APPEAL NO. 92642

This case returns for our consideration having been reversed and remanded for further development of the evidence and consideration, as appropriate, pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.42(b)(3) (Vernon Supp. 1992) (1989 Act). Texas Workers' Compensation Commission Appeal No. 92409, decided September 25, 1992. A second contested case hearing was held in (city), Texas, on October 23, 1992, (hearing officer) presiding. The hearing officer, upon admitting over objection certain of claimant's medical records previously excluded, reached the same findings and conclusions reached in the prior hearing, that is, that claimant was not struck by a forklift and injured on (date of injury), and that claimant thus failed to prove he sustained an injury in the course and scope of his employment. Claimant has filed no request for review subsequent to the second decision of the hearing officer. The carrier has filed what it describes as a "conditional" request for review which it asks be considered in the event claimant should file a request for review of the second hearing officer's decision.

DECISION

Finding that claimant did not file a request for review and that the carrier conditioned its request for review upon the claimant's filing such a request, the decision of the hearing officer is affirmed.

Article 8308-6.41(a) (1989 Act) provides, in part, 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 of the hearing officer is received from the hearings division of the Texas Workers' Compensation Commission (Commission). *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §143.3(a)(3) (Rule 143.3(a)(3)). Article 8308.-6.34(h) provides, in part, that: "[t]he decision of the hearing officer regarding benefits is final in the absence of a timely appeal by a party . . .." At the close of the second hearing, the hearing officer advised the parties that if either were dissatisfied with his decision they could contact the Commission's ombudsman at the Commission's (city), Texas, office for advice. The hearing officer signed his decision on November 2, 1992. By letter dated November 12, 1992, the Commission's hearings division forwarded a copy of that decision to the parties and a fact sheet explaining what to do if a party wanted to appeal that decision. The letter also stated the office and address to which an appeal should be directed. *See* Rule 142.16(d)(2). Since claimant failed to file a request for our review of the hearing officer's decision after remand, our jurisdiction over that decision has not been invoked. While the carrier filed a request for review of the hearing officer's evidentiary ruling admitting claimant's previously excluded medical records over objection, carrier states that its request is "conditional" and asks that we consider it only if claimant should file a request for review. Rule 142.16(f) provides that a decision regarding benefits not appealed to the appeals panel becomes final on the sixteenth day after the date received from the Commission's division of hearings. Thus, pursuant to Article 8308-6.34(h) and Rule 142.16(f), the hearing officer's decision of November 2, 1992 is final.

Though not necessary to our decision, we will briefly discuss the evidence to determine whether there was sufficient evidence to support the hearing officer's determination, and whether his determination was so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Texas Worker's Compensation Commission Appeal No. 92080, decided April 14, 1992.

In our earlier decision in this case, Appeal No. 92409, *supra*, we fully detailed the evidence of the parties adduced at the first hearing. In brief, claimant, who had commenced employment on October 2, 1991, testified that on (date of injury), while walking back to his work area in a warehouse, he threw his hands and arms out in front of him to avoid being struck by a backing forklift and was jerked backwards off his feet, but did not fall. The forklift driver testified that claimant twice told him he had not been hit. A coworker said that when claimant returned to his work area she understood from his comment that he had almost but not actually been hit. Claimant said he soon thereafter told his supervisor he was hurting in the chest area, but denied saying he had been hit in the chest. According to the supervisor, however, claimant stated he had been hit "about the chest." He admitted telling carrier's adjustor he had been hit in the chest but said he was under sedation at the time. The evidence indicated the forklift was waist high and not tall enough to strike claimant in the chest. Claimant sought medical treatment the same day but denied advising Dr. D he had been struck in the back, as that doctor's initial report indicated. Dr. D treated claimant, on his subjective symptoms, for a very mild neck muscle spasm and neck and lumbar range of motion limitations, and released him for normal duty at the October 18th followup visit. According to the records excluded at the first hearing, appellant next saw (Dr. B) on October 30th for continued pain. Dr. B found acute bruising of the thoracic muscles in addition to acute neck and lumbar muscle strain. Claimant was hospitalized and treated by Dr. B for about 15 days, and continued to see Dr. B until about February 10, 1992, the date he said he was then able to return to work.

The evidence concerning whether claimant was actually struck in the chest by the forklift was in conflict, as was the medical evidence respecting the scope of his injuries. The record contained no other explanation for claimant's symptoms. The hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Article 8308-6.34(e). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App. - Amarillo 1974, no writ). "In reviewing a case, the Appeals Panel should not set aside the decision of the hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deem most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences." Texas Workers' Compensation Commission Decision No. 91013, decided September 13, 1991. As the trier of fact, it was for the hearing officer to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). When presented

with conflicting testimony, the trier of fact may believe one witness and disbelieve others, and may resolve discrepancies in the testimony of any witness. R.J. McGalliard v. Kulman, 722 S.W.2d 694, 697 (Tex. 1987).

Had our jurisdiction been properly invoked, we would be of the opinion that the hearing officer's conclusion that claimant did not sustain a compensable injury is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer's decision is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge