APPEAL NO. 93717

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. 401.001, *et seq.* (1989 Act). On July 12, 1993, a contested case hearing (CCH) was begun in (city), Texas, with (hearing officer) presiding. The hearing was recessed, reconvened and concluded on July 28, 1993. The issues presented and agreed upon were: "Was CLAIMANT injured in the course and scope of his employment? If so, did he give his employer timely notice?" The hearing officer determined that claimant was not injured in the course and scope of his employment and that he did not report any injury to his employer within 30 days of the alleged injury date.

Appellant, claimant herein, contends that the hearing officer erred in finding that claimant was not injured in the course and scope of his employment, and that he did not give notice within 30 days, and requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The evidence set out in the hearing officer's Statement of Evidence is a fair and accurate statement of the case and, accordingly, we adopt it for purposes of this decision. At the outset, we note that this decision turns entirely on the credibility to be given to the various testimony and evidence, in that the parties' positions are totally in opposition to each other. The undisputed testimony is that claimant was employed by Interim Services, employer herein, a concern which provides temporary employees to various businesses, including (employer) herein, a concern that manufactures sprinkler parts. Claimant had been placed with three other businesses but had problems with absenteeism and insubordination with those businesses. Claimant was then placed with the Company to check irrigation equipment parts and pack them in boxes during the third (11:00 p.m. to 7:00 a.m.) shift.

Claimant testified that on (date of injury), at approximately 2:00 a.m., while putting parts in a box he "turned around and could not move." He testified that (MB), the acting lead person, who was in front of him, saw he could not move and told him to rest a few minutes and "not to worry." Claimant testified that he finished his shift that night and returned to work the next evening. Claimant then states he called the Company and told them he "was sick" and could not work. Claimant states when he went back "after Thanksgiving" he was told he had been terminated. Claimant states he went to MB and she told him not to worry, she would tell them he had been injured. Claimant testified that "about two weeks later" (subsequently determined to be (date)) he went to employer's office and spoke with (Ms. W) and told Ms. W he had hurt his back. Claimant was accompanied by several friends when he went to employer's office. Two friends, (VC) and (EL) accompanied claimant into the reception area and testified regarding portions of claimant's conversation with Ms. W that they allegedly overheard. Claimant testified, and is supported

by his two friends VC and EL, that when he told Ms. W he had hurt his back Ms. W stated he had not, "only wanted easy money" and said it was "b---s---." Claimant further testified that (Ms. V) was present and told him "to go to the hospital if he was hurt because they were not going to pay." Claimant also testified he was told he should have reported the accident the next day. Claimant stated he first sought medical care when he went to the hospital emergency room (ER) on (date), where he saw (Dr. VN) for complaints of back pain. Claimant states he attended two therapy sessions before his attorney referred him to n(Dr. N) who diagnosed claimant as having a "lumbosacral strain."

MB, the Company's acting lead person on claimant's shift on (date), testified through a deposition and denied seeing claimant get injured, denied that claimant told her he was injured and denied receiving notice of an injury. (MP), the Company's regular lead person, denied knowledge or notice of claimant's injury. (CD), the Company's shift supervisor for claimant's shift, testified by deposition and denied any knowledge of claimant's alleged injury and testified about complaints he had received from MP about claimant's job performance. Ms. W, employer's customer service supervisor, testified regarding claimant's past job performances and his placement with the Company. Ms. W denies that she, or employer, received notice of injury from claimant or the Company. According to Ms. W's testimony, claimant came to employer's office on December 4th, stating he wanted his shift changed. Ms. W testified she was unaware at that time that claimant had been terminated by the Company. Ms. W states she told claimant he could not change his shift and this was his last chance. Ms. W emphatically denies that claimant told her of any injury he received while working for the Company. Ms. W states she gave claimant his pay check and denies using foul language during the meeting. Ms. W states Ms. V was not present during her meeting and conversation with claimant. Ms. V also testified that she was not present during the conversation between claimant and Ms. W. Ms. W further testified that later, on December 4th, she heard from the Company that claimant was being terminated for absenteeism. Ms. W testified she first learned of claimant's alleged injury on (date), when she received a call from a lady who refused to identify herself (but was later determined to be an employee of claimant's attorney's law firm) inquiring about employer's workers' compensation coverage. After receiving the call from the law firm, according to Ms. V's testimony, it was verified that no report of injury had been made by claimant to anyone; nonetheless, Employer's First Report of Injury or Illness was filed on (date).

Based on the testimony and evidence, very briefly summarized above, the hearing officer determined that claimant had not sustained an injury in the course and scope of employment and had not given timely notice. Claimant appealed those determinations, emphasizing testimony favorable to his position.

As previously indicated, the evidence is directly contradictory. The hearing officer could chose to believe claimant and his testimony regarding reporting the injury to Ms. W on December 4th, as supported by claimant's witnesses VC and EL, or she could believe MB, denying an accident on (date), and Ms. W's version of what happened on December 4th. The hearing officer obviously believed the latter.

We have frequently noted that the hearing officer is the sole judge of the relevance and materiality of the weight and credibility to be given to the evidence. Section 410.165(a) (formerly Article 8308-6.34(e)). Texas Workers' Compensation Commission Appeal No. 93265, decided May 19, 1993; Texas Workers' Compensation Commission Appeal No. 93429, decided July 14, 1993; Texas Workers' Compensation Commission Appeal No. 93659, decided September 13, 1993, *et al.* The hearing officer had the opportunity to hear the witnesses and observe their demeanor. When presented with conflicting evidence 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, 697 (Tex. 1986). There was evidence presented on both sides of the issue and the hearing officer had the opportunity to assess the credibility of the witnesses appearing before her. Obviously the hearing officer chose to believe evidence supporting the carrier's version. There is sufficient evidence to support such a finding. We will reverse the hearing officer based on insufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio, 1983, writ ref'd n.r.e.); In re King's Estate, 150 Tex. 662, 244 S.W.2d (1951). There being ample evidence to support the hearing officer we cannot say the decision was so weak or the findings so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

The hearing officer chose not to believe claimant's version. We will not substitute our judgement for the hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge