APPEAL NO. 92718

A contested case hearing was held in (city), Texas, on December 1, 1992, (hearing officer) presiding as hearing officer. He determined the appellant (claimant) neither suffered an injury to his back nor an aggravation to a preexisting injury on either (date of injury 1) or (date of injury 2). Accordingly, benefits were denied under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). Claimant disagrees with a finding of fact, two conclusions of law and asks the Appeals Panel to review the records and reverse the decision of the hearing officer. Respondent (self-insured) asserts that the appeal is untimely and lacks specifity as to how any of the evidence supports claimant's claim for compensation, and asks that the decision be affirmed.

DECISION

Finding the evidence to be sufficient to support the determinations of the hearing officer, we affirm his Decision and Order.

Initially, we determine that this appeal was timely filed. The decision was not mailed from the Directorate of Hearings and Review until December 14, 1992, and the appeal was mailed to the Commission on December 28, 1992. Not even allowing for mail time, the appeal meets the 15 day time period.

The claimant worked for the (employer) and claims he injured his back on (date of injury 1) when he knelt down and reached to his left to pick up some light clothing. He testified that he felt a sharp pain in his back and numbness in his leg when he got up. He states he finished his task of helping to dress patients and then went to the day room. He said the pain got so bad he told his supervisor, (MR) and then went home. The next day he came to work but was unable to perform and told his supervisor and went home. Several days later he returned but the pain was still present so he made out an incident report, left and has not been back to work since. He went to a doctor on the September 14th; a CAT scan was ordered and was performed on September 19th. The CAT scan shows disc herniations at L3-L4, L4-L5, and L5-S1. The claimant testified that he had a prior back injury in October 1991 and had several previous CAT scans performed which showed disc herniations. He states that he declined to undergo surgery. He testified that he still can only do light duties like "cleaning the house a little bit," but that he can still play his drums in a band. He denied that he has worked out in any gym since the injury of (date of injury 1).

MR testified that she did not work on (date of injury 1) but that the claimant told her of his injury on (date of injury 2) before the start of the work day and that he subsequently went home. An undated statement from a (PV) indicated that the claimant notified her of his (date of injury 1) back injury on September 14th and that after doing so he filled out a report.

The self-insured introduced the previous CAT scans performed on the claimant which were similar to the September 19, 1992 CAT scan and which showed disc herniations. The carrier also introduced a statement of the assistant superintendent at the school which provided as follows:

> On the evening of September 15, 1992, I attended the [fair and rodeo] with my family. Around 10:00 we went to listen to a Rock band at the far end of the fairway. I witnessed [claimant], an employee of [employer], playing the drums for this band. He was doing a very good job, and appeared to be in no physical discomfort, as he was very animated in his performance. I have also encountered [claimant] at the First Baptist Family Life Center in the past two weeks using the Universal Weight Lifting Machines.

The finding of fact and conclusions of law with which the claimant takes exception are:

Findings of Fact

4. Claimant did not suffer an injury to his lower back on (date of injury 1) (or date of injury 2), nor did he aggravate a pre-existing injury or condition.

Conclusions of Law

2. Claimant failed to prove by a preponderance of the credible evidence that he suffered a compensable injury in the course and scope of his employment with employer.

3. Claimant is not entitled to workers' compensation benefits as a result of this claim and carrier is therefore not liable for the payment of such benefits.

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. Article 8308-6.34(e). In this case, there was evidence before him which rather convincingly showed that the claimant's back condition had not changed from the injury of October 1991 and that his activities, as observed by the assistant superintendent, were inconsistent with the injury he alleges he sustained on (date of injury 1). The CAT scans were all in evidence and, in the words of the hearing officer, "[a]ll three were similar." It is apparent from his decision that the hearing officer did not believe the claimant's testimony in pertinent part. The hearing officer, as the finder of fact, can believe all, part or none of the testimony of a witness, including that of an interested party such as the claimant. <u>Taylor v. Lewis</u>, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); <u>Cobb v. Dunlap</u> 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.); <u>Highlands Insurance Co. v. Baugh</u>, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). Where, as here, there is sufficient evidence to support the determinations of the hearing officer and they are not so against the great weight and preponderance of the evidence as to be clearly wrong or unjust, there is no sound basis to disturb his decision. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The Decision and Order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge