APPEAL NO. 92702

A contested case hearing was held in (city), Texas, on November 30, 1992, (hearing officer) presiding, to determine whether appellant (claimant) was injured in the course and scope of his employment on (date of injury). The claim was contested by respondent (employer) whose workers' compensation insurance carrier had apparently not disputed the claim. The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.10(4) (Vernon Supp. 1993) (1989 act) provides an employer with the right to contest the compensability of an injury if the insurance carrier accepts liability for payment of benefits. The hearing officer determined that claimant failed to prove he sustained a compensable injury and claimant seeks our review asserting that the decision below was against the great weight and preponderance of the evidence. Employer urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings of fact and conclusions of law, we affirm.

Employer, in its timely response, asserts it never received a copy of claimant's request for review, notwithstanding that claimant's request for review certifies that copies were sent "to all interested parties." Employer, while not explaining how it happens to be responding to the request for review without having received a copy from some source, also points out that claimant's certificate of service does not comply with Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3) and contends the Texas Workers' Compensation Commission (Commission) Appeals Panel therefore lacks jurisdiction over claimant's appeal. Rule 143.3(b) provides the form for the certificate of service on a request for review. We have previously stated that a failure to serve a copy of the request for review on another party does not deprive the Appeals Panel of its jurisdiction over a timely filed appeal. Texas Workers' Compensation Commission Appeal No. 92383, decided October 12, 1992.

Claimant worked for employer, a temporary labor contractor, and was sent to Trinity Industries to perform sandblasting in the hull of a ship. Claimant testified that on (date of injury), he was working the night shift and after he entered a compartment to commence sandblasting, his sandblasting hose was activated and started whipping around spraying sand. He said he tried to grab the hose but could not breath because he had not yet donned his fresh air mask. The sand blew out the light bulb and he then left the compartment. Claimant said all he had then was a bruise on his leg and some red spots on his arm which he attributed to having been struck, indirectly, with sand. On the following weekend, claimant said he "felt a pop" in his back and went to see (Dr. R). He said that immediately after the incident he talked to coworker (Mr. D), who was operating the sand pot controls supplying sand for claimant's hose. He said he also told his supervisor, (EK), that he "almost got killed in that hole," showed (Dr. K) where sand had struck him indirectly, and told (Mr. K) his leg was hurting. He said he also talked to coworker (Mr. C) about the incident. Claimant finished his shift and reported for work the next night. However, he did

not complete that shift and voluntarily stopped working because employer, while agreeing to his request for a new "deadman valve" for his hose and improved lighting in the compartment, would not agree to provide a lookout to watch the compartment while claimant was sandblasting. Claimant felt he did not want to continue that work without an observer and left the job.

(Dr. K) testified that on the night of the incident claimant told him the hose had turned on and hit him several times, but made no mention of being hurt and returned to work. (Mr. C) testified that he was working elsewhere on the ship and did not see claimant's accident. He said he signed the written statement introduced by claimant but denied having authored the top line of the statement which stated, "you went in the hole and you hurt your leg and shoulder." Claimant introduced a statement authored by claimant and signed by (Dr. D) which stated that (Dr. D) turned on the blast hose while claimant was in the compartment "causing injury to claimant," and which went on to outline certain workplace safety concerns. The employer introduced a later statement from (Dr. D) recounting how claimant had come to his residence, awakened him after about three hours of sleep, and asked him to sign a statement to the effect that he had turned on the control valves for the sandblasting hose. (Dr. D)'s later statement referenced the portions of the earlier statement written by claimant which (Dr. D) was recanting including a reference to the incident "causing injury" to claimant. Carrier also introduced a transcription of a telephone interview of claimant recorded on August 31, 1992, in which claimant said he could not recall having any prior workers' compensation claims. Claimant conceded in his testimony that he had at some time settled a workers' compensation claim for a sprained muscle for $5000.00.

(Mr. T), the Trinity Industries paint foreman, who was (Dr. K)'s supervisor, testified that on the night of the incident he discussed with claimant the replacement of the control valve on the hose and explained why an observer was not required for sandblasting work. He said that claimant never mentioned having been injured and (Mr. T) saw no evidence of injury and thus he never filled out an accident report because he observed nothing to indicate an injury occurred in the compartment that night. He believed, based on his conversations with claimant, that claimant just quit because he did not want to work that job.

(Mr. H), the owner of employer, testified that he met with claimant on August 24, 1992 and asked about the accident. Claimant told him he was hit in the knee and bruised, and was hit on the arm with sand. (Mr. H) then observed claimant's knee and saw no bruise or mark, and looked at claimant's arm and saw no marks.

Records of (Dr. R) indicated claimant saw him on August 27th giving a history of losing control of a sandblasting hose and injuring his lower back and lower right leg. The diagnosis was acute lumbosacral strain and a right lower leg contusion, and physical therapy and medication were prescribed. The records of (Dr. D), who saw claimant on September 2nd, indicated claimant gave a history including a large contusion to his knee, which has subsided, and an injury to his shoulder. The clinical exam showed evidence of a resolving knee contusion and "symptomatic spondylolisthesis of L5-S1." The physical therapy (PT)

records of September 8th reflected that claimant thought his earlier PT treatment made his back worse, that he had to discontinue the treatment about one-half way through, and that he believed he "felt a pop" in his back during "PT of 55#" so it was promptly stopped.

The hearing officer found that claimant did not receive an injury in the furtherance of his duties with employer on (date of injury) or any other time, and concluded he did not sustain a compensable injury on that date. In her discussion the hearing officer commented that "not only did Claimant prove to be an unreliable witness, in that his testimony regarding the incident made the basis of this case was not internally consistent, but it also appears highly probable that Claimant offered into evidence two witness statements which had been altered." The hearing officer went on to observe that claimant's case was not credible.

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. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge