APPEAL NO. 93291

On March 11, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, who is the appellant, had not sustained an injury on (date of injury), in the course and scope of his employment with (employer)., doing business as (the employer).

The claimant has appealed, arguing that the hearing officer has misinterpreted body shop records upon which he apparently based his conclusion that claimant did not perform the work he stated on the date of injury. The claimant points out that the records in question establish that he did perform the work he stated. The carrier responds that the hearing officer, as judge of credibility, chose to believe the testimony of the dispatcher over that of claimant, and asks that the decision be upheld.

DECISION

After reviewing the record, we affirm the determination of the hearing officer, finding no reversible error.

I.

The claimant stated that he was a body work mechanic for the employer, and at the time of his injury had worked about six weeks. He stated that around 11:00 a.m. on (date of injury), as he was working on straightening a vehicle on a frame rack of the employers' shop, he slipped on a film of hydraulic fluid that had been caused by a leak. He stated that the particular frame machine, referred to in the record as the "Blackhawk" machine, leaked hydraulic fluid regularly, even though new, and was always having to be repaired. He stated that hydraulic fluid was clear, and would not be allowed to puddle, but that cleaning it up would still leave a film. He said he was holding tools, and slipped but did not fall to the ground. He was able to catch himself, although he twisted his knees, and worked the rest of the day with what he believed was a pulled muscle.

The claimant stated at least twice that he was unable to recall the type of vehicle he was working on. He indicated that while he thought it may have been a Jeep, he was not sure. The claimant agreed that he did not tell anyone about his injury that day.

Claimant stated that he was out the next day with swollen knees, and could hardly walk. He stated that his wife called in to report his absence. Claimant stated he went to work the following day, and went to see (Mr. H), his supervisor, and told him of his injuries. Claimant said he also told Mr. H about other injuries he had sustained the month of June, specifically an abscess on his arm and an allergic rash on his hands. (Claimant said he was not asserting a claim for these injuries at this time because they had resolved and he was seeking a adjudication of only his knee injuries). Mr. H's reported response was that he was terminated. The claimant filed a claim for compensation with the Texas Workers' Compensation Commission (Commission) field office on June 29, 1992, in which injuries

were claimed to hands, arm, knees and feet.

The Claimant said he went to Clinic for treatment that next week, and that the clinic called his employer. The claimant stated that he later had his abscess treated in the hospital emergency room and his knees were examined that same day. A bill from County Hospital District verifies that claimant was treated on June 30, 1992, and had knee x-rays taken; the diagnosis or results of the x-rays are not indicated, however. He sought treatment for his knees from (Dr. C), an associate professor of orthopaedics at the University of Center, on August 4, 1991. At that time, Dr. C noted that his x-rays were normal. It was his impression, however, that claimant might have a torn medial meniscus in the left knee, which he stated would need an MRI to confirm. On August 25, 1992, Dr. C indicated that the MRI confirmed a meniscal tear, and surgery was recommended. However, claimant did not see Dr. C to discuss this until December 3, 1992, and had surgery in mid-January 1993.

The claimant introduced two invoices from Mueller Hydraulic Service as support for his contention that work was performed on the frame machine. These invoices were dated June 23 and June 26, 1992. Claimant said that a receipt showing payment to him for auto body work dated August 31, 1992, represented a project he had agreed to do prior to his injury. He said that such a project would only take three or four days in a shop, but indicated it had taken him longer because he could only work for two hours a day because of pain.

Mr. H, who had been terminated from the employer by the date of the hearing, testified that he had been the body shop manager in June 1992. He stated that claimant was terminated on June 19, 1992 for excessive unexcused absences. He stated that claimant missed the prior two days of work, the 17th and 18th, and that no one called to report the absence. Mr. H said that when claimant came in to the shop on the 19th, he did not appear dressed for work, and Mr. H said that claimant probably came to him because he had been warned by him that the next unexcused absence would result in termination. Claimant reportedly told Mr. H he felt he ought to get out of body shop work because it was stressful and he needed to get his mind clear. Mr. H said that he then told claimant "if you have a problem, you need to go see a doctor," but said this was in relation to claimant's assertion that he needed to get his mind straightened out.

When asked if there was a leaking problem with the Blackhawk machine, Mr. H responded, "I don't think so." He further stated that he did not know for sure, but would have to check the repair records of the servicing company to say. When he reviewed the two repair invoices, he agreed that an item labelled OTC-PA6 was a pump that could be related to the Blackhawk frame machine. He indicated that this invoice item could have, or could not have, related to leaking hydraulic fluid.

Mr. H indicated that after claimant was terminated, he was contacted by a Medical

Clinic around June 25th or 26th because claimant had sought treatment for a purported burn on his arm. Mr. H said that claimant contacted him this day to get a workers' compensation claim form, and that in July Mr. H referred claimant to the company doctor. He first heard about claimant's alleged knee injury when he received a registered letter from the claimant, and through phone calls.

(Mr. P) stated that he was the parts and service director. Mr. P said that the receipts in question were the only two repair receipts for June 1992 from the hydraulic service. He said that the "OTC" item represented a repair to a pump for an air leak on an air hose that went into the pump. He stated that the Blackhawk frame machine was only a year old and was still under warranty.

(Mr. T) testified he was the dispatcher for employer who would be in charge of handing out repair orders. He testified about the way that time is kept and accounted by the employer, as reflected on documents put into evidence. Mr. T stated that actual hours were not logged, but that timekeeping was done by "flag time," the allotted number of hours that the insurance company indicated a certain task would be allowed. Some of Mr. T's testimony was ambiguous. On one hand, he indicated that flag time would be documented on the date that the task was actually performed. On the other hand, and in cross-examination, he stated that flag time would be posted on the date that the project was completed, which could be later than the date of actual performance. He stated that he himself logged in flag time upon the date the project was completed, but that the other person in charge of accepting flag time, CR logged in flag time when the task was performed. It was Mr. R and not Mr. T, who accepted claimant's flag time record for the week the injury was alleged to have occurred.

At this point, Mr. P recalled himself and stated that he wanted to make clear that the date of flagging was when the job was finished.

The records in evidence indicate that claimant was credited with three hours of flag time on (date of injury). Framing was described as the first step in body work. Mr. T surmised that, because there were only three hours logged, that the service performed on this vehicle (a Honda) was body work and not framing. He pointed out that claimant appeared to have been credited with hours relating to framing on this same vehicle on June 13, 1992. An underlying repair order for this Honda does indicate that the framing task (described in these terms) that claimant was assigned to do would total 6.7 hours. Mr. T agreed that claimant worked a full day on June 16th and surmised that claimant, during the remaining hours of that day, could have been "moping around" or doing work on another vehicle.

In fact, claimant's records show that three entries for three vehicles are listed for June 17th; the flag times indicated are 8.7 hours (which underlying records indicate was another

Honda), 11.5 hours (a Mazda), and 6.0 hours (an Eagle). Mr. T asserted that all these tasks would have been performed on that day, and that although the total was greater than eight hours, this was attributable to insurance approved "flag" hours rather than actual hours taken, which could vary and indeed be less than the approved hours. An entry for June 19th, the day of termination according to Mr. H, shows three hours for work on a Jeep.

Mr. T stated that he had compared all of claimant's flag time to underlying repair orders and concluded that claimant did not do framing work the week of the injury. He stated that claimant came in on the afternoon of the 19th and told him he had burned his arm. Mr. T said he knew at this time, from a time card on his desk, that claimant was terminated, and told him he would have to speak to Mr. H about it because he was terminated.

The secretary for the employer, (Ms. S), who did the workers' compensation paperwork, affirmed that she was contacted by the medical clinic about a burn injury, but that nothing was mentioned about any knee injury.

Claimant did not testify in rebuttal. Although the claimant asserts on appeal that hours shown for the days after June 16th reflect some framing work done the day before, there was no testimony in the record specifically about this other than Mr. T's conclusion from his inspection of the records that no framing was performed by claimant.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.34(e) (Vernon Supp. 1993) (1989 Act). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The 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 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 was conflicting evidence in several points, as well as corroboration of claimant's testimony on some points. Nevertheless, the hearing officer evidently concluded that the knee injury did not happen on the job.

There is sufficient evidence to support the hearing officer's decision that no injury

occurred, and it is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge