

## APPEAL NO. 991670

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 24, 1999. The issue at the CCH involved whether the appellant, who is the claimant, was injured in the course and scope of employment on \_\_\_\_\_, and whether he had disability. Two other issues were resolved and withdrawn at the CCH.

The hearing officer held that the claimant was not injured while working for the employer and did not have disability. The claimant has appealed. He argues that his account of the incident was the more credible evidence and that he met his burden of proof. The respondent (carrier) responds that the factual determinations of the hearing officer should not be set aside and are supported in the record.

### DECISION

We affirm.

The claimant was employed by (employer), and assigned to work at (client company) on or about January 25, 1999. He testified that on the morning of \_\_\_\_\_, a Monday, at about 7:25 a.m., "everyone" went into a meeting. The claimant said he asked one of the permanent employees what to do and was told to sort out some rolls of foam. It was when he was pulling and rolling these rolls that he felt a sharp pain in his back. He said he complained to an electrician who was working nearby. However, about seven minutes later, Mr. R, a supervisor, approached him; he said he did not feel like reporting his injury to Mr. R because Mr. R spoke rudely to him. According to the claimant, Mr. R asked the claimant whether he had been told he was terminated and Mr. R ordered him off the premises. The claimant denied he was ever told by anyone at the client company that his services were no longer needed.

The claimant asserted that he called a friend to pick him up and was taken home around 9:00 a.m. The claimant then telephoned Ms. R for the employer to report his injury, and she told him to come to her office to fill out a report. He then called another friend to drive him to the employer's office, where he reported the injury. Although Ms. R referred him to a clinic, the claimant was treated by Dr. J, D.C., who had treated him for a previous back injury. Although the claimant recalled no details about his previous injury, he agreed that he went to Dr. J for regular adjustments about six or seven times during 1998. He said this injury was different because he had pain down the legs.

The claimant said his immediate supervisor for the client company was Mr. C. He said that he did not see Mr. C on the day of the injury. The claimant said that normally a forklift was used to perform the foam roll sorting that he was doing. The claimant said he had worked the previous Saturday, tightening bolts on a scaffold.

Mr. R testified for the carrier. He said that the claimant really worked for a British subcontractor building a storage unit. He said that on Friday, he was informed that all temporary employees that were scheduled were not needed and he called about five of them into his office, including the claimant, after lunch to inform them of this. Although he recalled smelling alcohol on the claimant's breath, he said that this had nothing to do with the termination, and that he did not so inform an investigator for the carrier (although this was in the investigator's report as the reason for termination). Mr. R also said he did not recall the incident set forth in the investigator's report that he escorted the claimant to pick up his personal belongings. However, Mr. R said that the smell of alcohol made him concerned about safety. He had another employee go over to converse with the claimant before the termination to check his suspicion about alcohol. This employee came back and told him he "had a problem" because the claimant had been drinking. Mr. R did agree that he was interviewed by an investigator for the carrier on or about March 3rd.

Mr. R agreed that the claimant might have been asked at various times while he worked there to roll up scrap foam pieces that were sent to a bailer. He said that while it was possible such a roll could weigh 50 pounds, more likely the rolls weighed 10 to 15 pounds. Mr. R said he did not see the claimant on the day he claimed that his injury occurred. He said that he ascertained later that the claimant had come in to have Mr. C sign his time card on that day. Mr. R said he understood that temporary employees would come in and have Mr. C sign their time cards on Monday for the prior week's work and these time cards were used by the client company for making payments to the employer. The time card for the claimant showed that he worked nine hours on Friday and four and one-half hours on Saturday, February 6th. The card was signed by Mr. C and dated \_\_\_\_\_.

Mr. R said he found out that the claimant also worked for a few hours on the Saturday after he had been told that he was no longer needed. The only explanation he had for this was that the claimant may have been asked by the British subcontractor to report for work that day. He said that there were no time cards showing any work done by the claimant on Monday, \_\_\_\_\_.

On rebuttal, the claimant called Mr. G to testify. Mr. G was the friend that the claimant called to take him home after his asserted injury. Mr. G stated that the claimant used to be his neighbor. He was called by the claimant about 9:00 a.m. or a little after to come pick him up on Monday, \_\_\_\_\_. Mr. G estimated it took him 10 to 15 minutes to drive to the employer's to pick up the claimant. Asked if the claimant said anything, Mr. G said that when he arrived to pick up the claimant the claimant told Mr. G that he had been injured at work and was not walking very well. However, the claimant did not go into detail. He offered to take the claimant to a doctor if he needed to go. On cross-examination, Mr. G said he had known the claimant about 15 years. He stayed with the claimant about 45 minutes after he dropped him at home and he did not recall the claimant making any telephone calls while he was there.

Dr. J wrote that on April 30, 1999, the claimant was under his care and should be excused from all work duties since February 16th in order to avoid aggravation of his

condition. The diagnosis was lumbar and thoracic subluxation and muscle spasm. Dr. J's records show an initial visit date of February 10th. The recorded history of injury was that the claimant lost his balance while loading rolls and he hurt his back and knee.

Concerning the prior injury, a Report of Medical Evaluation (TWCC-69) was admitted over objection by the claimant which showed that the claimant's prior injury occurred on April 11, 1995, and he was certified at maximum medical improvement on September 26, 1995, with a nine percent impairment rating for the lumbar spine. The narrative report to the TWCC-69 indicated that the claimant experienced some radiation of pain down his left leg. The claimant testified that due to his current injury, he could not work and was limited to about 45 minutes sitting and 20 minutes walking at the maximum.

The hearing officer is the sole judge of the relevance, 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 Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). 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 Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Clearly, there were conflicts and failures of recollection on the part of all witnesses, as well as inconsistencies. These were the responsibility of the finder of fact to weigh after observing the demeanor of the witnesses.

We do not agree that the great weight and preponderance of the evidence compels a contrary result and, accordingly, we affirm the hearing officer's decision and order.

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Alan C. Ernst  
Appeals Judge

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Tommy W. Lueders  
Appeals Judge