APPEAL NO. 92631

On October 15, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held pursuant to a remand of the first contested case hearing decision because a complete record of the first hearing was not available for review by the Appeals Panel. The hearing officer determined that the appellant, hereafter the claimant, did not sustain an injury within the course and scope of his employment and further determined that respondent, hereafter the carrier, is not liable for benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The claimant requests review of the hearing officer's decision. The carrier responds that the hearing officer made a correct decision.

DECISION

The decision of the hearing officer is affirmed.

The issue at the hearing was whether the claimant was injured in the course and scope of his employment with his employer, (employee). The claimant alleged that he was injured at work on (date of injury), when boards fell off a "buggy" hitting him on the leg. Pictures in evidence showed that a buggy is a cart with wheels on it. The carrier's position was that the incident which the claimant alleged occurred at work was a "staged" accident, a "trumped up affair" and a "sham," and that the claimant was not injured at work as he claimed.

The employer manufactures walk-in coolers and the claimant worked for the employer for about nine years in the metal shop. The claimant testified that when he arrived at work the morning of (date of injury), he had a conversation with (Mr. F), the assistant plant manager, concerning why he was not at work the day before and that (Mr. F) suspended him from work for one day. The claimant said that as he was walking down the main aisle of the plant to go to the shipping department to call his wife to pick him up, he had to turn sideways to get past buggies that were in the aisle and as he did, he bumped up against some boards that were on a buggy, he fell down, and several boards fell off the buggy onto his leg. The claimant said that the boards broke the skin on his leg, that he had blood everywhere on his leg, that blood came through his pant leg, and that there was "blood everywhere." The claimant said that when the incident occurred he was carrying a coffee cup with coffee in it in one hand and his lunch pail in his other hand. He said that in order to go through the aisle he had to raise his arms above his head and that when he fell down he dropped his coffee cup and lunch pail. The claimant further testified that a coemployee, (Mr. S), got the boards off of him and put the boards back onto the buggy, and that (Mr. F) took him to (Dr. Mc) that same morning. At the first hearing, the claimant said that he injured his right leg, but admitted that he had told the benefit review officer that he had hurt his left leg. At the hearing on remand, the claimant first said that he had hurt his left leg, but then said that it was his right leg that he hurt.

In a medical report dated (date of injury), (Dr. Mc) indicated that he examined the claimant on that day and found "no visible signs of injury." He reported that the claimant had full range of motion of the back and both knees, and that x-rays of the right knee and lumbar area were normal. The next day, the claimant went to (Dr. B) who reported that the claimant had an abrasion and swelling of the right knee and low back muscle spasm. (Dr. B) diagnosed the claimant as having a contusion and strain of the back and contusion and sprain of the right knee.

(Mr. F) testified that prior to (date of injury) he had talked to the claimant several times about unexcused absences from work and that the week before (date of injury) the claimant had been suspended without pay for three days because of unexcused absences. When the claimant returned to work on Monday, October 14th, the claimant said he would quit work on Friday, October 18th, and that he needed to be off work the afternoon of Tuesday, October 15th. (Mr. F) said he allowed the claimant to be off work Tuesday afternoon, but expected him to show up for work Tuesday morning. The claimant did not show up at work on Tuesday and did not call into work. (Mr. F) said that when the claimant arrived at work on the morning of Wednesday, (date of injury), he terminated the claimant and the claimant said to him "I'm going to let you take care of me for awhile." He then began to escort the claimant out of the building, but went into an office briefly to look up some records. When he came out of the office he saw the claimant standing next to two employees in the main aisle. He said that the claimant told him some boards had fallen on him and hurt his right leg. The claimant showed him his right leg and there was a "scuff" just below the claimant's right knee. The claimant said he wanted to go to a clinic so this witness took him to (Dr. Mc's) clinic. This witness said that the claimant did not have an abrasion or blood on his leg. This witness also said that there was between six and 10 feet of free space in the aisle to walk through and that he did not see any boards on the floor. He said the buggy with the boards on it extended six to eight inches into the aisle. He also said that he did not see a coffee cup or spilled coffee on the floor.

(Mr. S) testified that on the morning of the incident there was about six to eight feet of unobstructed space in the main aisle to pass by the buggy. He heard a loud bang and looked down the aisle and saw a stack of boards on the floor and the claimant on the floor across the aisle from the boards. He said the claimant was about seven feet away from the boards and was holding his side and back. He said no one was standing next to the claimant and that he was the first person to reach the claimant. He further testified that he did not observe any coffee cup or coffee on the floor nor did he see any blood on the floor or on the claimant's leg when the claimant rolled up his pant leg. He testified that the claimant had a little mark on his leg "like you would make if you took your fingernail and drew it across your skin." He further testified that he had observed the aisle and the buggy before the incident and that he did not believe it was possible for the incident to have occurred the way the claimant described it.

(Mr. G), a foreman for the employer, testified that on the morning of (date of injury) he saw the claimant walking down the main aisle and across the aisle and came out of his

office to see what the claimant was doing. When he got out of his office, he saw the claimant rolling around on the floor on the opposite side of the aisle away from the buggy and about six to eight feet from where three boards were on the floor. He said he did not see coffee or a lunch pail on the floor. He went back to the office, got (Mr. M), who is an assistant plant manager, and went to the claimant. He said the aisle was not obstructed and that a forklift could and did go through the aisle. He also said that he did not see any blood on the claimant's legs. He testified that the boards on the buggy were neatly stacked and that the boards would not have been knocked off the buggy by brushing against them. In his opinion, due to the weight of the boards, the boards had to be deliberately knocked off the buggy.

(Mr. M) testified that he did not see any coffee on the floor and that the claimant's lunch pail was sitting behind a fan about 10 feet from the claimant "as if somebody had carefully set it down." He did not see any blood on the claimant's pant legs or on the claimant's legs. When the claimant rolled up his right pant leg, this witness saw a "scratch" which he described as "like you would take your fingernail and scratch real hard on your skin, it left like a white mark." He also testified that earlier the same morning he had pushed the buggy out of the aisle after getting some material from behind it and had moved the boards on the buggy about six inches from the edge of the buggy table. He said that the boards were eight foot 2" x 6" and that they were wrapped three boards to a bundle, each bundle weighing between 50 and 70 pounds. He said that a person would have to hit the boards "awful hard" in order to accidentally knock a bundle of boards off the buggy, and that the boards would not be knocked off the buggy by just brushing against the boards. He said that the main aisle was clear enough for a forklift to move through with a person walking on both sides of the forklift.

(Mr. T) also testified for the carrier. He was employed by the employer on the day of the alleged accident, but was not employed by the employer when he testified. On the morning of (date of injury), he said that the main aisle was not obstructed, that he could and did drive his forklift through the aisle, and that the aisle was about eight feet wide. When he turned the corner into the main aisle with his forklift, he saw the claimant sitting down holding his leg. He said the claimant told him that boards on the buggy had hit his leg, but he did not see any boards on the floor. He testified that the claimant rolled up his right pant leg and showed him "a few scratches" which this witness described as "fingernail scratches" which appeared to have been deliberately made. He also said that there was no blood on the claimant's pant legs or on the claimant's leg. He did not see a coffee cup or spilled coffee on the floor. He said the claimant asked him to get his lunch pail which was neatly set down behind a fan about 10 feet from the claimant. This witness said that he doesn't think the claimant was involved in an accident the morning of (date of injury) because in his opinion, bumping into the buggy would not have caused the boards to fall; someone would have had to deliberately take the boards off the buggy.

As previously mentioned, the issue at the hearing was whether the claimant was injured in the course and scope of his employment. In both her first decision and her

decision on remand of the case, the hearing officer found that the claimant had been terminated and was on his way out of the building at the time of the alleged incident, and further found that the claimant did not sustain any alleged injury while at his place of employment. The hearing officer concluded that the claimant failed to establish by a preponderance of the evidence that his alleged injury was the result of an accident which occurred within the course and scope of his employment.

We first observe that merely because the employee sustains an injury at the workplace after having been terminated is not necessarily dispositive of the issue of whether the employee has sustained an injury in the course and scope of employment. *See* INA of Texas v. Bryant, 686 S.W.2d 614 (Tex. 1985). *See also* Texas Workers' Compensation Commission Appeal No. 91096, decided January 17, 1992. However, in this case, in addition to finding that the alleged incident occurred after the claimant had been terminated, the hearing officer also found that the claimant did not sustain any injury while at his place of employment, which is where the claimant alleged he sustained his injuries. We believe that while both findings are sufficiently supported by the evidence, the latter finding supports the hearing officer's conclusion that the claimant failed to establish that his alleged injury was the result of an accident which occurred in the course and scope of his employment. From the evidence, we conclude that the hearing officer could reasonably believe that after having been terminated on the morning of (date of injury), the claimant staged an incident at work by deliberately making a minor scratch on his leg which did not result in an injury, and by deliberately pulling boards off the buggy and then sitting on the floor of the main aisle as if he had been injured.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). The claimant had the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The testimony of the claimant and the carrier's witnesses was conflicting. 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 (Tex. 1986). As the trier of fact the hearing officer also resolves conflicts and inconsistencies in the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Having reviewed the record, we conclude that the hearing officer's decision that the claimant was not injured in the course and scope of his employment is sufficiently supported by the evidence, and is not so contrary to the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Johnson, *supra*.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge