testimony or documents indicated whether or not they were accomplished. Claimant's counsel referred to such tests as not having been done.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. He could choose to give weight to the records made in the emergency room that showed injury to the back and did not show any blood or other material on claimant's face. Since JR accompanied the claimant to the hospital and did not testify that along the route claimant removed all the pink or red color from his face, the hearing officer could question why no observation of it was made at the emergency room. On the other hand, the testimony and notes of the nurse, DS, were clear and there is apparently no reason to doubt her veracity. The testimony of the claimant at the hearing also makes it appear that there could be some misunderstanding on his part as to questions asked or some problem in translation. These matters are for the hearing officer to resolve. There is sufficient evidence of injury in the course and scope of employment for him to have reached that conclusion. Similarly, there is evidence that both an emergency room doctor and Dr. C had taken claimant off work for some periods of time, but that Dr. C indicated a return to work was possible on (date of injury). As stated, there was no evidence that disability continued beyond that point. The evidence of disability is sufficient to support the hearing officer's finding that claimant was unable to work because of the injury through (date of injury).

The findings of fact are based on sufficient evidence of record and the conclusions of law are adequately supported by the findings of fact and evidence. The decision and order are not against the great weight and preponderance of the evidence and are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge