APPEAL NO. 93868

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01, *et seq.*). On August 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether claimant was injured in the course and scope of his employment on (date of injury), while employed by (employer), which is a self-insured governmental entity (referred to herein, depending upon the context, as employer or carrier), and whether he had disability as a result of that injury. The hearing officer determined that claimant was not injured on (date of injury), but injured his right shoulder on (date of injury), in the course and scope of his employment, and had disability from that injury from March 5, 1993, until July 20, 1993.

The carrier has appealed, arguing that the hearing officer's decision is against the great weight and preponderance of the evidence, which indicates that claimant was injured during a fistfight that occurred after he had been drinking with coworkers. The carrier points to various inconsistencies that it asserts contradict or impugn the credibility of the claimant's case. Claimant's response was untimely filed.

DECISION

We affirm the hearing officer's decision.

The claimant stated that he was injured on (date of injury), while assisting his groundskeeping crew in stacking, sorting, and loading numerous bricks of various sizes and weights. Claimant stated that at about 3:30 that afternoon, he was lifting a 45 lb. brick to throw it into a dump truck and felt something in his right shoulder pop. He stated that he thought nothing of it at the time, and did not mention it to anyone. His former wife, (Ms. V), testified that claimant came to her house the evening of the 19th and stated that he thought he had pulled his muscle that week while doing the sorting and loading of bricks.

The claimant stated that he was initially not able to recall the date this happened, and when he went to report his injury to a clerk, (Ms. M), on (date of injury), he told her he could not recall the exact date. He says that Ms. M suggested using (date of injury) as the date of injury because it would "look better," and that the Employer's First Report of Injury was initially typed in by her using the (date). This is the date that the claimant subsequently supplied to the employer's clinic doctor, (Dr. F), when he saw him on the 25th. Claimant testified that he was going to go the 24th because he was in so much pain, but then decided to see his own doctor. However, claimant went the next day because it would take two weeks to see his own physician. The initial medical report from Dr. F at the clinic diagnoses a right deltoid muscle strain. The date of injury at the top of that report is shown as (date of injury). However, in the text of the report Dr. F describes the complaint as involving the left shoulder, and the date of injury as (date). The claimant stated his opinion that the text of the report contained typographical errors. Other medical test reports produced by claimant rule out damage to the rotator cuff or fracture.

The claimant said that he later identified the day of (date of injury) as the date of injury after talking with his crew leader, who told him that his crew had done brick work on the (date) and 19th as well as three earlier dates that month. Claimant said he told his supervisor, (Mr. F), of his injury on (date). Several coworkers provided sworn affidavits that state that they did not observe claimant to be in pain; many of these affidavits corroborate claimant's testimony regarding his participation in brick loading and sorting activity on (date of injury). One coworker stated that claimant said he was hurt while firing a gun.

Claimant acknowledged that he had been in a fistfight after drinking with some coworkers on February 27th. One coworker was (Mr. Y). Claimant stated that he was punched around the head only. A sworn affidavit from Mr. Y stated that he was involved in a fight in which claimant was knocked to the ground and kicked several times in the back and shoulder area. However, Mr. Y does not state what date that this occurred, only that it was prior to claimant's "claiming to have been injured" while at work. Claimant stated that Mr. Y's account was untruthful, and that Mr. Y had not thrown punches nor was claimant knocked to the ground as stated. Claimant submitted a written, unsworn statement from SP which was more favorable to claimant's version; the dates on this statement appear to have been changed or altered with no initials or explanation of the reason for the alteration. The fistfight is not mentioned in the medical history of any report submitted into evidence.

The claimant said he was taken off work by his treating doctor, (Dr. W), effective March 5, 1993. Claimant returned to work on July 21, 1993.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). 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, 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). Although the ombudsman noted several times during the hearing that claimant's doctor's reports recite a connection to loading bricks, claimant testified that he supplied this information to the doctors. In any case, as the Appeals Panel has observed before, the facts set out in the history of a medical record would not be good evidence to prove that an accident in fact occurred. Presley v. Royal Indemnity Co., 557 S.W.2d 611 (Tex. Civ. App.- Texarkana 1977, no writ). However, a claimant's testimony alone is sufficient to establish that an injury has occurred. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). 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.).

As part of the carrier's appeal, it argues that claimant has given materially different testimony at the benefit review conference and contested case hearing. However, "testimony" is not taken at a benefit review conference. *See* Section 410.026(c). The

hearing officer determines the case based upon the record at the hearing; the hearing in this case was protracted, and carrier had ample opportunity, and made several attempts, to highlight discrepancies in the records. Claimant's explanations for the discrepancies in the dates of the injury were not farfetched, and the hearing officer obviously chose to believe his explanation over the written statement of Ms. M. The hearing officer may believe all, part, or none of the evidence. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). We have stated before that the finder of fact is not restricted to the date of injury set forth on the benefit review conference reports, if the evidence indicates that injury occurred on another date. Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992.

Although there were conflicting portions of the evidence, these were for the trier of fact to weigh. His determination that a compensable injury to the shoulder occurred is sufficiently supported by the record, and we affirm.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge