APPEAL NO. 93266

On March 5, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue at the hearing was whether the appellant (claimant herein) was injured in the course and scope of his employment. The hearing officer determined that the claimant was not injured in the course and scope of his employment and denied him benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The claimant disputes the hearing officer's decision. The respondent (carrier herein) responds that the decision is supported by the evidence and requests that it be affirmed.

DECISION

The decision of the hearing officer is affirmed.

On (date of injury), the claimant was working as an auto mechanic in the automotive shop of his employer. On that day, he said he felt pain and soreness in his back and hip when he unloaded truck tires from a truck and stacked them. He said he unloaded about 75 tires by himself and was assisted by a coworker, (IR), with the last 15 tires. He said he continued to work for the next two weeks with a slight limp and that his pain gradually got worse. He said he did not report having pain to anyone until (date), because he thought he was just sore and that his soreness would go away. On (date), he said he reported to his supervisor, (JG), that he had back and hip pain which started two weeks before when he was unloading tires at work, and requested to fill out an accident report and to see a doctor. He said that JG told him to talk to the people in the personnel office, which he did. He said there was confusion and a misunderstanding at the personnel office because the employer had not kept a record of a 1989 injury. The claimant said that on October 1st he mentioned to a coworker, (JE), that he was in pain and that he again reported to JG that he was in pain and asked to see a doctor, but JG did not send him to a doctor. The claimant said he was allowed to go home early on October 1st, that that was the last day he worked for the employer because of his pain, and that he called JG on October 2nd and 3rd and again requested to see a doctor. The claimant further testified that when he was not sent to a doctor by the employer on October 3rd, he went to a hospital emergency center. On October 4, 1991, the claimant filed a written accident report with his employer in which he stated that on (date) he helped unload a shipment of tires, that he felt sore the next day, and that as the days went by his pain got worse. The claimant was subsequently seen by several doctors.

In a signed, handwritten statement IR stated that he helped the claimant finish unloading the tires, that the claimant did not tell him about an injury, and that he did not "notice any visible injury to him." JE stated in a sworn statement that he worked with the claimant in the automotive shop and that sometime in September the claimant told him that he had hurt himself and was going to a doctor. JE said the claimant did not say how or when he had been hurt. JE also said that he never noticed the claimant limping at work.

In a sworn statement JG, the claimant's supervisor, said that sometime in (date of injury)991 the claimant was limping at work and the claimant told him that he had injured his leg two years before and had an ongoing problem with his leg. JG said he told the claimant that he would check the employer's files to find out if an injury report of that injury was on file to see if he could get the claimant "covered." JG said he checked the employer's files, found no report of a leg injury two years before, and told the claimant that no injury report was on file with the employer. JG said the claimant missed work the next day, and then the following day the claimant told him that he had recently been injured at work unloading tires. In an unsigned transcription of a recorded statement, Janice Rouse (JR), the employer's personnel coordinator, said that around September 30th she was told by JG that the claimant was complaining about pain from a leg injury that had occurred two years earlier, but that she found no report of that injury. She also said that at one time, the claimant said his injury occurred on (date of injury).

Hospital records of October 3, 1991, revealed that the claimant complained of right hip pain and gave a history of having soreness in his hip over the past three months which worsened over the past two weeks. The claimant told the admitting doctor that his job required heavy lifting, but the initial hospital report does not recite any specific incident at work as a cause of the pain. X-rays of the claimant's pelvis and right hip were normal. A bone scan of the right hip was recommended. Hospital records for a follow-up visit on October 15, 1991, recite that the claimant gave a history of having first noticed his hip pain on (date of injury), during a long day at work lifting tires. In a letter dated October 22, 1991, (Dr. H) wrote that a bone scan of the hips revealed increased signals in "the area of interest," but that plain films revealed no specific pathology. Dr. H said that the claimant's symptoms were most consistent with chronic muscle strain and expected a full recovery in one to two months. A hospital record of October 29, 1991, noted that the claimant had right hip pain picking up tires on (date of injury), but then noted "no specific injury."

In a report dated February 11, 1992, (Dr. A), who examined the claimant at the request of the carrier, stated that the bone scan that the claimant underwent in October 1991 showed "increased activity in the hip area." Dr. A recommended magnetic resonance imaging scans of the hips and lumbar spine. In an addendum to his report, Dr. A stated that MRI scans of the hips and lumbar spine were "entirely normal," and recommended that the claimant undergo a functional capacity evaluation test (FCE). The report on the results of the FCE stated that the claimant gave "submaximal effort" during the evaluation process. On April 22, 1992, Dr. A recommended that the claimant undergo an awake diagnostic discogram. The claimant said that the carrier has refused to pay for that test. On May 1, 1992, Dr. A diagnosed the claimant as having low back syndrome and "pain in joint, pelvic & thigh region." In a report dated (date of injury)0, 1992, (Dr. C) set forth the results of a physical examination of the claimant, reviewed the claimant's test results, including MRI scans and an EMG, and opined that the claimant "probably has degenerative disc disease." On October 6, 1992, Dr. C wrote that the claimant's back pain is probably due to

degenerative disc disease. Dr. C referred the claimant to (Dr. V) who diagnosed the claimant's condition as "chronic sprain, lower lumbar spine."

The issue to be decided by the hearing officer was whether the claimant was injured in the course and scope of his employment. The hearing officer found that on (date of injury), the claimant stacked tires for the employer, but that he did not sustain an injury in that activity. The hearing officer further found that the claimant had been diagnosed as having degenerative back disease and that the disease was not the result of, nor was it exacerbated by, the claimant's act of stacking tires for the employer on (date of injury). The hearing officer concluded that the claimant failed to establish by a preponderance of the evidence that he sustained an injury while in the course and scope of his employment.

A "compensable injury" means an injury that arises out of and in the course and scope of employment for which compensation is payable under the 1989 Act. Article 8308-1.03(10). The burden is on the claimant to establish that the injury occurred while he was engaged in or about the furtherance of his employer's business and that the injury was of a kind and character that had to do with and originated in the employer's business. Director, State Employees Workers' Compensation Division v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ). The question of whether an injury was sustained in the course and scope of employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ). Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e) and (g). As an interested witness, the claimant's testimony did no more than raise a fact issue to be decided by the hearing officer. Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991. The hearing officer is privileged to believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

In the instant case there were inconsistencies in the evidence presented in support of the claimant's claim. For example, the claimant testified that his hip and back pain began on (date of injury), at work; however, the record of his initial visit to the hospital on October 3rd recited that the claimant gave a history of hip pain for three months. There were also conflicts between the testimony of the claimant and the carrier's witnesses. For example, the claimant testified that he initially reported to his supervisor that he had pain at work on (date of injury); however, the supervisor indicated that the claimant initially reported to him that the claimant's leg pain stemmed from a two year old injury and that the claimant changed his story to a recent incident only after being told that the employer had no record of the prior injury. There were also conflicts in the medical evidence. Dr. C diagnosed degenerative disc disease, whereas Dr. V diagnosed a chronic sprain of the lower lumber spine. No doctor diagnosed an acute injury to the back or hip nor opined as to a work-related aggravation of a preexisting condition. X-rays and MRI scans were reported to be

normal. Only a bone scan revealed "increased activity" in the hip. When presented with conflicting evidence, as in this case, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's decision that the claimant was not injured in the course and scope of his employment and that her decision is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ).

On appeal, the claimant asserts that he was "unfairly judged" by the hearing officer, that the hearing officer did not carefully review the medical evidence, that the medical reports prove he was injured at work, that the written statements introduced into evidence by the carrier contain "false allegations" and should have been excluded from the evidence, that he was denied the right to report his injury and receive medical treatment, and that the hearing officer "judges his personality unfairly."

Upon review of the record in this case, we find no basis for disturbing the decision of the hearing officer. The hearing record demonstrates that the hearing officer conducted a fair and impartial hearing, and her decision reflects that she considered the evidence presented at the hearing in reaching her decision. The hearing officer had the responsibility of resolving the conflicts and inconsistencies in the evidence presented; she was not bound to accept the testimony of the claimant at face value. The hearing officer may accept some parts of a witness' testimony and reject other parts where the testimony is inconsistent, contradicted, contrary to established physical facts, or the manner and demeanor of the witness creates doubt of its truthfulness. Aetna Insurance Company v. English, 204 S.W.2d 805 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer heard the claimant's testimony that he has severe pain and observed in her decision that he did not appear to be in pain. She surmised that the claimant must have taken pain medication prescribed by his doctors or that he was extraordinarily stoic. She then stated that the claimant did not seem to be under the influence of any medication which rendered his testimony incoherent. While we think such statements were ill-advised, they can fairly be read to convey only physical observations of the trier of fact, and do not, as asserted by the claimant, necessarily compel a conclusion of unfairness in the decision-making process. The medical records contained conflicting histories of the onset of the claimant's alleged injury. The hearing officer resolves such conflicts. We also observe that it has been held that a doctor's recitation of the history of injury as reported to him by the claimant, although admissible to show the basis of the doctor's opinion as to the cause of the claimant's problems, is generally not considered competent evidence that the injury in fact occurred on the date alleged by the claimant. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The claimant did not object to the

written statements introduced into evidence by the carrier. Evidence which is admitted without objection cannot ordinarily be complained of on appeal. *See* Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.). In any event, the weight to be given to those statements was for the hearing officer to determine.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge