APPEAL NO. 93641

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on June 30, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not injure his back or leg while in the course and scope of his employment, did not sustain a compensable injury and does not have disability. Claimant disagrees with one of the hearing officer's findings of fact and several of his conclusions of law, argues that claimant has met all requirements for giving notice of his injury (a matter not in issue), urges that there was no evidence presented that an incident involving the claimant did not occur or that he was injured on another job and states that the evidence is insufficient to support the decision of the hearing officer. Respondent (carrier) argues that the evidence presented at the contested case hearing amply supports the Decision and Order.

DECISION

Determining that the evidence of record is sufficient to support the findings and conclusions of the hearing officer, and that they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The credibility of the claimant was the key factor in this case, and it is apparent the hearing officer determined that matter against the claimant. Of course, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). Where there are inconsistencies in the testimony and conflicts in the evidence, it is for the hearing officer, as the fact finder, to resolve such matters and determine what the fact are in the case. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Where there is sufficient evidence to support his determinations, as there is here, and the determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, there is no sound basis to disturb his decision. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The claimant testified he was injured when he jumped out of the way of a backing forklift some two to three hours after he started his first day on the job. (He was employed by a temporary employment agency and placed at this particular job that same day.) His shift started at 4:00 p.m. He asserted that he twisted when he jumped and that he was carrying a bucket of chlorine tablets. Although he states there were witnesses who yelled at him causing him to jump out of the way, he states the driver of the forklift did not observe the incident and that he can not describe any of the people who he says were present. He did not report any injury to anyone and he continued working. His testimony was not entirely clear but he apparently did not feel it was anything serious and he did not feel pain at the time but only felt "strange" and "it didn't feel like it used to feel." He indicated that he did not have pain prior to the incident and had not had any back pain since he had back

surgery several years earlier. He stated that it pained him that night after he got home and he slept on the floor. He said the next day he was going to go back to work but when he got there in the afternoon he just did not feel right and decided to tell someone he wanted to see a doctor. He claims he told "some man" (not further identified) near the time clock that he wanted to see a doctor and was told to contact his temporary employment agency employer.

He contends he contacted the employment service that same day and was given authorization to see their doctor which he did several days later. He was diagnosed as having muscle spasms, was taken off work for three days, and was told to return which he did a week later. Not being satisfied with this doctor, he later went to a doctor recommended by his attorney. This doctor's reports note a history of lumbar discectomy in 1988, list his impression as "lumbar radiculopathy," and placed him on a physical therapy program.

The carrier called the plant supervisor as a witness and he testified that he gave the claimant orientation on the one day the claimant worked and instructed him on protective gear and other safety matters. He stated he was there the whole shift and was unaware of any incident like that described by the claimant occurring that day, that no one reported any incident or injury to him and that no other employee he talked to was aware of the incident or injury to the claimant. He flatly contradicted the claimant's testimony concerning the claimant's returning to the plant the day following the incident and testified that the claimant informed him before he left work on the day of the alleged incident that he, the claimant, would not be returning the next day as he had another job. The plant supervisor stated because of this he checked in the claimant's protective gear and noted the matter on the claimant's time cards. The time card was admitted into evidence with a notation stating "assignment terminated, had another job." He did not see the claimant at any time on the day following the alleged incident and does not know of anyone else who saw or talked to him.

With the evidence in this posture, the hearing officer determined in Finding of Fact No. 9, that "[c]laimant did not injure his back or leg while working as a general laborer at the [plant location] on March 26, 1992." While the claimant does not attack this specific finding in his request for review, the thrust of the request is to the effect that a compensable injury had been sufficiently established. As we stated above, we find there is sufficient evidence to support the determinations of the hearing officer and that his findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.

Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge