APPEAL NO. 93220

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on February 18, 1993, (hearing officer) presiding. The appellant, hereinafter carrier, appeals the hearing officer's determination that the claimant, who is the respondent in this case, suffered a compensable injury in the course and scope of his employment on (date of injury). The claimant filed no response.

DECISION

Finding some probative evidence to support the findings, conclusions, and decision of the hearing officer, we affirm.

The claimant, who resided in (city) at the time of the hearing, previously worked for (employer) in (city). He testified that his job involved fixing batteries from a forklift. On September 21, 1992, his supervisor, (Mr. Y), told him to paint a battery rack, which was similar to a scaffold. He said that while standing on a lower level or rung of the rack he slipped on something wet and fell backwards, hitting his arm and back on the concrete floor. No one else was present at the time the claimant fell. Claimant said he lay on the floor in pain for 10-15 minutes until someone from the marble factory next door came in, spotted him, and came over to see if he wanted help. The claimant responded affirmatively, and an ambulance was called. The claimant said the person, who worked at the factory next door, came to employer's shop periodically to borrow cigarettes, and he did not know that person's name. He specifically said he did not know whether the person was (Mr. N).

The claimant was taken by ambulance to Hospital. The history given in the admission report said the claimant fell approximately three feet off a scaffold, landing on his back. The examination revealed no evidence of trauma other than some abrasions to the extensor surface of his right arm. The assessment was low back strain and neck strain secondary to fall from height. He was prescribed medication and taken off work until a recheck on September 24th.

Mr. Y, employer's manager of the (city) facility, testified that on September 21st someone paged him, but when he walked back into the office, the claimant had already been taken away in an ambulance. He walked next door to the marble factory to find out what had happened; there, Mr. N told him he heard a thud and came over and found claimant lying on the floor, on his back with his arms open. At the hearing Mr. Y disputed that Mr. N could have heard a thud because of the dividing wall between the two businesses and noise from blower fans and transformers.

Mr. Y said he learned that Mr. N had changed his story on September 23rd, when the owner of the marble factory, (Mr. JN), came to talk to Mr. Y. The same day, Mr. N told Mr. Y that claimant had staged the accident and had asked him to call 911 for him. Mr. Y said he wrote out Mr. N's statement, which was a hearing exhibit. The unsworn statement

said, in pertinent part, "[t]he accident at hand w/[claimant] was a total set up and [Mr. N] was asked to call 911 after accident took place. [Claimant] claimed that he was unhappy with job and was going to fake an accident." Mr. Y signed the statement, which was also signed by Mr. N, Mr. JN, and P, one of employer's employees, as witnesses.

Sometime after he was released from the hospital, claimant said he went in to work to pick up his check. There he encountered (Mr. D), employer's district service supervisor, who originally had hired him. Claimant said Mr. D was angry, cursed at him, and said claimant knew Mr. D was getting ready to fire him because of claimant's daily production sheets which had been telecopied to Mr. D. Claimant also said Mr. D played a tape with an unidentified voice on it, and tried to get claimant to confess that he had staged his accident. The claimant said he told Mr. D that he hadn't staged anything. As claimant got up to leave, he said Mr. D followed him out the door and around the corner. Claimant said Mr. D threatened to call the police and to take claimant to the hospital; he said Mr. D was acting "like a madman" and he was afraid.

The claimant denied that prior to his accident he had had discussions with Mr. D about his job performance, and he said that to his knowledge his job was not in jeopardy. He also denied that he told anyone, including Mr. N, that he was going to stage an accident. The claimant said he had read Mr. N's affidavit, but indicated he did not really know him; he said Mr. N "normally come (sic) over to visit another employee and ask for cigarettes . . . and we just speak--you know, if that's the same guy, we just speak, and hi and bye."

Mr. D testified that he had called claimant the morning of the accident because claimant had not sent in his weekly time report which had been due the previous Friday. After he received the report, he said he called claimant back and told him "if he wasn't going to work, if we didn't get more out of him we'd find somebody who'd give us more."

After the accident, Mr. D said that he had had a discussion with Mr. JN and one of his employees about the possibility that claimant's accident had been faked, and he said he told Mr. JN "if it was a setup that we would prosecute as full as we could." Mr. D speculated at the hearing that Mr. N became aware of this, got scared, and then approached them. Mr. D stated as follows: "He came over and was afraid that he would be prosecuted for his part in the--in the whole thing. And he asked--he said, if I come forward with the truth, I want to make sure nobody's going to prosecute me . . ." Mr. D was not present when Mr. N's first statement was taken, but he said he and carrier's investigator went to Mr. N's house to take a second statement. He said Mr. N was still hesitant to give a statement because he wanted something saying no charges would be filed. Mr. D said he told him that "I can't answer for the state or anybody else, but I'm telling you that [employer] will not file any charges for your involvement in this." He gave Mr. N a written statement to this effect. Mr. D also said he paid Mr. N $5.00, which was the amount Mr. N would have earned if he had not taken off work to give the statement.

In the January 5, 1993 statement, which was signed and acknowledged by Mr. N, he stated in part, "[w]hen [claimant] came to me he just said call 911 and afterwards you know he said he was going to go in and lay down and fake like it was an accident or something like this." Mr. N said claimant told him, "I'll see what I can get out of it for you." He indicated he did not really know claimant's motives, since he had not known him very long. Mr. D testified that Mr. N was terminated from the marble factory shortly after he talked to employer about claimant's accident.

Mr. D said that on September 24th, when claimant came in to pick up his pay check, he talked to claimant about the accident and played part of the tape of Mr. N's statement. Mr. D said he did not use abusive language or accuse the claimant, but told him if they found out the claim was false they would prosecute him. He said he was not trying to intimidate claimant or get him to drop his claim; he stated that "I told him I wanted the truth, and if you need to go back to the hospital, I'll take you to the hospital." He said he followed claimant out of the building, where they could talk alone, but he said claimant would not tell him anything.

It was claimant's testimony that the accident happened when he slipped on something wet while standing on the bottom rung of the scaffold; that he had already painted the bottom rung but that he had not painted the top of that rung. The carrier introduced color photographs of the scaffold and surrounding area which were taken by Mr. D on September 24th. Mr. D and Mr. Y said the pictures showed that the top of the bottom rung was painted but did not have footprints or other marks of slippage on it. Claimant's notice of claim (Form TWCC-41) gives the cause of accident as "Sliped (sic) and fell on wet paint on Battery R." Mr. Y testified that the area had not been altered in any way between the time of the accident and the time the pictures were taken.

The claimant said that when he returned to Dallas he began treating with (Dr. L). That doctor's initial medical report, dated September 29, 1992, gave a history stating the claimant was injured at work when he slipped from a rail that was 13 feet high. Dr. L x-rayed the claimant; noted symptoms of constant sharp low back pain, left leg numbness, neck pain, neck stiffness, and mild headaches; and was treating the patient with manual manipulations, muscle stimulation, hot pack, and intersegmental traction. Dr. L recommended a CT scan, but the record does not reflect whether one was performed.

The claimant in a workers' compensation case has the burden of proving that he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer in this case determined the claimant had met that burden, stating that the carrier's case was based largely upon the unsworn statement of Mr. N. The hearing officer, as sole judge of the relevance and materiality of the evidence and of its weight and credibility, Article 8308-

6.34(e), was entitled to reconcile the diametrically conflicting evidence in the claimant's favor, and there is evidence contained in claimant's testimony and, to some extent, in the medical records, to support that determination. Where the evidence is in such conflict, the finder of fact must weigh the evidence, determine what credence should be given to the whole, or any part, of the testimony of each witness, and resolve conflicts and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ). Although we might very well have drawn different inferences from the evidence than those drawn by the hearing officer and have found them to be equally supported by the evidence this is not, in and of itself, a sound basis to reverse a decision of the fact finder. *See* Texas Workers' Compensation Commission Appeal No. 92113, decided May 7, 1992. While there was considerable evidence contrary to the determination of the hearing officer, we do not believe it is of such great weight or preponderance as to mandate reversal. *See* In re Kings Estate, 244 S.W.2d 660 (Tex. 1951).

The decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge