APPEAL NO. 92724

At a contested case hearing held on November 24, 1992, the hearing officer, after finding that appellant (claimant) was hired by (employer) on February 28, 1991, in (City 1), (State 1), where he then resided, for a traveling salesperson position stationed in (City 1), concluded that claimant was not hired or recruited in Texas, and that the Texas Workers' Compensation Commission (Commission) does not have jurisdiction over an injury claimant suffered on _____. Claimant has requested our review challenging the sufficiency of the evidence to support certain of the hearing officer's findings and contending that he was hired in Texas, not (State 1), and thus met his burden to establish that the Commission did have jurisdiction over his extraterritorial injury pursuant to the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-3.14 and 3.15 (Vernon Supp. 1993) (1989 Act).

DECISION

Finding the evidence sufficient to support the challenged findings, we affirm.

The 1989 Act addresses the extraterritorial coverage of injuries. Article 8308-3.14 provides, in part, that if an employee suffers an injury while working in a foreign jurisdiction, which would be compensable had it occurred in Texas, the employee is entitled to benefits if either the employee has had "significant contacts" with Texas, or the employment was principally located in Texas. Article 8308-3.15 provides that an employee has "significant contacts" with Texas if the employee was hired or recruited in Texas and (1) was injured not later than one year after the date of hire or (2) has worked in Texas for at least 10 working days during the year preceding the injury date. The parties at the hearing took the position that the operative issue for the hearing was whether claimant was hired in Texas, as claimant maintained, or in (State 1), as carrier maintained, and all the parties' evidence was directed toward proving that particular issue.

Claimant testified that while he had maintained an address in (City 2), Texas, since October 1990 and considered (City 2) his permanent residence, he was living in (City 1), (State 1), and managing a radio station when he was hired by employer in February 1991 as an outside salesman and given a territory covering eastern and southern (State 1) and west Texas. According to claimant, while in (City 1), he learned about the prospective position sometime in early 1991 from a friend who responded to employer's advertisement in a (City 1) newspaper. Claimant called employer's (City 3), Texas, office to express his interest. BJ, employer's sales manager, then traveled to (City 1), interviewed claimant, and expressed interest in hiring him for the position but indicated that employer made management team decisions on hiring, and that the team consisted of himself, DS, and BS. Claimant stated that Mr. BJ said he would arrange a meeting for claimant in (City 3) with the three of them. According to claimant, one week later he drove his car to (City 3), met with the three representatives at employer's facility, then had lunch with them at a restaurant at the building in (City 3). He recalled the date as February 14, 1992 because his birthday was on March 1st. He said that after the lunch and interviewing, the

employer's representatives then decided claimant had the job and they also then discussed his salary and starting date. Claimant said he returned to (City 1), gave two weeks notice to the radio station, and two weeks later, on a Monday, drove employer's truck to (City 3) for a week of training and the refitting of the truck bed. During that week, claimant said, he completed the paperwork for his employment, underwent training, and on Friday had lunch at the (City 3) Country Club with MS (employer's owner), BS, BaS, BJ, and DS. He then returned to (City 1) and the following week commenced working his territory. Claimant insisted that he was hired at the February 14th lunch meeting in the building in (City 3), pointing out that he subsequently gave his current employer two weeks notice and two weeks later commenced employment with the week of training in (City 3).

Claimant denied that BJ brought the employment paperwork to (City 1) and stated he completed the paperwork in (City 3) on the Monday of the week he started his training, March 4, 1991. He said employer asked him for references at the meeting at which he said he was hired, and conceded that scenario would have his references being called by employer after the date he contends he was hired. He said he recalled no phone calls from employer after returning to (City 1) from the luncheon meeting on February 14th, and specifically no such calls on February 28th.

Claimant also testified he disagreed with the position his attorney stated in the opening statement at the hearing to the effect that if the evidence should fail to prove claimant was hired in (City 3) at the luncheon meeting on February 14th, as claimant insisted, then claimant's alternate position was that the evidence would show that employer made an offer of employment to claimant during a phone call from (City 3) to claimant in (City 1) and that the fact that such phone call originated in Texas also proved claimant was hired in Texas.

Both claimant and carrier introduced copies of a document entitled "Chronology" which related dates and events concerning the hiring of claimant. This document was apparently prepared by employer and the copy offered by carrier had numerous supporting documents referenced and attached, while the copy offered by claimant had some but not all the supporting documents.

The following pertinent events were reflected in the Chronology and/or the attached supporting documents: during the first week in February 1991, employer ran an advertisement in the (City 1) newspaper for an outside sales position in employer's southeastern (State 1) and west Texas territory; on February 18th, BS and BJ, employed by employer, interviewed claimant in (City 1), claimant at that time being employed as the manager of a (City 1) radio station and living on the station property while looking for an apartment; claimant's (City 1) references, provided by him during his February 18th interview, were called by employer on February 18th from its (City 3) office; on February 28th, employer called claimant to confirm a job offer for the sales position based in (City 1), commencing on March 4th; on March 4th claimant commenced employment at employer's

(City 1) store and by that time was living in an apartment in (City 1); on March 8th claimant drove to (City 3) in employer's truck to meet and have lunch with employer's owner, MS, and returned to (City 1) that same day; during the week of May 13th claimant underwent training in (City 3) for five days; claimant claimed he sustained an injury (hernia) while unloading merchandise in (City 4), (State 1), on or about _____; and claimant's employment was terminated for cause in late July. The Chronology contained no reference to a luncheon meeting at the building on or about February 14th.

Also attached to carrier's Chronology was a (State 1) Workers' Compensation Administration document entitled "Recommended Resolution" which indicated that claimant did not appear for the mediation of his (State 1) worker's compensation claim for his _____ injury, scheduled for September 9, 1992, and that it was dismissed without prejudice. That document stated that employer's (State 1) workers' compensation carriers' position was that claimant was seeking but not receiving Texas workers' compensation benefits and that the (State 1) carrier, after investigation, would be willing to provide benefits in (State 1).

According to a transcribed interview of BJ, approximately one week after claimant was interviewed in (City 1), the hiring management team consisting of Mr. BJ, BS, and DS decided to hire claimant for the (City 1) position, and Mr. BJ, who at that point had only claimant's resume, returned to (City 1) with an application, got claimant started on the job and stayed there a week training him in employer's (City 1) store. He did recall telling claimant during an earlier telephone conversation that employer had decided to hire him but said "the actual hiring took place in (State 1) when I started with him on a Monday." BS stated in her affidavit that after the hiring decision was made, claimant was called in (City 1) and offered the job. If he accepted, he was to meet Mr. J at the (City 1) office. She said Mr. BJ then went to (City 1) with the job application and IRS forms, the "formal offer" was extended by Mr. BJ in (City 1), the paperwork was completed there, and claimant became an employee at that time. Later, on March 8th according to this affidavit, claimant came to (City 3) for a luncheon meeting and returned to (City 1) the same day to continue his work for employer. BS's transcribed interview stated that after the management team interviewed claimant in (City 1) and returned to (City 3), a decision was made to hire claimant and Mr. BJ called claimant from (City 3) to advise him of the decision and to establish the date he would commence the employment. When asked, she said "I guess you could say" that claimant was actually hired over the telephone. She also said that approximately three weeks after he was hired, claimant came to (City 3) for a week for training. In her affidavit, MS, employer's owner, said she had a luncheon meeting with claimant in (City 3) on March 8th by which time he was already hired and had driven a company truck to (City 3) for the meeting.

The hearing officer, finding that claimant was hired on February 28th while in (City 1) and that his first day on the job was March 4th, concluded he was not hired or recruited in Texas and that the Texas Workers' Compensation Commission does not have

jurisdiction over his _____ injury.

The predecessor Texas workers' compensation statute concerning employees' injuries sustained outside the state of Texas (TEX. REV. CIV. STAT. ANN. art. 8306, § 19, repealed by Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 16.01(7) to (9), eff. Jan. 1, 1991) provided, in part, that "[i]f an employee, who has been hired or, if a Texas resident, recruited in this State, sustain injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State, and that such employee, though injured out of the State of Texas, shall be entitled to the same rights and remedies as if injured within the State of Texas, . . ." That statute also provided that such injury shall have occurred within one year after the employee leaves this state. The provision respecting a Texas resident being recruited in this state was added by amendment effective June 15, 1977. Prior to that amendment, the Texas courts "have engrafted upon the above statute the provision that in order to recover for injuries sustained out of this State, the injured employee must show that he had the status of a Texas employee." Maryland Casualty Company v. Spritzman, 410 S.W.2d 668, 672 (Tex. Civ. App.-Houston 1966, writ ref'd n.r.e.). In Renner v. Liberty Mutual Insurance Company, 516 S.W.2d 239, 241 (Tex. Civ. App.-Waco 1974, no writ) the court observed as follows:

> "[T]hese statutory provisions have been construed many times by our Supreme Court. The cases are listed in Texas Employers' Ins. Ass'n. v. Dossey, (Tex.Sup., 1966) 402 S.W. 2d 153, 155, and were reviewed at length in Hale v. Texas Employers' Ins. Ass'n., 150 Tex. 215, 239 S.W.2d 608 (1951). The cases are in accord that the phrase, `who has been hired in this State,' in the statute, does not refer to the place where the contract of hiring is made; and that the real question is the status of the employee at the time of injury with regard to being a Texas employee. In Southern Underwriters v. Gallagher, 135 Tex. 41, 136 S.W.2d 590, 592 (1940), the Court said that if, at the time of injury, the employee occupied the status of a Texas employee, `he is entitled to protection under our Compensation Statutes, even though he was working out of the state. On the other hand, if the employee is hired or contracted within this state to go out of this state to perform labor or services, he cannot claim protection under our Compensation Law merely because the contract was made or entered into in this state.' And in the Dossey case, supra, the Court held that an employee has the status of a Texas employee `when he has been hired in this state to work in this state and in another state as the circumstances of his employer may require. His Texas employee status is fixed in the fact of his employment to work in Texas as well as in the other state. He continues to occupy this status even though he first works in the other state.'

In Renner, the record showed that the employee, though hired in Texas, was employed to work only outside Texas and therefore the court felt the record established as a matter of law that the employee "never occupied the status of a Texas employee." *Id*. at 241.

In Spritzman, *supra*, the case was remanded to determine whether the employee's employment contract required him to work in Texas after he completed a foreign duty tour for his employer. In United Pacific Insurance Company v. Farley, 566 S.W.2d 677, 680 (Tex. Civ. App.-Waco, 1978, no writ), the court stated: "Our Supreme Court has long held that before an employee injured outside the territorial limits of this State can recover for such injury under our workmens' compensation statutes, he must prove that at the time of such injury he occupied the status of a Texas employee. (Citations omitted.) When does an employee have the status of a Texas employee? This question has been answered by our Supreme Court in . . . [Dossey, *supra*.]" In Farley, the employee was hired at the employer's Houston, Texas, headquarters to work as a steel erector in New Orleans, Baton Rouge, and Lake Charles, Louisiana, and in Houston, as his work may require. Following his employment the employee moved his residence to Houston from West Virginia, and maintained it there even though the majority of his work was in Louisiana. He did some work in Texas for employer before leaving for Louisiana, purchased some tools in Houston for the New Orleans job, and came back and forth from New Orleans to Houston on weekends to pick up materials for the New Orleans job. The jury found that the employee and his employer contemplated that the employee would work in Texas and Louisiana as the circumstances of his employment might require and the court found the evidence legally and factually sufficient to support the jury's answer to the special issue.

In American States Insurance Company v. Garza, 657 S.W.2d 522, 524 (Tex. App.-Corpus Christi 1983, no writ) the court noted the amendment to the compensation statute's extraterritorial provision, effective June 15, 1977, to provide not only for an employee "who has been hired" in Texas, but also for "a Texas resident recruited in this State." Noting that this amended provision had not been previously construed, the court opined that "[i]t may be because the plain meaning of the words used in the amendment indicates an intent on the part of the legislature to extend the protection of the act to all Texas residents hired or recruited in the State, even though they had been previously denied coverage when injured outside the state." The Garza court commented on the Supreme Court's construction of the extraterritorial coverage statute before the 1977 amendment as follows:

> In construing that language, the Supreme Court has ruled that before an employee can recover under our compensation statutes for an injury received outside the state, he must prove that, at the time of such injury, he occupied the status of a `Texas employee' incidentally or temporarily sent out of the state to perform labor or services. [Gallagher, *supra*.] For purposes of this requirement, a `Texas employee' is one who has been hired in Texas and in

> another state, as the circumstances of his employer may require. In other words, it must be within the contemplation of the employer that the employee is to work in Texas as well as the other state. [Dossey, *supra*.] Under the standard set out in Dossey, an employee may occupy the status of a `Texas employee' and recover for an extra-territorial injury even though he never performed work in Texas, so long as he was hired here, and it was contemplated that he would perform work here under the contract. *Id*. at 523.

In Dossey, *supra*, the employee, an oil field worker, was a resident of Andrews, Texas, and contacted the employer's tool pusher near Andrews asking for work. He was told he was hired and to stand by until further notice. Some time later, the employee was called and told to report to work on a rig in New Mexico first. After four weeks of work on that rig, the employee was given work to do in Texas for a few days and then sent to another New Mexico location where he was injured. The court rejected the carrier's contention that the employee occupied the status of New Mexico rather than a Texas employee because he began his work for employer in that state, stating:

> "The extraterritorial provisions of the Texas statute do not expressly preclude benefits for a Texas workman in the circumstances of Dossey. Indeed, there is no sound reason why such a workman cannot have an employee status in both Texas and the other state, with protection at his election in either state if permitted by the compensation statutes of the other state as construed by its courts. Be this as it may, however, Texas has the most legitimate public interest in Dossey as an injured workman. He is a Texas resident; the contract of hire occurred in Texas; his employer is domiciled in Texas; and he did, in fact, perform labor and services in both Texas and New Mexico before his injury in New Mexico. (Citations omitted). *Id*. at 156.

In Dossey, the court characterized the evidence regarding the terms of the employment contract as inconclusive and said it was not undisputed either that Dossey was or was not employed to work in Texas as well as in New Mexico. The court thus could not determine as a matter of law whether or not the employee occupied the status of a Texas employee at the time of his injury and remanded the case after stating that "[a]scertaining the real agreement of the parties from a consideration of the evidence bearing on the terms and conditions of the contract of employment, and hence determining employee status, is the function of the trier of facts." *Id*. at 156.

Because the language in Article 8308-3.15 respecting "significant contacts" is substantially similar to the language in the predecessor statute, we view the Texas courts' construction of the earlier statute as applicable. In Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991, we noted the Texas Supreme Court's ruling "that when a statute is reenacted without material change, it is presumed

that the legislature knew and adopted the interpretations placed on the original act and intended the new enactment to receive the same construction."

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 the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-(City 3) 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.-(City 3) 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.)). As an interested party, the claimant's testimony only raises an issue of fact for the determination of the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-(City 3), no writ).

The hearing officer found that claimant was interviewed by employer in (City 1) on February 18, 1991, for the traveling salesman position stationed in (City 1), and that he was residing in (City 1) at the time. In her discussion of the evidence the hearing officer noted that claimant had to give his employer, a radio station, two weeks notice. The hearing officer further found that claimant was hired on February 28th, while in (City 1), and that his first day on the job was on March 4th. Based on these findings the hearing officer concluded that claimant was not hired or recruited in Texas, and that the Commission does not have jurisdiction over claimant's _____ injury. We believe the evidence supports these findings and conclusions. The hearing officer could credit the evidence to the effect that claimant was employed in and residing in (City 1) when he learned of and sought the position with employer, that he was interviewed in (City 1), that he was actually hired in (City 1) when BJ called him from (City 3) on February 28th to communicate the decision of the management team and discuss salary and starting date, and that he commenced the new employment on March 4th when BJ went to (City 1) with his application form and IRS forms and spent the week getting him started at employer's (City 1) store.

The 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:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge