APPEAL NO. 931165

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On November 19, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues to be resolved were:

1.Whether Claimant was injured in the course and scope of his employment with Employer on (date of injury).

2.If so, whether Claimant suffered any disability as the result of a compensable injury on (date of injury).

The hearing officer determined that the appellant, claimant herein, was not injured in the course and scope of his employment on (date of injury), and that he has not suffered a disability as the result of a compensable injury.

Claimant contends that the hearing officer "erred in not considering the testimony of . . . an eye witness," erred in not finding a disability, 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.

Claimant was employed as a painter/sandblaster by (employer), employer. Claimant testified that on (date of injury) (all dates are 1993 unless otherwise noted) he was on a scaffold or stage, sandblasting a large piece of equipment (a 990 backhoe), when the scaffold shifted and he fell 12 feet to the ground. Claimant said he fell on his back (there are some inconsistences whether it was flat on his back, on his low back or in a sitting position) and lay there for about 20 or 30 minutes until his brother (RG) helped him up. Claimant testified that he and RG then went to the equipment office and reported the fall and injury to (TP). Claimant testified that TP just laughed and told him to be careful. Claimant testified he thought the pain would go away so he continued to work until he was laid off on June 10th. Claimant stated he had put Ben-Gay on his back but finally called TP "about a week" after he was laid off to ask to be sent to a doctor. It is undisputed that claimant went to the employer's office on June 25th, spoke with Sarah Sharpe (Ms. SS), employer's human relations coordinator, and completed a written report of injury.

RG, claimant's brother, testified that he was employed as a laborer by the employer and was claimant's helper. RG testified that he was about 50 to 100 feet away (claimant said 50 yards) when the accident occurred, that he saw claimant when he was already in the air falling and that he rushed over to claimant. RG said that claimant was already getting up when he got to where claimant landed. RG stated that he and claimant then went to tell TP that claimant had fallen and hurt his back. RG testified that both he and

claimant continued to work until they were laid off.

TP testified he was employer's "warehouseman" and that he gave out equipment and tools. TP testified he first learned of a claimed injury when claimant called him on the telephone on the afternoon of June 24th and said he needed to see a doctor. TP specifically denied that claimant had come to him and reported an injury in May. TP testified that had claimant mentioned an injury or an accident he would have referred claimant to the safety director.

Ms. SS, employer's human relations coordinator testified about the employer's policy and procedures on reporting accidents. Although not entirely clear from the record, apparently TP, after the June 24th phone call from claimant, had referred claimant to the safety director and/or otherwise notified claimant to contact the personnel office. It is undisputed that claimant came to the employer's office on June 25th, reported the injury to Ms. SS, who testified that claimant had no trouble demonstrating how he was injured by bending, twisting and otherwise demonstrating how the injury occurred. According to Ms. SS, claimant at that time stated that there were no witnesses to the accident. Ms. SS testified claimant apparently had no trouble going down a flight of stairs, despite the availability of an elevator, and getting into a car. Ms. SS testified claimant and his brother, RG, were laid off because the work had slowed.

Claimant saw (Dr. W), the company doctor on June 25th. Dr. W, on an Initial Medical Report (TWCC-61) dated June 25th, reported a date of injury as "06/09/93," gave a diagnosis of "sacroilitis right," and indicated claimant could return to unlimited type work "06/25/93." In a narrative report, also dated June 25th, Dr. W recited the history, a "DOI: May of 1993," tests he conducted, x-ray examination and gave an assessment of "Compression injury to the lumbar spine, consistent with possible disc disease or sacroiliitis." Claimant was given a prescription for pain medications and scheduled for a follow up visit. By a Specific and Subsequent Medical Report (TWCC-64) dated July 13th, Dr. W notes claimant "continues to complain of pain w/radiation of pain into his (R) leg." Claimant was again released for limited work effective June 25th. Dr. W's treatment plan included obtaining an MRI scan. An MRI was apparently never done.

Carrier's position is that claimant's case is not credible in that had claimant fallen 12 feet as he maintains, he would have had immediate incapacity, but instead worked until he was laid off two weeks later and did not seek medical attention for a month after the alleged accident. Carrier points out that when the injury was reported to Ms. SS on June 25th, claimant said there were no witnesses and it was not until after the first benefit review conference (BRC) in August that claimant's brother, RG, was named as a witness.

The hearing officer found, as fact, that claimant had continued to work without complaint from May 25th, the date of the alleged injury, to June 10th, when he was laid off and that claimant first reported the alleged injury when he called TP on June 24th and asked employer to send him to a doctor. The hearing officer determined that claimant had not been injured in the course and scope of his employment on or about May 25th and that

consequently claimant had suffered no disability as the result of a compensable injury on May 25th.

Claimant appealed alleging that the "hearing officer erred in not considering the testimony of (RG), a co-employee, who testified as an eye witness . . . ." Very obviously claimant is incorrect in stating the hearing officer failed to consider RG's testimony in that the hearing officer, in the second paragraph of his discussion of the evidence, discussed and summarized RG's testimony. Our review of the testimony in the record indicates the hearing officer's summary to be a fair and accurate characterization of the testimony. Perhaps what claimant meant was that the hearing officer failed to accord greater weight to RG's (and claimant's) testimony and is in effect, challenging the hearing officer's decision on a sufficiency of the evidence basis.

In a workers' compensation case the hearing officer is the fact finder and Section 410.165(a) declares him (or her) to be the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. The hearing officer clearly considered RG's testimony as evidenced by his discussion, but just as clearly chose to disbelieve it. The hearing officer could have considered the fact that RG was claimant's brother, the disparity in the testimony how long claimant was on the ground and the fact that claimant neglected to list RG as a witness when he reported his injury to Ms. SS. Any inconsistencies and contradictions in the testimony and evidence are matters for the hearing officer, as the fact finder, to resolve. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer could choose to believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. .v English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer obviously placed greater credence on the testimony of TP rather than that of the claimant or his brother. The hearing officer saw and observed the demeanor of the witnesses, including claimant and RG. From our review of the record, including the documentary evidence, we do not find any basis on which to disturb the assessment of the hearing officer.

Regarding the issue of disability and the hearing officer's determination on that issue, we note that disability means the inability to obtain and retain employment "because of a compensable injury . . . ." Section 401.011(16). In that we are affirming the hearing officer's determination that claimant did not sustain a compensable injury, the claimant does not come within the definition of having disability and there is no basis to disturb the hearing officer's determinations.

In reviewing a hearing officer's decision based on factual sufficiency of the evidence, we will reverse such a decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). Where, as here, there is sufficient evidence to support the determinations there is no sound basis

to disturb the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 931095, decided January 5, 1994; In re King's Estate, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge