APPEAL NO. 91003
FILED AUGUST 14, 1991

On May 28, 1991 and June 7, 1991, a contested case hearing was held at _____, Texas, (hearing officer) presiding as hearing officer. The hearing officer determined that appellant (claimant) was not entitled to benefits under the Texas Workers' Compensation Act for the claimed injury as he was not injured in the course and scope of his employment on (date of injury). The hearing officer ordered that the claim of claimant against respondent (carrier) for benefits resulting from the alleged injury on (date of injury), be denied. On this appeal, the claimant requests us to reverse the decision and order of the hearing officer and find in his favor.

DECISION

Having considered the request for review, the response to the request for review, and the record developed at the contested case hearing, we do not find merit in the contentions of the claimant. The decision and order of the hearing officer are affirmed.

The claimant claims that on the morning of (date of injury), while at work, he slipped getting out of a dump truck, fell four feet to the ground, hit his head and injured his lower back, neck and head. There was no eyewitness to the incident other than claimant. During the morning of the alleged accident, claimant was working as a dump truck driver for his employer at a refinery hauling dirt from an excavation site to a landfill site at the refinery. It had rained during the two or three days immediately preceding (date of injury), resulting in very muddy conditions at the refinery worksite, including the landfill area where claimant claims the accident happened. Claimant told the landfill site bulldozer operator that he had fallen out of a truck and landed on his head, felt bad, and was going home. Soon thereafter, claimant told his immediate supervisor that he had fallen out of his truck, that his head was hurting severely, and he wanted to go home.

Claimant's supervisor took him to their employer's safety trailer at the worksite. At the safety trailer, claimant told his employer's first aid attendant that he had fallen off his truck, had a headache, and wanted to go home. The first aid attendant began examining claimant but stopped the examination when she thought she smelled alcohol on claimant and summoned her supervisor who is the safety manager for claimant's employer. Claimant told the safety manager that he had slipped and fallen out of the truck. The safety manager smelled alcohol or something on claimant's breath and immediately sent claimant to an occupational medicine clinic for alcohol testing and a physical examination. Claimant was driven to the clinic and picked up at the clinic by a co-employee. Results of alcohol and drug tests given to the claimant at the clinic were negative.

A doctor's slip dated (date of injury), contains a diagnosis of head injury, lower back strain, and left hip injury. The doctor's slip provides for daily physical therapy with a return to clinic date of January 10, 1991. Another record of the clinic shows that, on the morning of (date of injury), claimant stated that while getting off of his truck, he slipped off hitting his head and landing on his back and complained of left hip pain, and lumbosacral and head pain. Claimant testified that this was what he told the doctor. He also testified that on (date of injury), the doctor at the clinic told him that he could not work with the pain he was in, that he had just sprained his back and not to return to work for two weeks, and to take therapy every day. Claimant also testified that he had therapy for thirty minutes at the doctor's office on (date of injury). A letter dated January 10, 1991, from Dr. P, a medical doctor at the clinic, states that claimant was seen for follow-up of injuries

sustained in a fall on (date of injury), that an examination revealed very restricted movements with tenderness over the thoracic and lumbar paravertebral, but that there was no evidence of head injury, and a neurological exam was within normal limits. The letter goes on to state that claimant was treated with muscle relaxants and pain medication, was instructed to return to restricted duty, and would receive physical therapy on a daily basis with a re-evaluation date of January 14, 1991. The doctor anticipated a full recovery without permanent disability. A letter dated February 12, 1991, from Dr. K, a medical doctor at the clinic, to whom claimant was referred by Dr. P, reveals that Dr. K saw claimant on February 12, 1991, for treatment and evaluation of problems with his back and legs. Dr. K's diagnosis of claimant was a lumbar sacral strain and a possible ruptured disc. Dr. K recommended an MRI (magnetic resonance imaging) to be certain of the status of the disc, home exercise, physical therapy, and anti-inflammatory medication, and a light duty status for claimant. Claimant testified that he did not get an MRI because carrier refused to pay for one.

Claimant testified that the (date of injury) accident took away all his activities, such as playing basketball and jogging, and that now he cannot do anything. Claimant also testified about his 1981, 1988, March 1990, and December 17, 1990 injuries. Claimant's son testified that he is aware of workers' compensation claims that claimant has had in the past, including a claim for a December 17, 1990 injury, and that claimant has had low back trouble and complained about his head and neck from December 17, 1990 through the day he testified, June 7, 1991, but that everything got worse after (date of injury). Claimant's son also testified that claimant could do pretty much everything, but not everything after his December 17, 1990 injury that he could do before.

Three other witnesses testified for claimant. The first witness stated that on January 10, 1991, claimant told him about his accident and that claimant was not getting around like his normal self, but that claimant had been limping on December 25, 1990. The second witness stated that two weeks after (date of injury), claimant told him he had been hurt and that he could not play basketball. The third witness stated that on January 5, 1991, in response to her question, claimant told her about his accident and that claimant could barely get up after sitting down and that he was walking slow.

Claimant's supervisor, the first aid attendant, the safety manager, and the bulldozer operator at the landfill area, all testified that it was very muddy at the refinery worksite on (date of injury). The supervisor testified that on (date of injury), it was raining off and on, that the mud was six to eight inches deep in places, and that it was very muddy at the loading and dump sites. The supervisor also testified that after claimant reported the incident to him claimant has some mud on his hard hat, a spot on his upper left chest, and a spot of mud on his leg, but that it did not appear to him that claimant had gotten that mud from falling into the mud. He could not say whether claimant had mud on his bottom, back, or the shoulders of his back. The first aid attendant at the refinery worksite testified that upon examining claimant's clothing and looking around on him she saw a small amount of mud on the top of his hard hat, a hand smudge mark beside his face, a very small round-like spot of mud on his upper left chest, a lot of mud on the top of his boots, and mud on the soles and sides of his boots. She testified that she had the opportunity to examine the rest of his clothing for mud, including the clothing behind him and his backside, and did not see mud anywhere else on claimant's clothing, and he had no mud on his hands. The safety manager testified that he observed claimant and saw

that claimant had a little mud on his hat, mud on one side of his face, a little bit of mud on his chest area, and a little bit of mud on his feet. He also testified that he specifically looked at the claimant's back and did not see any mud on his back, neck, back of his shirt, nor the back of his pants. Claimant testified that his hard hat came off when he fell and that he did not change clothes between the time he fell and before he went to see the first aid attendant.

Certain exhibits of carrier admitted into evidence at the hearing over claimant's objection show that claimant filed a 1981 workers' compensation claim for injury to his right thumb sustained in a fall from a truck, that he filed a May 1988 workers' compensation claim for injuries to his neck, back, and body in general sustained in a fall from a truck, and that he filed a March 1990 workers' compensation claim for injuries to his left knee, right thumb, and back sustained when he fell under a 110-pound sack he was unloading. At claimant's request, the hearing officer took official notice of claimant's workers' compensation claim filed on or about March 19, 1991, for a December 17, 1990 injury. The notice of injury and claim for compensation for the December 17, 1990 injury is also part of one of carrier's exhibits and shows that claimant claims injury to his back sustained when he slipped and fell while stepping out of a dump truck on December 17, 1990.

Claimant raises 16 contentions on appeal but has cited no authority in support of his contentions. Claimant's first contention is that the hearing officer failed to recognize the significance of page 3 of Exhibit R-5 in that this record tends to show that claimant was injured on (date of injury), while in the course and scope of his employment. The document referred to is entitled "Employee's Report of Occupational Illness/Injury," and is the same as Carrier's Exhibit C-1. The first aid attendant testified that the employer keeps a record of every injury on the jobsite, with the top half of the form being filled out by the person that comes in and herself filling in the bottom half. She testified that in this instance, another safety supervisor (not the safety manager that testified at the hearing) filled out the top half of the form by asking claimant questions because claimant did not understand the questions and did not know what to write. She stated that she filled out the bottom half of the form, but that the description of the nature of the injury as "head, back and hip" came from the doctor's slip.

Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991) effective January 1, 1991, provides in pertinent part that "[t]he hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence . . . ." An employee's report of injury to his employer is competent evidence, not of the fact of injury, but of the fact that he reported it. Broomfield v. Texas General Indemnity Co., 201 F.2d 746, 748 (5th Cir. 1953). The purpose of the employee's notice of injury is to give the insurer an opportunity immediately to investigate the facts surrounding the injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529, 532 (Tex. 1980).

Since the fact of injury in the course and scope of employment was the issue at the hearing, and not the reporting of the injury to the employer, we disagree with claimant's assertion that the hearing officer failed to recognize the significance of the employee's report of injury in that the report was competent evidence of the reporting of the injury, and not of the fact of injury. In assigning the weight to be given to this

evidence, the hearing officer could consider the purpose of the report and that it was competent evidence of notice of injury, not of the fact of injury.

Claimant's second contention is that the hearing officer failed to recognize the significance of page 4 of Exhibit R-5 in that this document tends to show that claimant was injured on (date of injury), while in the course and scope of employment. The document referred to is a printed form with handwritten responses to questions and is entitled "Supervisor's Report of Accident".

Claimant's supervisor testified that he did not see the accident and that part of his job duties is to investigate alleged accidents and injuries, not from a liability standpoint, but to see what can be done so that it does not happen again. He also testified that he filled out the supervisor's report, that it was part of his job to do so, that his responses indicating that claimant was looking into the truck bed and that he fell from the truck are what claimant had told him, that he investigated the accident in accordance with procedures he followed in the past. He stated that he did not think that claimant fell at all.

The supervisor's report under consideration is not the employer's report of injury which is filed with the Texas Workers' Compensation Commission pursuant to Tex. Rev. Civ. Stat. Ann. art. 8308-5.05 (Vernon Supp. 1991). Therefore, the prohibition on considering the employer's report of injury as evidence against the employer or insurance carrier does not apply. The supervisor's report in this proceeding is similar to the foreman's log book entry which recorded an injured employee's statement concerning the employee's illness and which entry was held to be admissible as a business record in Texas Employers' Insurance Association v. Butler, 483 S.W.2d 530, 534 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). However, the weight to be given the supervisor's report was for the hearing officer. Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991). In determining what weight to give the report, the hearing officer could consider that the information contained in the report as to how the alleged accident occurred was told to claimant's supervisor by claimant, that there are no material inconsistencies between what claimant's supervisor testified to at the hearing regarding what claimant told him about the incident and what he recorded as claimant's description of the incident in the report, that the purpose of the supervisor's testimony was to investigate the incident, and that, having investigated the incident, claimant's supervisor gave his opinion that he did not believe claimant fell at all. Under these circumstances, we cannot say that the hearing officer failed to give sufficient weight to the supervisor's report.

Claimant's third contention is that the hearing officer was swayed by the handwritten note on the bottom of the Supervisor's Report of Accident in that such note was prejudicial to claimant, irrelevant, and made in anticipation of litigation. Claimant is in no position to make this contention. The Supervisor's Report of Accident is part of Claimant's Exhibit R-5 which claimant introduced into the hearing record. The record does not indicate claimant made any reservations in so introducing it. Poehls v. Texas Employers' Insurance Association, 381 S.W.2d 383, 387 (Tex. Civ. App.-Austin 1964, writ ref. n.r.e.). Furthermore, the handwritten note which states "I did not see this accident and cannot find, any witness to same, the above info. was related to me by [claimant] the same person who claims injury," is merely a summary of the supervisor's testimony.

The supervisor testified that he did not see the accident, that he questioned both the bulldozer operator at the landfill site and the operator at the excavation site about the incident and both told him they had not seen the accident, and that the answers written in the supervisor's report relating to what claimant was doing when injured and how the accident occurred were told to him by claimant. This testimony was elicited on direct and cross-examination without objection.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tex. R. Civ. Evid. 401. The hearing officer is the sole judge of the relevance and materiality of the evidence offered. Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991). Considering that the issue in the hearing was whether claimant was injured in the course and scope of employment, the hearing officer could conclude that the handwritten note on the Supervisor's Report which, along with the supervisor's testimony, explained the circumstances surrounding the taking of the report, and the investigation of the reported incident, was relevant to the issue in dispute.

It has been stated that evidence cannot be excluded just because it may prejudice the opposing party before the fact finder. This is because Tex. R. Civ. Evid. 403 recognizes that evidence can result in fair or unfair harm. Thus, evidence must not only create a danger of unfair prejudice, but such danger must substantially outweigh its relevance before it can be excluded. See John Deere Co. v. May, 773 S.W.2d 369, 374 (Tex. App.-Waco 1989, writ denied). Claimant has not shown, and we do not find, unfair prejudice in the evidence complained of.

Tex. R. Civ. P. 166b(3)(d) provides that certain communications between agents, representatives or employees of a party, when made after the occurrence or transaction upon which the suit is based, and in anticipation of litigation, are privileged and exempt from discovery. We fail to see how claimant's assertion that the supervisor's handwritten note was "made in anticipation of litigation," which term concerns an exemption from discovery, could possibly pertain to a document claimant introduced into evidence. See Morris v. Texas Employers Insurance Association, 759 S.W.2d 14 (Tex. App.-Corpus Christi 1988, writ denied) for a discussion of when the privilege for documents prepared in anticipation of litigation may be invoked.

Claimant's fourth, fifth, and sixth contentions are that the hearing officer failed to realize the significance of a doctor's slip dated (date of injury), from the clinic claimant was taken to on the day of the alleged accident, in which the doctor did not give claimant a full release, failed to realize the significance of Dr. K's orthopedic consultation report for claimant dated February 12, 1991, which contained a diagnosis of a lumbar sacral strain, possible ruptured disc and which recommended an MRI (magnetic resonance imaging) to be certain of the status of the disc, and failed to realize the significance of Dr. Z's medical report on claimant dated March 28, 1991 which diagnosed a strain to claimant's lumbar spine and states that the MRI is still pending. Claimant asserts that these reports tended to show that claimant was injured while in the course and scope of his employment.

None of the medical reports referenced by claimant contain an opinion as to the cause of the injuries diagnosed, although Dr. K's report recites the history of the (date of

injury) incident as given to him by claimant. The report recites that claimant stated he was injured on (date of injury) when he was getting out of a truck and that he slipped hitting his head and landing on his back. The March 28, 1991 report from Dr. Z indicates that he was examining claimant for a December 17, 1990 injury, and the history in that report is that claimant was at work at the refinery when he was getting out of his truck and slipped and fell landing on his back. The date of accident given in Dr. Z's report is December 17, 1990. This is consistent with claimant's testimony that Dr. Z saw him for the December 17, 1990 injury, but has not treated him for the (date of injury) injury. The record shows that claimant filed a workers' compensation claim in March 1991 for a prior injury to his back sustained when he slipped and fell while stepping out of a dump truck on December 17, 1990. The record also shows that claimant suffered a lumbosacral strain in May 1988 and a lumbosacral stenosis in March 1990.

The part of a hospital record consisting of the history given by the claimant is not admissible as proof of the truth of the matters stated therein; such history is admissible only as explanation of a witness' opinion. Texas Employers' Insurance Association v. Butler, 483 S.W.2d 530, 534 (Tex. Civ. App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.). A doctor's examination which discloses an injury that could have been caused in the manner claimed is not enough to prove that the injury was sustained in the manner claimed. See Hartford Accident and Indemnity Company v. Hale, 400 S.W.2d 310, 312 (Tex. 1966). A doctor's diagnosis of an injury may corroborate a claimant's statement that he was injured at work and the evidence of the occurrence of the event. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182, 186 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). However, a claimant's testimony merely creates fact issues for the jury's resolution. Burlesmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695, 698 (Tex. Civ. App.-Amarillo 1978, no writ). It is within the province of the jury to judge the credibility of the witnesses, to assign the weight to be given their testimony, and to resolve the conflicts and inconsistencies; the jury is privileged to believe all or part or none of the testimony of any one witness. Burlesmith v. Liberty Mutual Insurance Company, supra.

In view of the above-cited authorities and claimant's three prior back injuries, one of which is actually the subject of Dr. Z's diagnosis of March 28, 1991, we do not believe that the medical diagnosis, recommended MRI, and denial of a full release from medical treatment, compelled the hearing officer to find that the claimant sustained an injury in the course and scope of his employment on (date of injury). The clinic report of (date of injury) and the orthopedic consultation report of February 12, 1991, tend to show that the lumbar sacral strain could have been caused in the manner claimed by claimant, but that is not enough to prove that the injury was sustained in the manner claimed. Hartford Accident and Indemnity Company v. Hale, supra. The medical reports may also corroborate claimant's testimony concerning the occurrence of the accident. Atlantic Mutual Insurance Company v. Middleman, supra. However, claimant's testimony did no more than raise a fact issue and it was within the province of the hearing officer as the finder of facts to judge the credibility of the claimant and assign the weight to be given his testimony. Burlesmith v. Liberty Mutual Insurance Company, supra, Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991).

Claimant's seventh contention is that the hearing officer incorrectly relied on inconsistent testimony of claimant's supervisor regarding the ground condition where

claimant claims he fell. The hearing officer found that on (date of injury), the conditions at the employer's worksite were wet and muddy as the weather had been rainy for several days. Claimant's supervisor testified that on (date of injury), the loading area and dump area at the work site were very muddy, that it would not have been possible for someone to fall to the ground without getting muddy, that if someone fell to the ground they should have mud practically all over them, that he had mud to his knees from walking around, that the mud was running six to eight inches deep in places, and that every time he walked he was stepping in six to eight inches of mud. He also testified that the job of the bulldozer at the truck dumping site was to push the mud back so that the trucks could get in and out, that the bulldozer was available to pull trucks out of the mud, that he went to the area where claimant said he fell after claimant went to the clinic and it was still muddy, that there could be mud on top of hard surface, that there could have been a dry compacted area, and that there could be six to eight inches of mud lying on perfectly dry ground depending on the penetration of the water in the soil. His testimony on cross-examination also included the following exchange:

Q:Well, based on what you have stated, there could have been an area there that was hard enough to where a person or a truck could still step on it and not go in to the ground six or eight inches?

A:Oh yeah, a dozer could have pushed the mud back. It could have been at a dry place; or it could not have been in a dry place.

The bulldozer operator at the landfill site, who did not work for claimant's employer, testified that the ground where he and claimant were working was very muddy, the first aid attendant who worked at the employer's safety trailer at the refinery work site testified that the weather conditions on (date of injury) were very rainy and very muddy, however, she never went to the area where claimant was unloading the dirt, and the employer's safety manager testified that on (date of injury) the entire work site was muddy including the area where claimant claimed to have fallen. The claimant testified that it had rained for two or three days and that there was mud all over the place. He also testified that it was no big muddy deal, but that the bulldozer had to pull the trucks out because the trucks could not get traction in the clay.

The testimony summarized above shows that five witnesses, including claimant, all of whom were at the refinery work site on the day of the alleged incident said that it was muddy. Three of the witnesses; claimant, claimant's supervisor, and the bulldozer operator, all of whom had the opportunity to observe the unloading site where claimant claims to have fallen, testified that it was very muddy or real muddy. This testimony supports the hearing officer's finding that the worksite was muddy on (date of injury). Although we do not believe that the supervisor's testimony concerning the mud at the worksite was necessarily inconsistent when taken as a whole, if there was inconsistency in his testimony, it was within the province of the hearing officer, as judge of the credibility of witnesses and weight to be given their testimony, to resolve conflicts and inconsistencies in such testimony. Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991); Garza v. Commercial Insurance Co. of Newark N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ).

Claimant's eighth and ninth contentions are that the hearing officer improperly admitted into evidence four exhibits offered by carrier which relate to claimant's prior injuries for which he filed workmen's compensation claims. Claimant asserts that the evidence on prior injuries is irrelevant and immaterial to the issue of whether claimant was injured on (date of injury), and that it biased the hearing officer. Claimant's objections to this evidence were overruled by the hearing officer.

The only reason evidence of other injuries is admissible at all in a compensation case is that it might have some bearing on the question of whether the injury sued on is the producing cause of any incapacity claimed. Hartford Accident and Indemnification Co. v. McCardell, 369 S.W.2d 331, 337 (Tex. 1963). Evidence of other back injuries similar to the one sued on has been held admissible in a workmen's compensation case. See Hartford, supra. Whether evidence of injuries other than the one sued on might have some bearing upon the cause of the present incapacity should be determined by the nature of those other injuries. Mayfield v. Employers Reinsurance Corporation, 539 S.W.2d 398 (Tex. Civ. App.-Tyler 1976, writ ref'd n.r.e.). For example, a prior hand injury could have little, if any, bearing on the cause of a back incapacity. Mayfield, supra. Medical testimony establishing a causal connection between the prior back injuries and the present back incapacity is not necessary where the possibility of the causal connection is manifest. Mayfield, supra. The documents complained of relate to three prior injuries.

1981 injury. The notice of this injury lists a previous employer and contains the following description of the accident: "I was unloading a load of sand in City A, Texas, when I got into the bed of the truck in order to clear clay and road gravel, when I lost my balance and fell off the truck and injured my right hand. The full extent of my injuries are unknown." A doctor's report states that claimant had fractured his right thumb.

1988 injury. The notice of this injury lists a second previous employer and contains the following description of the accident: "Slipped and fell out of truck, injuring neck, back and body in general." One doctor diagnosed the injury as a lumbar disc sprain, and another doctor diagnosed the injury as a lumbosacral sprain and functional overlay.

March 1990 injury. The notice of this injury lists a third previous employer and contains the following description of the accident: "Unloading 110 lb. sacks of "bulgar" I fell under a sack to my knees, hurting my left knee, right thumb, and back. I am presently disabled." A doctor's report dated October 15, 1990, diagnosed the injury as a lumbosacral stenosis with lumbar somatic dysfunction. The doctor's prognosis was that claimant was suffering from pain, spasms, and discomforts to the lumbosacral area as a result of injuries he sustained March 7, 1990, that he was last examined October 4, 1990, and that there was no significant change with his spasms still persisting in the lumbar area. The doctor opined that claimant would continue to suffer from these symptoms and that therapy was of minimal benefit.

The fourth exhibit complained of consists of 21 pages of medical records and reports from the office of Dr. G which pertain to claimant's March 1990 injury. The medical records and reports reflect that claimant had been in Dr. G's office for therapy treatment for the March 1990 injury 4 times in March 1990, 13 times in April 1990, at least

5 times in May 1990, that he continued to see Dr. G on a regular basis throughout the months of May, June, July, August, and September 1990, and that throughout these months claimant had complaints of pain, spasms, and discomforts, and that on August 21, 1990, claimant had complaints of lumbosacral stiffness with pain radiating down his legs.

We conclude that the evidence relating to the 1988 and March 1990 back injuries was admissible over claimant's objection as to relevancy and materiality in that the evidence related to prior back injuries similar to the one claimant now alleges and thus had some bearing upon the cause of the claimed back incapacity. Hartford Accident and Indemnification Co. v. McCardell; Mayfield v. Employers Reinsurance Corporation, supra. The evidence on the 1981 fractured thumb injury should not have been admitted as it had no bearing upon the cause of the alleged back incapacity. Hartford Accident and Indemnification Co. v. McCardell; Mayfield v. Employers Reinsurance Corporation, supra. To obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, claimant must first show that the trial court's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732, 737 (Tex. Civ. App.-San Antonio 1981, no writ). Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, supra. The hearing officer's written findings of fact and conclusions of law on which his decision is based, do not appear to be based, in any manner, on evidence of the claimant's 1981 injury. Under these circumstances, we conclude that claimant has failed to show that the error in admitting evidence on the 1981 injury was reasonably calculated to cause and probably did cause rendition of an improper decision. Furthermore, we note that on direct examination claimant testified about his 1981, 1988, and March 1990 injuries. A party may not complain of improper evidence introduced by the other side where he, himself, has introduced the same evidence or evidence of a similar character. Hughes v. State, 302 S.W.2d 747, 750 (Tex. Civ. App.-Eastland 1957, writ ref'd n.r.e.).

Claimant's tenth contention is that the hearing officer failed to recognize inconsistencies in the testimony of the employer's first aid attendant in that she testified that claimant complained of only a headache while on the Employee's Report of Injury she documented claimant's injuries as head, back, and hip. Claimant contends that this tends to show that her testimony should be perceived as questionable.

We do not view the first aid attendant's testimony on what claimant told her about a headache to be inconsistent with her testimony about filling out the analysis code of injury on the Employee's Report of Injury from the doctor's slip. Therefore, we disagree with claimant's contention. Moreover, if the first aid attendant's testimony on the matter of claimant's injury could be perceived as inconsistent, it was within the province of the hearing officer as the fact finder to judge the credibility of the witness, to assign the weight to be given to her testimony, and to resolve the conflicts and inconsistencies. Burlesmith v. Liberty Mutual Insurance Company, supra; Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991).

Claimant's eleventh contention is that the hearing officer failed to recognize the

biased nature of the first aid attendant's testimony and to give appropriate weight to her inconsistent testimony in that the first aid attendant testified she smelled alcohol on claimant, claimant's supervisor testified that he did not smell alcohol on claimant, and the drug and alcohol tests on claimant were negative. Claimant asserts that this tends to show that the first aid attendant's testimony should be perceived as questionable.

We find no inconsistency in the first aid attendant's testimony concerning alcohol. She made no statement contrary to her testimony that she thought she could smell some type of alcohol or something and that she detected a smell of alcohol. There is a conflict in the evidence concerning alcohol, with the first aid attendant and the safety manager testifying that they thought they smelled alcohol or something on claimant, and with claimant's supervisor testifying the he did not smell alcohol and the negative alcohol test results. The first aid attendant's testimony, together with related testimony of other witnesses, were before the hearing officer. The conflict in the evidence was for the hearing officer as the finder of facts to resolve, and the weight to be given to the first aid attendant's testimony was also within the province of the hearing officer. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991). Moreover, intoxication was not a disputed issue at the hearing. Consequently, the hearing officer made no finding of fact or conclusions of law regarding intoxication.

Claimant's 12th, 13th, and 14th contentions are that the hearing officer failed to recognize the biased nature of the employer's first aid attendant, safety manager, and supervisor in that they receive a bonus from the employer if the workers' compensation insurance rate remains the same. Claimant contends that the credibility of these witnesses should be limited due to the monetary incentive the employer has placed on these witnesses.

Claimant's supervisor testified that the employer's reputation is based on safety and the insurance rate is based on safety, therefore, they are highly concerned with the welfare and safety of individuals employed at the company. The supervisor further testified that, if people can accumulate a given number of hours or days without an accident, they will be paid a safety bonus, that if they do not get a doctor's case and just have minor fender-benders the employer will pay them for working safe in addition to their regular pay, that the safety bonus is probably three percent of an employee's income for a quarter, and that he received a safety bonus in the amount of $344.19 the day before the hearing which may have covered the period March, April, and May or maybe two months or maybe only a month as he did not know how long a period it covered. The supervisor also testified that he would not fabricate a story about whether or not someone had been injured just so he could get a safety bonus, that they are really concerned with the safety of the people, that they want them to work safe today so they can work again tomorrow, and that they were not fabricating anything.

It is the settled rule that in passing upon the credibility of a witness and the weight to be given his testimony, the jury may consider his interest, if any, in the matter sought to be established. Aetna Ins. Co. v. English, 204 S.W.2d 850, 856 (Tex. Civ. App.-Fort Worth 1947, no writ). The financial interest of parties and witnesses in the success of a party is a proper subject of disclosure by direct evidence or cross-examination. General Motors Corporation v. Simmons, 558 S.W.2d 855, 857 (Tex. 1977). Juror may accept

some parts of a witness's testimony and reject other parts, when the testimony given is inconsistent, contradictory, contrary to established physical facts, or from the manner and demeanor of the witness creating a doubt of its truthfulness, or because of the interest the witness has in the fact sought to be established or discloses a prejudice or bias on his part prompting what he has said; in such instances the jury may form its verdict upon that part accepted along with any other testimony of probative value tending to support the same fact. Aetna Ins. Co. v. English, supra.

The financial interest, if any, of the first aid attendant, safety manager, and supervisor in their employer's safety bonus program was disclosed to the hearing officer through the testimony of the supervisor. In passing upon their credibility and the weight to be given to their testimony, the hearing officer could consider their financial interest. We cannot conclude from the record before us, wherein the potential financial interest of the witnesses was disclosed to the hearing officer, that the hearing officer failed to recognize that their testimony may have been prompted by the disclosed financial interest in the form of a safety bonus, nor can we conclude that the hearing officer was compelled to reject part of or all of their testimony.

Claimant's 15th contention is that the hearing officer failed to give sufficient weight to the testimony of the bulldozer operator at the landfill site in that his testimony tends to show that claimant was injured on (date of injury), while in the course and scope of his employment. The bulldozer operator testified that he did not know claimant, that he did not work for claimant's employer, and that while he was trying to clean mud off the road with the bulldozer, claimant stopped the dump truck next to the bulldozer and told him that he had fallen out of a truck, landed on his head, and that he felt like the devil and was going home. The bulldozer operator also testified that the ground where he and claimant were working was very muddy. The bulldozer operator's testimony does not indicate at what time claimant spoke to him on (date of injury). Claimant's testimony was that, after he fell and finally got up, he talked to the bulldozer operator and told him he had just fell. Claimant's testimony does not reflect at what time he spoke to the bulldozer operator, but it appears from the record that the conversation took place before claimant spoke to his supervisor about the accident and before he was taken to the safety trailer.

In benefit contested case hearings, conformity to legal rules of evidence is not required. Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(e) (Vernon Supp. 1991). The hearing officer is to ensure the full development of the facts required for the determinations to be made; and the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Tex. Rev. Civ. Stat. Ann. art. 8308-6.34(b) and (e). The statement made by claimant to the bulldozer operator may have been an excited utterance. See Tex. R. Civ. Evid. 803(2). If it was a spontaneous utterance flowing from a traumatic or startling event, then it may be admissible to prove the truth of the utterance. Jones v. Hopper, 506 S.W.2d 768, 770 (Tex. Civ. App.-Houston [14th Dist.] 1974, no writ). However, in this appeal the question raised is not the admissibility of the statement, but the weight to be given the statement. In assigning the weight to be given to claimant's statement to the bulldozer operator, the hearing officer could take into consideration that it was unclear how long claimant waited before making his statement to the bulldozer operator, that there was no showing of claimant's excitement, and no showing that his excitement, if any, was spontaneous or in response to the accident. See Urquhart v. Antrum, 776 S.W.2d 595, 597 (Tex. Civ.

App.-Houston [14th Dist.] 1988, no writ). We conclude that claimant has not demonstrated that the hearing officer failed to assign sufficient weight to the testimony of the bulldozer operator.

Claimant's 16th contention is that the hearing officer was prejudiced and biased against claimant's witnesses and in support of his assertion relies on that portion of the statement of evidence in the decision wherein the hearing officer recites that all of claimant's witnesses testified they have known him for years. Claimant contends that this statement, without qualification, shows that the hearing officer did not believe their testimony and gave little credibility to same. In addition to claimant's son, three witnesses testified for claimant. Each of these witnesses testified that they were claimant's friend. One stated he had known claimant for 13 years, another stated he had known claimant all his life, and the third witness stated she had known claimant for 12 years.

We cannot perceive how the hearing officer's summary of the witnesses' testimony regarding the length of time they have known claimant shows bias or prejudice towards these witnesses. The subject of a judge's bias or prejudice is discussed in Tex. Jur. 3rd, Judges, § § 27-29 (1986) and no where within that discussion do we find any circumstance wherein a judge's personal bias or prejudice has been shown through the mere recitation of testimony of record in a decision. We strongly disagree with claimant's unsupported allegation. The credibility of the witnesses and the weight to be given to their testimony was within the province of the hearing officer In assigning the weight to be given to the witnesses' testimony concerning claimant's statements to them about his alleged accident, the hearing officer could have taken into consideration the length of time between the incident and the statements (two days, seven days, and two weeks), and that there was nothing in their testimony to show that such statements were part of the accident, or made under such circumstances as to raise a reasonable presumption that they were spontaneous utterances of facts created by or arising out of the accident itself. Skillern & Son, Inc. v. Rosen, 359 S.W.2d 298, 304 (Tex. 1962).

What is evident from the hearing officer's decision is that the hearing officer did not believe claimant's testimony that he fell from his truck and injured himself on (date of injury). The great weight of the testimony was that the worksite where claimant claimed to have fallen to the ground was very muddy, yet when claimant was observed at the first aid office without having changed his clothes he had very little mud on his clothes.

Moreover, claimant testified that when he was seeing his doctor in August, September, and October of 1990 for his back injury of March 1990 he was well and had no problems and that in October of 1990 he was completely well. Claimant's doctor's records and reports show the contrary in that throughout August, September, and part of October 1990 claimant had complaints of pain, spasms, and discomforts, and also had complaints of lumbosacral stiffness with pain radiating down his legs on occasion, and he was receiving therapy and medication on a regular basis. While claimant testified he was completely well in October 1990 when seeing his doctor, his doctor stated in a report of October 14, 1990 that claimant's spasms were still persisting in his lumbar area and he continued to complain of pain to the low back area. It was the doctor's opinion that claimant would continue to suffer from these symptoms. We believe that a serious question as to the credibility of the claimant arose when he claimed he was completely well when seeing his doctor for his March 1990 injury when the medical records and

reports show differently. The hearing officer, as the finder of facts, could have concluded not to accept any of his testimony. See Montes v. Texas Employers' Insurance Association, 779 S.W.2d 485, 488 (Tex. App.-El Paso 1989, writ denied); Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611, 613 (Tex. Civ. App.-Texarkana 1977, no writ). The evidence was sufficient to support the decision of the hearing officer.

The decision and order of the hearing officer are affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge