APPEAL NO. 94179

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* A contested case hearing was held on January 10, 1994, with (hearing officer) presiding as hearing officer; the record closed January 20, 1994. The issues considered were whether the claimant, GB, who is the respondent in this appeal, sustained a compensable injury to his back (date of injury), while acting in the course and scope of his employment at the (employer), and whether he had disability from the injury beginning August 19, 1993. The hearing officer determined that he had sustained a compensable injury and ordered medical and applicable temporary income benefits paid to claimant.

The carrier appeals, arguing that it was reversible error for the hearing officer to admit, over objection, two unsigned and unauthenticated transcripts purporting to be interviews with witnesses (not present at the hearing), one of whom corroborated claimant's version of the accident. A third statement admitted under the same circumstances is not raised on appeal. The carrier further argues that the decision is against the great weight and preponderance of the evidence. The claimant responds that the decision is supported by sufficient evidence in the record.

DECISION

We find no reversible error by the hearing officer, and affirm his decision and order.

I.

FACTS

The claimant, GB, was an assembler at the employer's plant. He stated that on the day in question, (date of injury), he left his work station and approached the station of another worker, (Mr. S), who was having problems getting his hand into an area to tighten a screw. Claimant said he attempted to help, and, as he did, a supervisor, (Mr. J), walked over. Claimant said he queried, "[h]ow is a man supposed to do his job if he can't get his hand in?" He said Mr. J "hollered" at him to get out of the way and Mr. J would show him how, and shoved claimant backwards with both hands. Claimant said he hit a parts bin behind him, and hit his right lower back. Although there was immediate pain, it subsided. He told Mr. J that if he touched him again, there would be trouble, and left the area in anger. Soon after, he contacted his union representative, and both he and Mr. J went to a meeting with management to discuss the incident. After this meeting, claimant finished his shift.

Claimant said he did not realize he had been hurt, until he woke up the next day in severe pain. Before his shift was to start, he went to the plant doctor, who took him off work. He had not been to work since. Claimant identified two other coworkers in the area at the time of the incident as (Mr. L) and (Ms. D). Claimant said Mr. S had walked away from the area before Mr. J came up to claimant. Ms. D told him she had not seen or heard the incident. When claimant was about to file a police report on the incident, he obtained a written statement from Mr. L to submit with the report. The statement, put into evidence,

states that the witness saw Mr. J push claimant into a parts bin. It is not dated. An August 24, 1993, statement signed by Mr. S states that he did not see Mr. J shove claimant.

Mr. J denied that he had shoved claimant. He said that it was a hectic day, he saw a team having a problem, and he was focused on resolving the problem rather than things going on around him. He said that claimant was located where Mr. J needed to be, and he moved him back with his forearms against claimant's chest. He said that he did not first ask claimant to move. Mr. J agreed that claimant was upset and told him if it happened again, there would be trouble. He said that Mr. S was still standing in the area when he moved claimant back.

Mr. J felt that the matter had been resolved at the meeting and was surprised to find out later that claimant was contending an injury. Mr. J said that the rest of the day on (date of injury), claimant did not appear or act hurt. Mr. J denied there was a parts bin or anything else around claimant, and he said that claimant did not fall or hit anything. Mr. J said there had been a disagreement prior to (date of injury), with claimant over directions to clean up; after mediation of the problem by a union representative, claimant was told he had to follow Mr. J's instruction to clean up.

(Mr. F), who investigated the incident for the employer, said that he determined that there had been no intentional harm inflicted. The investigation included interviews with persons in the area. He agreed that this did not mean that there was not negligence or inadvertent harm. However, he said there was no indication from his investigation that claimant had hit a parts bin.

Statements, not signed or authenticated, and ostensibly provided by Ms. D, Mr. L, and Mr. S, were admitted into evidence over the carrier's objection. The statements were purportedly given to the carrier's adjuster.

An August 23, 1993, MRI report finds degeneration and protrusion of L3-4 and L4-5 discs, with moderate central stenosis at L3-4. A medical report by (Dr. M) dated September 24, 1993, finds severe right radiculopathy, and characterizes the L3-4 condition as a herniation. Dr. M recommended back surgery. However, the continuing diagnosis throughout most of the subsequent records (Drs. D and S) is lumbar strain. Claimant himself indicated that only Dr. M seemed to indicate surgery, and that Dr. D told him that epidural injections and therapy were the advisable course of treatment. That is the treatment claimant had pursued, and said he was treated continuously up to the date of the hearing. By October 1993, claimant is reported in the doctor's notes as saying his back hurts a little bit, but not much, and that he still had a few sharp pains. There are no comments from doctors or statements contained in the record which indicate that claimant has been either taken off work or released to work. Claimant said that his condition had improved some.

II.

WHETHER THE HEARING OFFICER ERRED BY ADMITTING UNSIGNED, UNAUTHENTICATED TRANSCRIPTS OF PURPORTED STATEMENTS BY WITNESSES

We agree with carrier that the hearing officer erred in admitting over objection the unsigned, unsworn, typewritten transcripts of what purported to be telephone interviews with coworkers who were present when the injury occurred. Carrier objected that the statements were not signed by the purported witnesses; the hearing officer had previously told the claimant that the only authentication he needed to be concerned with was whether the hearing officer would accept them or not. The carrier pointed out that the 1989 Act gave leeway to the hearing officer to accept signed (if un-notarized) statements and the hearing officer, cutting the objection short, informed the attorney he was wrong and that he had power to accept any statements and to use summary procedures. He overruled the objection. Although the carrier's attorney said that the transcripts "appeared" to be ones that were given to the adjuster, there was no formal authentication of these documents, nor did they contain any affirmation from a transcriber as to their accuracy.

In this case, the hearing officer erred. In Texas Workers' Compensation Commission Appeal No. 92490, decided October 28, 1992, we held that admission of such a statement over objection was error. As that decision notes, Section 410.165(b) provides that the hearing officer may accept written statements signed by a witness, and we further observed that while Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.8 (Rule 142.8) provides for the use of summary procedures, including sworn witness statements, it did not limit the provisions of Section 410.165. Section 410.163(a)(5) provides that the hearing officer shall allow the presentation of evidence by affidavit; Section 410.163(b) permits the hearing officer to use summary procedures, "including witness statements;" and Section 410.165(b) provides that the hearing officer may accept written statements signed by a witness. Reading all applicable provisions persuades us that it is the better practice to refuse to admit unsigned, unauthenticated "transcripts" of telephone interviews over objection, even when using summary procedures.

Notwithstanding that conformity to the legal rules of evidence is unnecessary in contested case hearings, Section 410.165(a), the obvious problem with the particular exhibits objected to in this case--unsigned, unsworn, typewritten transcripts, containing several blank words, not self-authenticating under traditional rules of evidence--is the absence of any indicia of authenticity or identification; that is, that the document is what its proponent claims it is. No witness testified to the transcriptions' authenticity nor was there any other extrinsic evidence of authenticity. We repeat what we have said in our earlier decision, that we do not read other references to "witness statements" in the 1989 Act as inconsistent or in conflict with the reference in Section 410.165(b) authorizing the acceptance of signed witness statements. While summary procedures are authorized, they cannot be used as license to admit that which has essentially no probative value.

Because admission of such statements was error, we have disregarded them in evaluating the evidence in this case. That being so, we cannot agree that such error was

reversible. The record contains other corroborative evidence, specifically medical evidence, of an injury. While a transcript from Mr. L was erroneously admitted, there was a signed statement from Mr. L tendered and admitted. Finally, as we have stated before, a claimant's testimony alone can be sufficient to support a determination that a compensable injury has occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989).

III.

WHETHER THE DECISION IS AGAINST THE GREAT WEIGHT AND PREPONDERANCE OF THE EVIDENCE

Section 410.165(a) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of the weight and credibility it is to be given. The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). There are conflicts in the record, but those were the responsibility of the hearing officer to judge, considering the demeanor of the witnesses and the record as a whole.

Temporary income benefits are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as: "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The evidence on disability is scant, given the nature of the injury. Nevertheless, the hearing officer evidently considered that claimant's treatment and complaints of pain, together with his statement that he had been initially taken off work by the company doctor, established disability.

Consequently, ignoring altogether the unsigned transcripts, there is sufficient evidence to support the findings and conclusions that an on-the-job compensable injury, resulting in disability, occurred. They are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge