APPEAL NO. 93260

On March 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues considered were whether the claimant, who is the appellant, sustained an injury to his back on (date of injury), in the course and scope of his employment with (the employer), and whether he gave notice within thirty days of injury. The hearing officer determined that notice of the alleged injury was timely given within thirty days (on date), but that the claimant had not sustained an injury in the course and scope of employment.

The claimant appeals the decision with regard to the finding that an accident did not occur, arguing new evidence not presented at the hearing, in which he contends that the employer, Mr. C, perjured himself. The matters about which untruthful testimony is alleged to have occurred concern statements that claimant contends the employer made during the hearing, when Mr. C purportedly stated that he had not spoken to anyone about the (date of injury) injury, and the "essential detail" about whether Mr. C ever permits anyone to unload things from the van other than himself. The claimant argues that the apartment manager where work is done is a sister of Mr. C, and impeded interviews with witnesses who were apartment complex employees by indicating they would be fired if claimant's attorney contacted them. Specific allegations of error in the decision itself are not asserted. The carrier responds that the appeal does not conform to the requirements of the Texas Workers' Compensation Rules governing appeals, specifically those found in Chapter 143.1 *et seq*., that the appeal is untimely, and that the decision that no injury occurred as claimed is supported by the record.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The appeal was timely filed within fifteen days after receipt by the claimant. *See* Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.41(a); Texas W.C. Comm'n Rules, 28 TEXAS ADMIN. CODE §§ 102.5(h) and 143.3 (Rules 102.5(h) and 143.3)

FACTS

The claimant was employed doing lawn work for the employer, Mr. C, at an apartment complex. The claimant stated that he had initially claimed his injury occurred on (date), but amended his claim after checking his pay stubs and verifying that it occurred on (date of injury), a Monday. The claimant said that it was part of his job when he arrived every morning at 8:00 to unload the van of the tools that would be needed that day. He stated that because this was a Monday, the lawn would be mowed. Consequently, he unloaded the push lawnmower, a 9-inch weed eater, a blower, a rake, and a trash can. He stated that it took him about 20 minutes to unload the van. (Mr. C), the employer, instructed him to proceed to finish what had already been started with the weed eater. Mr. C then left to rent a "transit' in order to perform surveying work that day. The claimant contended that he did

not return until after lunch. That afternoon, the transit was taken out and surveying was done until six o'clock.

The claimant first alleged that he hurt his back while lifting the push lawnmower out of the van, although in later testimony expanded on this to attribute injury to his activities working with the weed eater as well. He stated that he immediately felt a strain in the lower back on the right side, although he did not feel bad pain. He worked the rest of the day, but the next day stayed home due to pain. He did not work the next day either, and stated that he reported his injury to Mr. C that day, after Mr. C returned his message to call. Claimant stated that he worked until the 13th, when he took the day off to move, and then until October 20th, when he went to the chiropractor and was taken off work. The claimant stated that he talked to Mr. C from the chiropractor's office on the 20th and told him he had been injured at work. (Mr. C agreed with this, contending it was the first he heard of a work-related injury). The nature of the back injury is not in the record. Claimant testified that he was told by a clinic where he sought additional treatment that they could find nothing on the x-ray and therefore would refer him to a specialist.

The claimant denied that he sustained any injury while moving. He stated that he was able to perform his job because when he was active and moving around his back did not hurt so much.

Mr. C was called as a witness by the claimant. Mr. C identified claimant as his only employee on (date of injury). He stated that it was he, not his employee, who customarily unloaded tools and supplies from the van. He agreed that on occasion, he might send someone else[1] to retrieve tools from the van. Mr. C stated that on the morning of (date of injury), he unloaded the weed eater from the van and instructed claimant to use it. He stated that he did not unload the push lawnmower, nor did claimant. Mr. C drove in the van to a rental agency, at around 8:15 a.m., to pick up equipment to use in survey activities. A rental receipt shows that he picked up the transit at 8:50 a.m. Mr. C stated he immediately returned and worked with claimant the rest of the day in these actions. He stated that claimant helped him unload the transit from the van, and then carried around a board to assist. Mr. C unequivocally testified that the push mower was not unloaded that day from the van, and remained in the van while he drove to the rental company.

Mr. C said he had conversations with Mr. JC, who he indicated came to him and was kind of "angry-like." Mr. C then later stated that he had a conversation with Mr. JC, "not about the injury, but about something he was told." The details of any conversation were not described. There is not, on the record, a direct and clear assertion by Mr. C that he had not spoken to anyone about claimant's injury. Mr. C was asked, after objection to initially

[1] Testimony of the claimant and Mr. C alluded to working with employees of the apartment complex, including a (Mr. JC). This was not made entirely clear, however, for the date of the alleged injury.

confusing questions, if Mr. C had even been told anything about the (date of injury) injury by anyone. Mr. C responded that claimant was his only employee, and that claimant was the only one who ever conveyed information to him about "his condition."

Mr. C stated that when he was informed by claimant on October 20th that he had been injured, that claimant was unable to supply any specifics about the injury other than say he had been hurt while unloading the lawnmower. Mr. C stated that he did 95% of all mowing work.

In final argument, claimant's attorney stated that the apartment manager's relationship to Mr. C would put her in a position to retaliate against her employees, and further generally argued that he was not allowed to speak to employees of the apartment complex, which had impeded his investigation.

POINTS OF APPEAL

We agree that the appeal does not specifically assert how the hearing officer's decision was erroneous. We have generally construed such appeals as raising a point of appeal that the decision was against the great weight and preponderance of the evidence, albeit usually for "pro se" claimants. *See* Texas Workers' Compensation Commission Appeal No. 92157, decided June 1, 1992. Consequently, the appeal will not be disregarded as carrier responds that it should. We will not, however, undertake a wholesale review of the record searching for potential errors on evidentiary rulings, framing of the issues, or procedural matters when points of error on those matters are not expressly asserted by counsel. Article 8308-6.41(b); 6.42(c); 6.62(b). As we see it, the appeal raises only the contentions that Mr. C committed perjury, and that the decision with regard to occurrence of an injury was against the great weight and preponderance of the evidence. Recitation of facts in the appeal that are not part of the record will not be considered. Article 8038-6.42(a).

Regarding the issue that Mr. C committed perjury, such that the case should be remanded to rectify this, we would note that Mr. C did not assert (as is claimed) that no one else ever unloaded his van. On the contrary, he agreed that other persons had done so, although he characterized this as an infrequent occurrence. It was up to the hearing officer to weigh this against claimant's assertion that it was part of his normal tasks to unload the van.

We also do not find that Mr. C made a direct denial contending that he had not spoken to anyone about the injury, as the appeal asserts. The line of questions on this topic was initially confusing, and objected to by the carrier. Mr. C's testimony indicated conversations about the injury with claimant, as well as claimant's chiropractor, supporting the hearing officer's determination that timely notice was given. Mr. C stated he talked to Mr. JC,

although not about "the injury". The record indicates that some answers to claimant's questions may have been nonresponsive, but Mr. C was not asked to specify the substance of the conversation with Mr. JC or what he meant by "the injury" in answering questions, so as to rule out misunderstanding or confusion. Even assuming that Mr. C had numerous post-(date of injury) conversations with a number of people, testimony concerning who or what was discussed with others about the injury would appear to go mainly to the issue of notice, rather than whether an injury occurred on (date of injury). The notice issue was decided in favor of the claimant.

Matters of credibility of witnesses, and the relevance, weight, and materiality of evidence, are for assessment by the hearing officer. Article 8308-6.34(e). His decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). A trier of fact is not required to accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole. In this case, the evidence sufficiently supports the hearing officer's determination.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Thomas A. Knapp
Appeals Judge