APPEAL NO. 931034

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On September 17, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The record was held open to obtain a legible copy of a medical report and allow the parties to respond. The record was finally closed on October 11, 1993. The issues to be decided at the CCH were: whether claimant sustained an injury within the course and scope of his employment on (date of injury), and whether claimant has sustained any disability as a result of such alleged injury. The hearing officer determined that the appellant, claimant herein, sustained an injury to his face, but not his low back in the course and scope of his employment on (date of injury), and that the claimant did not have disability as a result of the alleged low back injury.

Claimant disputed much of the evidence presented at the CCH, points out contradictions, disputes the medical examination order (MEO) doctor's report, contends that the hearing officer "ignored" his request to submit questions to the MEO doctor, and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

In reviewing the record we find the hearing officer's statement of the evidence to be a fair and accurate recitation of the pertinent evidence and adopt it for purposes of this decision. By way of background, claimant conceded, and it is undisputed, that claimant had a workers' compensation claim in 1986, subsequently became depressed because of personal problems and had not worked since 1986. In order to support his present wife, claimant and his brother-in-law, (JH), obtained work in a four day "shut down" at (employer), employer herein. Claimant testified that on the first day of the job, (date of injury) (all dates are for 1993 unless otherwise noted), he was required to buy steel toed boots. Claimant also testified he had some experience as a professional painter and finisher and was familiar with the procedure for "tying off" a ladder. Claimant testified that on (date of injury), he tied off the eight foot ladder he was using to a pipe approximately seven feet off the floor. Claimant stated he secured his safety belt to an object about waist high and was standing on the fifth rung of the ladder as he was using a pneumatic air chisel to remove old paint. Claimant testified that a bolt came out of a pipe hanger, causing the pipe hanger to open and the ladder to slide sideways. As the ladder slid to the right, testified he fell off the ladder to the left. Claimant states his fall was broken by the life line attached to his safety belt; however, the shock absorber in the life line failed causing a severe jolt to his back as the life line abruptly ended his fall. Claimant stated as he was falling he hit his face on the pipe which the ladder had been leaning against. Claimant stated he was able to "untie" himself and reach the ground. Claimant maintained that the fall knocked off his hard hat, twisted his safety glasses and bruised his cheek. Although JH, claimant's brother-in-law, was working close by, JH testified he did not see the fall but did see claimant "hanging from the pipe." JH states that by the time he got to where claimant was working, claimant

had already untied himself and gotten down. JH testified the claimant asked him if his (claimant's) cheek was bleeding. JH testified he said "[n]o, you're all right." Claimant and JH agree that while claimant went to find the foreman, JH returned to work.

It is undisputed that while looking for the foreman to report his injury, claimant encountered (JS), who was a "fire watcher" in the area. Claimant testified he showed JS the accident site. JS testified that claimant, at that point, came up to her and asked her to look at "his cheekbone or his face" and that claimant said a "bolt had flew out and hit him in the face." JS denies claimant said anything about falling from a ladder. JS further testified that earlier in the day she had overheard claimant "and another man" talking right behind her, something to the effect that claimant's back had been hurt before. JS testified that claimant was walking with a limp and "kind of disfigured." Claimant disputes JS's testimony stating that the work place was very noisy, that JS must have misunderstood what he said, and that he had never seen JS until he encountered her after the accident. Claimant also disputes JS's testimony pointing out errors such as JS stated claimant was using a grinder when in fact he was using an air chisel and that it was not possible for him to get hurt as JS testified claimant had said. JS also testified she had been hired only for the four day shutdown and is not currently working for the employer. JS testified the work place was loud, but that she was certain she correctly understood claimant.

(JC) was employer's site superintendent and testified he had been notified of claimant's injury by radio. JC stated that he and the safety director went to the site of the accident, picked claimant up in a truck and took claimant to the office to interview him about the accident. JC also testified he interviewed all the workers in the vicinity of the accident site. Apparently JH was not interviewed and claimant disputes JC's testimony as to when the accident happened and whether a safety briefing had been given before the accident. Claimant testified no safety briefing had been given before the accident while JC testified a briefing was conducted both before the accident and after the accident. JC also testified that he had examined the column claimant was cleaning at the time of the alleged fall, that three sides of the column were clean and the fourth side was cleaned from the floor up to a height of about three feet. JC testified at length how the safety belt shock absorber is to work and that the claimant's shock absorber had never been activated. JC testified after the accident report was completed in the office, one of the secretaries took claimant to the doctor.

Claimant was first seen by (Dr. S) on (date of injury). In a report dated September 3rd, Dr. S stated claimant "had fallen and was complaining of back pain and had a bruise to his left cheek." Claimant was given medication and "advised not to return to work until I released him." Claimant apparently was next seen by (Dr. WS), an orthopedic surgeon on referral by claimant's attorney (apparently in another civil action) for an orthopedic consult. By report dated June 7th, Dr. WS recited the work and medical history, pertinent findings, and gave an impression of "[m]echanical low back derangement. Possible lumbar radiculopathy" and recommended further studies including an MRI. By a Texas Workers' Compensation Commission (Commission) requested medical examination order (MEO) dated July 20th, (Dr. CP) was appointed to determine if claimant "has a back injury, its

extent, and if it occurred approximately (date of injury)." Dr. CP in a report dated September 9th, recited claimant's work and medical history, physical and x-ray examination results which included a report of a CAT scan on May 11th "demonstrating mild disc bulge at the L5-S1 level, with a suggestion of a small central left lateral herniated nucleus pulposus." Dr. CP's impression was: "Degenerative disc lumbar spine with a superimposed traumatic event as the precipitating episode." Dr. CP certified MMI and impairment but, as those are not issues, they will not be discussed in this decision. Dr. CP in his discussion noted degenerative changes at several disc intervals but states: "This degenerative process is a consequence of age and physiologic deterioration . . . not the result of an injury. The injury may represent a superimposed traumatic event that allowed the onset of his symptoms." Claimant offered Dr. CP's report as Claimant's Exhibit 12. (Parenthetically we note that Dr. CP engages in a discussion of "impairment" and "disability" from a medical viewpoint which is completely contrary to the 1989 Act's definition of those terms.)

Apparently at the CCH on September 17, Dr. CP's report had not been clearly reproduced and the fax was not legible. The hearing officer left the record open so that the ombudsman could obtain a legible copy of Dr. CP's report. Both parties were to be given an opportunity to respond to the contents of the report. Carrier requested, and was granted, the right to direct additional questions to Dr. CP. The record is silent regarding whether carrier availed itself of that opportunity. Claimant apparently did respond to Dr. CP's more legible report (although that response is not in the record presented for our review) and, as the hearing officer notes, "included several questions to be propounded to [Dr. CP] . . . ." The hearing officer, in the statement of the case, concluded "it does not appear that [Dr. CP's] answers (to claimant's questions) would further illuminate the facts of this case." The hearing officer recited that the record was not held open in order to obtain Dr. CP's responses to those questions.

The hearing officer determined that claimant sustained an injury to his face when he was hit by a bolt on (date of injury), that claimant did not injure his low back falling off a ladder and that claimant's inability to obtain and retain employment was not the result of a compensable injury (the back). The hearing officer commented, in her discussion, that it was extremely difficult to believe that claimant would have been working on the fifth step of a stepladder when the physical evidence at the site of the alleged accident indicates that claimant could have removed the paint from the structural steel column while continuing to stand on the floor. The hearing officer also observed that claimant's initial concern was that his face was bleeding, a concern which seems far more likely (as stated by the hearing officer) if claimant's facial injury were the result of being struck by a flying bolt than the result of claimant having fallen onto a smooth surfaced pipe. Claimant appealed the hearing officer's determinations, taking issue with JS's, testimony, pointing out inconsistencies in JC, the site superintendent's testimony and stating that Dr. CP admitted that he was unable to "determine <u>when</u> my injury occurred without a <u>crystal ball</u> . . . ." Claimant alleges that the hearing officer erred in not admitting his receipt for the new boots he had been required to purchase and admitting a signed statement of a witness because it was not notarized. Claimant reiterated much of his testimony from the CCH, including an explanation of his "unnatural gait" and the impossibility of being struck in the face by a "bolt flying out of a pipe

hanger" with such force to knock his hat and face shield off.

At the outset, we would point out that while the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury, Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 410.165 of the 1989 Act provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility to be given to the evidence. A finder of fact may believe that a claimant has an injury, but disbelieve the claimant's testimony that the injury was received in the course and scope of employment. Johnson, *supra*. A claimant's testimony is that of an interested party and it only raises an issue of fact for the fact finder to determine. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer may believe all, part, or none of the testimony of any witness, and may believe one witness and disbelieve others. Burelsmith v. Liberty Mutual Insurance Company 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Claimant in his appeal emphasized contradictions in the evidence, such as JS's testimony which stated claimant was using a grinder when in fact it was an air chisel, that the work place was very noisy but still JS testified as to a conversation he had with her and with his brother-in-law, that JC testified he completed the accident report at 11:00 a.m. while in fact claimant's accident did not happen until 2:30 p.m. Claimant made these points before the hearing officer who was able to observe the witnesses and their demeanor and listen to their testimony. It is obvious that the hearing officer did not find claimant a very credible witness and that she did find JS and JC, together with unrefuted graphic evidence, very credible. Where there are conflicts and contradictions in the testimony, it is the duty of the finder of fact, in this case the hearing officer, to consider these conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escabera, 385 S.W.2d 477 (Tex. Civ. App.- San Antonio 1964, writ ref'd n.r.e.). Having claimant state a particular fact is so, does not preclude the hearing officer from finding to the contrary. Claimant challenges the credibility of JC but by statute (the 1989 Act) the hearing officer is the sole judge of the weight and credibility to be given the evidence.

Regarding specific allegations of error, claimant alleges, in effect, that the hearing officer abused her discretion in failing to keep the record open and allow the claimant to submit questions "to clarify [Dr. CP's] answers." First we would note that although Dr. CP was the Commission's MEO doctor it was the claimant who offered Dr. CP's report into evidence. The initial report was apparently illegible and therefore the hearing officer requested the ombudsman to obtain a more legible copy. Carrier asked for permission to submit clarifying questions. The record is not clear that carrier actually propounded any such questions or how, if at all, Dr. CP's report in the record differed from the original report. Claimant's response, and questions claimant propounded are not in the record. The hearing officer clearly considered claimant's response and ruled that claimant's additional questions would not "further illuminate the facts of this case." A hearing officer's decision should not be set aside except when arbitrary or an abuse of discretion. Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1966). Abuse of discretion has been found when one of the following

occurs: (1) the decision omits from consideration a factor the legislature wanted the agency to consider in the situation, (2) the decision included in its consideration an irrelevant factor, or (3) the decision reached a completely unreasonable result based on weighing only relevant factors. Stateside Convey Transports v. Railroad Commission of Texas, 753 S.W.2d 800 (Tex. App. - Austin 1988, no writ). We do not find that the hearing officer abused her discretion in this case by refusing to keep the record open in order to allow further unspecified questions to a doctor whose report was being offered by claimant.

Claimant also contends as error that the hearing officer allowed an un-notarized signed statement into evidence, noting it was "very convenient" for employer that the witness was not present at the hearing. We would note that even had the witness been present, the hearing officer may have found the statement admissible. Section 410.165(b) specifically provides that a hearing officer may accept a written statement signed by a witness. The 1989 Act does not require that the statement be sworn or notarized. Furthermore, it does not appear that the hearing officer gave great weight to the statement in that the hearing officer fails to make reference to the statement in her discussion or statement of the evidence.

Only because the carrier has commented on the existence of a letter from a state representative do we feel compelled to comment on it. That letter raises facts not in evidence, and not at issue in the CCH and appears to accept as incontrovertible fact claimant's testimony. The Appeals Panel, pursuant to Section 410.203(a), may only consider the record developed at the CCH. *See* Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. Consequently we will not consider information provided in that letter unless it was also in the record of the CCH.

In reviewing a case for sufficiency of the evidence, we will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App. - Texarkana 1989, no writ). The challenged findings and conclusions 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, 635 (Tex. 1986). Finding no reversible error and the decision supported by sufficient evidence, the decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge