

## APPEAL NO. 93954

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S. 8308-1.01 *et seq.*). On September 30, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be resolved at the CCH were: 1. whether the claimant sustained a compensable injury on (date of injury), and 2. if the claimant did sustain a compensable injury on (date of injury), has claimant had any disability as a result thereof. The hearing officer determined that the appellant, claimant herein, did not sustain a compensable injury in the course and scope of his employment on (date of injury), and as a consequence no period of disability resulted.

Claimant contends that the hearing officer based her decision on evidence which was not credible, 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 parties agreed that claimant was employed as a painter by (employer), employer herein, and had been so employed since April 8, 1993. Both parties also agree that the key to the case is the credibility of the witnesses. Claimant testified, through an interpreter, that he was working on the job in the afternoon of Saturday (date of injury) (all dates are for 1993 unless otherwise noted) carrying a 32 foot ladder when he stepped in a hole or depression in the ground and injured his back. The parties appear to agree that there were five people on the job at the time: (Mr. E), the foreman; (Mr. O), who was another painter; claimant; (Mr. R), claimant's helper; and Mr. E's cousin, who was Mr. O's helper. Claimant testified he continued on the job because Mr. E would not let him quit until the job was finished. Claimant testified that on Monday he called Mr. E to find out if or where he was working. There is a dispute as to exactly what was said, but it is claimant's testimony that Mr. E "ran him off." Claimant testified that he then went to the combination home/office of (Mr. H), who is employer's president, to report his injury and to collect his check. Again there is a dispute as to what was said with claimant testifying that Mr. H threatened to kill him and refused to pay him. Claimant concedes he did receive his paycheck on Friday when Mr. R brought it to him. It is undisputed that Mr. R was with claimant when he went to Mr. H's home/office. Claimant subsequently sought treatment from (Dr. A) who, in a report dated September 11th, diagnosed claimant as having a back sprain and prescribed therapy. Dr. A notes in his report that claimant was seen the "last time on 7 June 1993." Claimant retained an attorney on April 17, and subsequently saw (Dr. W). Dr. W apparently conducted no tests and by report dated August 23rd, diagnosed claimant as having "Cervicothoracic and lumbar sprain" and took claimant off work. Claimant conceded he had been in an automobile accident "about 2½ years ago," and had received an insurance settlement which he used to buy his house.

Mr. H, employer's president, testified that claimant was hired to finish the particular job he worked on the previous week because his painters "were spread kinda thin" at that time. Mr. H testified that normally each painter has his own helper, who carries the ladders, carries paint and otherwise assists the painter. Mr. H denies threatening claimant in any way or using threatening language. Mr. H agrees that claimant came to the office on April 12th and asked for his pay check. Mr. H testified he told claimant he could not get paid until Friday of that week, which is the regular pay day for all employer's employees. Mr. H testified claimant became hostile and threatening when Mr. H refused to pay him before Friday.

Mr. O, the other painter on the job in question, testified that each painter had a helper and the helpers carried the ladders. Mr. O testified that on the day in question they were painting a long wall, were within sight of each other and that he did not see claimant carrying a ladder or injuring himself.

Mr. R, who was claimant's helper, also testified through an interpreter. It is this testimony that is most hotly disputed as claimant maintains that Mr. R is an "illegal" and therefore should not be believed. Mr. R testified that he carried all claimant's ladders on the day in question, that claimant did not carry a ladder that day, that employer's painters all have helpers who carry the ladders, that he did not see claimant get hurt and that claimant did not appear to be hurt. Mr. R testified that on Monday, April 12th, when Mr. H refused to pay claimant, claimant requested Mr. R's assistance in lodging a workers' compensation claim against the employer and threatened to report Mr. R to the Immigration and (INS) as being in the country illegally if Mr. R did not assist him by verifying claimant's testimony of an accident. Mr. R testified claimant offered him money to lie and that claimant admitted he had not been hurt on this job.

The hearing officer found that claimant had not sustained an injury on (date of injury), while in the course and scope of his employment and consequently did not have disability as defined by the 1989 Act. Claimant's appeal is almost entirely predicated on attacking the credibility of Mr. R who claimant states "was most susceptible to being unduly influenced and coerced by the employer . . . was lying, is not a person to be believed and that the hearing officer should not have ascribed any probative value to his testimony."

Claimant further extensively attacks Mr. R as not being a credible witness by referring to "a written statement allegedly made by [Mr. R], exchanged at the Benefit Review Conference and attached herewith as Exhibit 'A'." Most of claimant's appeal deals with pointing out discrepancies in the "Exhibit A" attached to the appeal. However, the written statement of Mr. R, so extensively attacked by claimant, was never offered, or admitted, into evidence at the CCH. The hearing officer in the Statement of Evidence, clearly found Mr. R's testimony credible, but did so based on live testimony at the CCH rather than any written statement he may have made. Pursuant to Section 410.203 the Appeals Panel will only consider the record developed at the CCH, the written appeal and response. We have early on held that we will not consider matters first raised on appeal, in this case being Mr. R's written statement. Texas Workers' Compensation Commission Appeal No. 91100,

decided January 22, 1992; Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. In fact, claimant seeks to introduce Mr. R's statement solely for the purpose of discrediting it. Consequently, we will not consider allegations regarding inconsistencies claimant raises regarding a matter not in evidence at the CCH.

Claimant reasserts on appeal, as he did at the CCH, that Mr. R is an "illegal alien who was afraid of losing his job . . . (and) was coerced into giving false testimony . . ." Mr. R denied he was coerced by the employer and testified that it was claimant that sought to coerce him by threatening to report him to the INS. Claimant certainly raised contentions regarding Mr. R's credibility at the CCH and no doubt the hearing officer considered all of the evidence, including claimant's testimony and demeanor, and compared it to that of Mr. H and Mr. O. We point out that pursuant to Section 410.165(a) the hearing officer is the sole judge of the weight and credibility of the evidence presented at the hearing. She was in a position to observe the demeanor of the witnesses and to judge their credibility. That the claimant is the only witness to an injury does not defeat an otherwise valid claim, however as the claimant's testimony is that of an interested party, his testimony only raises an issue of fact (Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ)), and the hearing officer as the trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given his testimony in light of the other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer may believe all, part or none of the testimony of any witness. Taylor v. Lewis, 553, S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, no writ). The hearing officer obviously declined to believe claimant and instead believed the testimony of Mr. H, Mr. O and Mr. R. The hearing officer's determinations are supported by sufficient evidence.

Because we are affirming the hearing officer's determination that claimant did not sustain a compensable injury, as claimant alleged, on (date of injury), that is also dispositive of the issue of disability in that claimant cannot incur disability, as defined in Section 401.011(16) in the absence of a compensable injury. Consequently no further discussion on this issue is warranted.

Where, as here, there is sufficient evidence to support the determinations of the hearing officer, there is no sound basis to disturb the decision. Only if we were to determine, which we do not in this case, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside her decision. In re King's Estate,

244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision is affirmed.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Susan M. Kelley  
Appeals Judge