APPEAL NO. 92699

On November 19, 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 herein, did not sustain an injury to his back in the course and scope of his employment on (date of injury), and denied benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act).

Claimant contends that the hearing officer misapplied the facts, the decision is not supported by the evidence, and requests that we reverse the hearing officer's decision and render a decision in claimant's favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision of the hearing officer.

DECISION

The decision of the hearing officer is affirmed.

The issue framed at the contested case hearing (CCH) and agreed to by the parties was "[w]hether or not CLAIMANT suffered an injury on (date of injury) while in the course and scope of his employment."

The evidence, as found by the hearing officer, was that claimant was a 35-year-old oil rig worker who was employed by (employer) as a driller. Claimant testified that on (date of injury), his third day on the job, he injured his back when he picked up a "float sub" and "stabbed" it into a pipe. The hearing officer's statement of the evidence fairly and accurately sets forth the facts in this case and we adopt the facts as recited for purposes of this decision, other than to comment on areas in dispute. The claimant testified as to the size and weight of the "float sub" but is disputed on this fact by the rig supervisor, referred to as the tool pusher. Claimant testified he injured his back sometime in the early afternoon. He concedes he did not report the injury at the time but states it was because he thought it was just a mild strain.

Claimant testified he told his coworker and longtime friend, (Mr. N), about the injury " about ten minutes" after it occurred. (Mr. N's) testimony regarding the injury and when he was told about it is somewhat vague. At one time (Mr. N) testified he was told about the injury while they were changing clothes after work and then later claimant was "uncomfortable" riding back home. The claimant testified after getting home he went to a local nightclub at about 10:00 or 11:00 p.m. to look for hands to work the next day. One of carrier's witnesses, (Mr. D) saw claimant at the nightclub. There is a dispute whether claimant was dancing or not. Claimant testified the next morning he was so sore he could not get out of bed. When his crew came to get him for work he yelled "[g]et out of my face. I'm not going to work." Testimony from (Mr. N) was that when claimant did not answer the door they went on without him. The tool pusher, a supervisor, testified that claimant was at

the controls and did no lifting and it was he, the tool pusher, who, with two workers, other than claimant, picked up the float sub and put it into the "hole." The tool pusher stated he was at the rig all day and was working beside claimant and claimant did not injure himself. The tool pusher also testified that claimant called him the night of (date of injury), talked about the job and told the tool pusher he would see him the next day. Claimant denies calling the tool pusher.

Perhaps the biggest inconsistencies, or disputes, concern the testimony of (Mr. D), a coworker on the rig. (Mr. D) testified he worked on (date) and (date) but not on the (date), the date of the alleged accident, or the (date). Claimant is equally adamant that (Mr. D) was working on (date of injury) and was up in the derrick at the time of the accident. (Mr. D) also testified overhearing a conversation between claimant and another coworker where claimant allegedly said the employer would never have hired claimant if they knew claimant had a bad back. Claimant denies this conversation and testified he had taken some "10 or 12 physicals" for jobs that year and had passed them. (Mr. D) also testified he saw claimant drinking and dancing at the nightclub on the date of the alleged accident and standing playing a guitar at a county benefit a few weeks later. Claimant admits to being at the nightclub but testified he did not dance. He also admits to "playing two songs" at the benefit.

The day following the alleged accident claimant testified he went to at least two hospitals for treatment and pain medication. On cross-examination carrier produced an incident report, dated 9-21-92 (almost a month after the alleged accident) where claimant had come to the hospital and threatened to shoot some employees because he was unhappy with the pain medication the hospital had given him. This incident was labeled a "terroristic threat." Claimant denies the incident. The carrier also introduced results of drug tests done on August 30, 1992 which show claimant tested positive for benzodiazepines, cocaine and marijuana. Claimant denies drug use and stated the results of the test were wrong. During cross-examination claimant admitted to, and documentation was introduced of, felony convictions for burglary of a building in 1986 and delivery of a controlled substance in 1984. Claimant in cross-examination testified he was on parole in (month year) and as such he was not supposed to be drinking or using drugs.

It is also noted that claimant testified he had a herniated disc in his back; however, no medical documentation was presented regarding the extent of claimant's injury.

The hearing officer found that "claimant did not lift a float sub on (date of injury)" and that "claimant did not suffer an injury while working for employer on (date of injury)." Consequently the hearing officer concluded that "claimant failed to prove by a preponderance of the credible evidence that he suffered a compensable injury on (date of injury) . . ."

Claimant presents six points on appeal. Points I, III, IV and VI deal largely with the weight to be given to certain testimony and the credibility of the witnesses. The factual determinations in this case depended largely on the weight and credibility to be given the

testimony of the witnesses. The 1989 Act in Article 8308-6.34(e) provides, and we have repeatedly held, that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The hearing officer clearly did not give much credibility to the testimony of the claimant, and instead relied on the testimony of the tool pusher, that no injury or accident occurred. This testimony is supported by the testimony of (Mr. D) who said that claimant was drinking and dancing at a local nightclub the evening of the alleged injury. The hearing officer saw and heard this testimony and observed the demeanor of the witnesses, including that of the claimant. 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 which would support either side of the issue. 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.). There is some probative evidence to support the hearing officer's decision. The court in Commercial Union Assurance Company v. Foster, 379 S.W.2d 320, 322 (Tex. 1964), held "[i]t is an elemental proposition of law that where there is some evidence of a substantial and probative character to support the trial court's findings of fact, they are controlling . . . and will not be disturbed, even though this court might have reached a different conclusion therefrom." Applying these standards of review, we conclude that sufficient evidence exists to support the hearing officer's findings and decision.

Items II and V of claimant's appeal argue that the "terroristic threats" to the employees were apparently not believed because no investigation was conducted, and the felony convictions were not relevant to this claim. We would agree that evidence of so-called terroristic threats, made almost a month after the alleged injury, has only marginal relevance to show claimant was unhappy with the painkilling medication which had been prescribed. Evidence of the felony convictions was presented in cross-examination to impeach the credibility of claimant's testimony. Carrier cites this evidence as admissible under Rule 609 (Tex. R. Civ. Evid. 609). We have previously held, while "recognizing that `conformity to legal rules of evidence is not necessary' at a contested case hearing (Article 8308-6.34(e), 1989 Act), we believe unduly prejudicial matters should not be admitted or considered." Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. In the instant case we do note that Rule 609 provides that for purposes of attacking credibility of a witness, evidence of a felony conviction may be admitted if elicited from the individual or established by public record if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party." We would note that claimant's attorney at the CCH raised no objection to the introduction and admission of this evidence. The only objection to this line of questioning came from the claimant when he stated "what does this have to do with getting hurt on the job?" There being no further objection by counsel, the cross-examination proceeded. It is difficult to assess the impact of this line of questioning; under the circumstances we cannot say the hearing officer abused

his discretion of admitting unobjected to evidence which was used to impeach claimant's credibility. However, even if this line of questioning constituted error, the failure to exclude this evidence was not reasonably calculated to cause, and probably did not cause, rendition of an improper decision. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Finding no reversible error and the evidence sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge