APPEAL NO. 92040

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On January 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. (hearing officer) determined that (claimant), appellant herein, did not incur a compensable injury on (date of injury), in the course and scope of his employment as a boat salesman with ("employer"). Because of her determination on this issue, she did not issue a decision resulting in relief for appellant on the second issue of whether or not he was disabled.

Appellant seeks review of the decision of the hearing officer, arguing that her determination that a compensable injury did not occur is against the great weight and preponderance of the evidence. Appellant further argues that inadmissible evidence prejudicial to him, specifically prior lawsuits, prior injuries, and prior job applications, was admitted which in fact biased the hearing officer in her evaluation of his credibility on the issue of whether an injury occurred.

DECISION

Finding that the record supports the decision of the hearing officer that appellant did not incur an injury on (date of injury), within the course and scope of his employment, we affirm. We further note that the admission of some evidence that would not be admissible in a court of law was harmless error in this matter; there is no indication

that the hearing officer in fact gave any weight to such evidence, or that the case would have been decided differently if such evidence was not admitted.

The appellant testified that he worked as a boat salesman for the employer, and was hired to work in this job in late November 1990. On Saturday, (date of injury), a day that was hot and dry, the employer was sponsoring a special boat sale promotion. Appellant brought out in direct testimony that he had trouble before with his back, and had a laminectomy in October 1990, relating to a non-work related injury (the date of which was established on cross-examination as September 25, 1990). He stated that he was not given limitations by his doctor, and indicated this was due to the fact that his doctor wasn't seeing him because of a dispute over payment. He testified on direct examination that, between October 1990 and the date of the contended accident, he did not see any doctor for his back. Appellant testified that he was having no problems with his back or physical limitations before (date of injury).

Appellant said he arrived at work at 9:00 a.m. that day. He said that boats are displayed in an outside yard as well as in a showroom. He stated that he first ran into customer ["Mr. G"] around 10:30-11:00 a.m. that day as (Mr. G) was coming into the showroom from the front lot. Appellant stated that he had just finished with a customer, and began talking to Mr. G. His impression was that Mr. G had already picked out the type

of boat he wanted and was ready to buy one. Appellant stated that there was this type of boat in the showroom, as well as one out on the lot. Appellant stated that the model of boat selected was a Pro-17 bass boat, a "catalogue" boat, consisting of a basic package, and the customer may pick accessories to go with the boat. Appellant and Mr. G proceeded to appellant's office where they negotiated for the boat and accessories for about 1 to 1-1/2 hours. Ultimately, a deal was closed. Appellant stated that Mr. G filled out all papers necessary to buying the boat and applying for financing. He stated that he then took the deal to ["Mr. L"], the business manager, who told him he had to have a manager's signature. Appellant then went out to go to his manager, [Mr. T"] for the signature. He stated that at this time he saw Mr. G on the showroom floor; Mr. G said something to the effect of "wait a minute, I want to look at a boat." Appellant stated that he thought Mr. G would just look at a boat and then leave. He then went in to get Mr. T's signature, but Mr. T refused to approve the deal because there were no serial numbers on the papers. At this point, appellant stated he headed for the Pro 17 boat located outside. He stated that he went to this one rather than the showroom model because it had a 40 horsepower motor like Mr. G wanted. He stated that the boat was located 50-60 yards outside the showroom. There was no one with him when he walked out there, but Mr. G and his wife and child were out at this boat. Appellant stated that he climbed up into the boat for the purpose of getting the serial numbers from the engine. He stated on direct examination first that Mr. G was making small talk, then that he could not recall having a conversation with Mr. G. Appellant said that he also checked around the boat to make sure that required equipment and manuals were with the boat. The boat was a 17-foot bass boat, with two side-by-side seats, and was on a trailer. He stated that both to get up into the boat, and get out of it, he had to step on the rim of the trailer. He got out of the left side of the boat, and, as he was bringing his second foot down on the trailer rim, his toes "came off" the trailer and he went down hard on his heels, on concrete. He did not fall completely to the ground, but stated that he held himself up against the side of the boat to keep from falling. He described the sensation from hitting his heels hard as one that went up through his head, and which caused immediate pain in his lower back and left hip. He stated that he had no further discussion with Mr. G, but just wanted to get inside, where he proceeded immediately to the break room to sit down. The rest of the day, he made no sales, and left work around 5:00 p.m. He stated that he had recorded the serial numbers on a business card, and went to Mr. T to get the deal sheet to record the numbers there, and told Mr. T at that time that, "I just hurt my back bad." Later, on the showroom floor, appellant stated that he saw Mr. L, who asked him what was the matter and he told Mr. L that he slipped getting out of a boat and wrenched his back.

Appellant stated he worked both Monday and Tuesday, and that on Wednesday, the general manager of the employer, [Mr. H] came to talk to him about the low number of customers recorded on his log sheet. He told Mr. H about his back pains, and stated that Mr. H told him if he couldn't do his job he should go to the doctor or emergency room. Appellant testified that he went home, and tried to call his surgeon, [Dr. C], but that Dr. C would not see him because his bill had not been paid. He went to the emergency room of (Hospital) either that night or the next day, where he was not admitted but was given muscle relaxers, x-rays, and mobility tests. He testified that his regular health insurance paid for

this visit. The emergency room doctor told him to call him in 3-4 days if he was still having problems, He did so, and was then advised by this doctor to see a back doctor. He was referred to a back doctor on staff, but stated that when he was giving the hospital health insurance information, and indicated that an on-the-job injury occurred, processing this stopped, and the staff told him that regular health insurance would not pay. Appellant contacted his employer the next day to get the name of the workers' compensation insurance carrier. Appellant then went to see ["Dr. CL"] referred to him by his wife, a legal secretary. He first went to see Dr. CL on September 12, 1991. An initial medical report from Dr. CL dated September 13, 1991, confirms appellant's subjective reports of pain. The report further notes that side to side bending and backward bending were well performed but produced low back pain; that forward bending was markedly limited to 10 degrees with resulting pain in the back and left leg; that x-rays of the left leg and hip were negative for bone and joint pathology; that x-rays of the lumbar spine revealed evidence of previous laminectomy. Dr. CL notes that appellant's prognosis is good. The diagnosis is listed as "acute lumbar sprain".

Appellant testified that he saw Dr. CL a few times subsequently, and last saw him December 31,1991, to review the results of an MRI. No medical report was put into evidence because one had not yet been done; over objection by the respondent, appellant testified he had a protruding, bulging disc at the L4-L5 level, and Dr. CL put him in a steel braced corset which he wore to the hearing. He stated that he could not lift or bend presently, nor could he drive.

On cross-examination, it was brought out that appellant had not worked continuously for employer since November 1990, but was fired for a month, in approximately March 1991. Appellant testified that he had been in the Air Force, achieving a rank of "E-1". It was brought out that appellant identified his rank as E-3 on a statement given to the respondent's adjuster at his attorney's office on (date), and as an E-4 on his application for employment to employer (which application was admitted as part of an exhibit of employer's records, admitted without objection from appellant). The respondent further explored prior employments held by appellant, as well as two other compensable injuries to the back in 1984 and 1987. The hearing officer disallowed offered testimony and exhibits relating to the 1984 injury and interrogatories or statements made by appellant in relationship to that action. Medical records for these prior injuries were, however, admitted, and appellant did not object to introduction of any medical evidence. It was appellant's position that he had admitted prior injuries to the back, but that the injury suffered at employer's premises was a compensable aggravation of that injury.

On cross-examination, the respondent also elicited that appellant may have omitted certain prior injury information in interrogatories or depositions taken in proceedings after the 1984 injury. Appellant's attorney pointed out that discovery is subject to being supplemented; on at least one occasion in redirect examination he successfully established that there was no inconsistency in a statement that had been claimed by respondent. Appellant was also able to demonstrate that respondent was mistaken in contending that incorrect information had been furnished on an application for health insurance.

It was brought out in cross-examination that, contrary to his assertion on direct examination, appellant had seen another doctor for problems relating to his back between his surgery and (date of injury). He admitted that he had consulted with ["Dr. F"], who had been one of his treating physicians for his 1990 injury and surgery, on February 26, 1991. Dr. F's notes indicate that appellant told him on that date that his back had gotten better since surgery until two weeks ago. Pain in the lower lumbar region is noted. Appellant agreed that since his operation there were times when he would move wrong and his back would start bothering him, or there were times when he would jerk open a door and slip and his back would hurt.

On (date), appellant gave a statement in his attorney's office to the respondent's adjuster, (Mr. G), about the injury. Appellant stated, in redirect examination, that he did not realize on that date that respondent would eventually controvert the claim. Describing the injury, appellant states that he slipped off the trailer onto his heels while he was doing a "walk around" in a boat, after he had been "showing all of the features you know like a salesman does and uh . . . I got in the inside of the boat and got him inside the boat . . . ." He identified the customer as Mr. G.

On the matter of the serial numbers, appellant acknowledged on cross-examination that two of the three serial numbers he needed could be obtained without getting into the boat. However, he stated that he was getting the trolling motor serial number from the engine box which is usually up underneath the front deck. Later, he said that the engine number would be on a card, and that one did not have to get into the boat to get this card but he believed that he did.

Mr. G appeared as respondent's witness, and stated that he came voluntarily after being informed that he had been subpoenaed. Mr. G stated that he had selected the Pro 17 bass boat after hearing first about it in a magazine. He had been at the employer's lot about 3 weeks earlier. When he arrived at employer on (date of injury), he went there for the purpose of buying this boat. He stated that he arrived before lunch, and went with his wife and three-year-old child to the Pro 17 boat out in the lot. Mr. G did not look at boats in the showroom. He then went inside the lobby, into the warehouse doors toward the showroom and ran into appellant here. Mr. G stated that they went directly to appellant's office and negotiated for about an hour, and eventually forged a deal for a Pro 17 with a 40 horsepower motor.

Mr. G brought five photographs of the boat he bought, mounted on a trailer that was like the one it was mounted on (date of injury). He testified that he is five feet, six inches tall. The photographs show that the edge of the boat is approximately waist level on Mr. G. One photograph shows his hand reaching into a seat compartment inside the boat. His arm does not appear stretching to reach into the compartment. Mr. G testified he stood flat-footed on the ground when this picture was taken. [It can be inferred from these photographs that one can reach with ease into the boat without getting into the boat or stepping up onto the rim of the trailer]. The edges of the trailer rim appear to be located

more under the boat than sticking out to the side.

Mr. G stated that he was taken by appellant to another man's office where he filled out and signed papers. He recalled seeing appellant only once more, when he "popped his head" briefly into this office, and said something, but Mr. G did not recall what. He unequivocally stated that he left the employer's lot after this was done, and did not return at all to the boat in the lot. Mr. G said that he was never around a Pro 17 boat with appellant on (date of injury), nor did he recall appellant getting into such a boat when he was around him.

Mr. G went to pick up his boat on Tuesday, August 13, 1991. He said that it was located in front, and that he and appellant checked that lights and small equipment on the boat was working. He stated that appellant took out the paperwork, such as manuals and warranty. He stated that he put his three-year-old child into the boat, but does not recall whether appellant got into the boat or up on the trailer. Mr. G said that they did not test the features from inside the boat. He stated that he backed his Bronco up to the boat, and that appellant helped him attach the ball hitch on the trailer to his car. Mr. G stated that they both lifted the trailer to hook it to his vehicle. He stated that it did not matter to him which Pro 17 boat he got, in that series.

A statement from Mr. T, who was appellant's direct supervisor, taken (date), indicates that appellant had indicated back problems before at work. Mr. T noticed on Monday or Tuesday that appellant was walking around like his back was hurting. He asked appellant what was wrong, and he responded that he had slipped from the trailer of a boat and hit his heels hard on concrete. Mr. T stated that this was not reported to him on (date of injury).

A November 16th statement which was given to appellant's investigator by Mr. L, the business manager of the employer, at first indicates that Mr. L was told on some day other than Saturday by appellant that he had hurt his back stepping off a boat, but later in the statement Mr. L surmises it could have been a Saturday because appellant was casually dressed. Mr. L could not recall the date at all, and agreed with the investigator that during the summer, sales occurred run just about every weekend.

The appellant argues that the decision of the hearing officer creates a requirement that a claimant's injury be witnessed or corroborated, and that this is a change from previous law. We disagree that the hearing officer had imposed such a standard. It has been, and remains, the burden of the claimant to establish that an injury occurred within the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Although the fact of an injury may be established on the testimony of the claimant alone, Gee v. Liberty Mutual Insurance Company, 765 S.W.2d 394 (Tex. 1989), the trier of fact is not required to accept a claimant's explanation. Texas Employer's Insurance Ass'n v. Poe, 253 S.W.2d 645 (Tex. 1953). A claimant must link any contended physical injury to an event at the work place. *See* Appeal Panel Decision No. 91103 (Docket No. HO-00116-91-CC-1, decided January 10, 1991); Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.- Texarkana

1961, no writ).

The hearing officer's recognition that appellant was an interested witness does not show, as appellant argues, an arbitrary and capricious rationale for her decision, but simply acknowledges what has been recognized in workers' compensation case law. The trier of fact is not required to accept a claimant's testimony at face value, even when not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ); Whaley v. Transport Insurance Company, 559 S.W.2d 451 (Tex. Civ. App.-Tyler 1977, writ ref'd n.r.e.). The hearing officer is the sole judge of the relevance, materiality, weight, and credibility given to the evidence. Art. 8308-6.34(e). She may choose to reconcile conflicting evidence about the injury against the appellant. Johnson v. Employers' Insurance Corp., *supra*.

In this case, appellant gave conflicting statements as to how the accident occurred. The photographic evidence indicates that it would not be necessary to step into the boat, or onto the trailer, to get the serial numbers from the boat. The photographs further show that the inside of the boat is readily accessible to a person standing on the ground next to the boat. As the hearing officer notes, Mr. G testified as a person having no interest in the ultimate outcome of the claim. Evidence of assistance to hitch up the trailer to Mr. G's vehicle is inconsistent with his claim of pain. Although appellant argues that his accident was inconsequential, and Mr. G would have no reason to recall it, there was evidence presented by appellant that he suffered some loss of composure, and was shaken, which alludes to an incident of greater than inconsequential magnitude. Appellant also changed his statement about consulting with a physician about his back after his surgery in October 1990, stating at first that he had not, and under cross examination that he had consulted Dr. F.

As to evidence of prior back injury, it must be observed that an employer takes the claimant as he finds him, and the existence of a pre-existing condition *per se* does not defeat a claim of injury on the current job, so long as there is a causal connection between the work place and the injury. See Garcia v. Texas Indemnity Insurance Co., 209 S.W.2d 333 (Tex. 1948). An insurance carrier that contends that a pre-existing injury is responsible for incapacity has the burden to prove that it is the sole cause, rather than any subsequent accident. Texas Employers' Insurance Ass'n v. Page, 553 S.W.2d 98 (Tex. 1977). In this case, even though respondent contended no accident occurred, respondent also had to defend against an issue of disability. Had the hearing officer determined that a compensable injury occurred (date of injury), evidence of prior injuries would have been essential to respondent's discharge of his burden to show sole cause.

We conclude that evidence relating to the extent and nature of prior back injures was admissible in that the evidence related to injuries similar to the one appellant now alleges, and thus had some bearing on the issue of disability. *See* Mayfield v. Employers' Reinsurance Corp, 539 S.W.2d 398 (Tex. Civ. App.-Tyler 1976, writ ref'd n.r.e.).

However, we tend to agree with appellant that evidence from matters not related to

the injury or omissions in sworn statements on testimony offered in other proceedings on issues not directly related to the injury would be inadmissible in court. As noted in Appeals Panel Decision No. 91065 (Docket No. FW-00106-91-CC-2, decided December 16, 1991), although conformity to the legal rules of evidence is not necessary, Art. 8308-6.34(e), we nevertheless believe that unduly prejudicial matters should not be admitted or considered. The Texas Rules of Civil Evidence offer valuable guidance on evidentiary matters that might be appropriately considered in admitting evidence. Tex. R. Civ. Evid. Rule 608b (Rule 608b) generally precludes cross-examination of, or proof of, extrinsic evidence of specific acts of misconduct for purposes of attacking a witnesses' credibility, by showing that he would have behaved in the instant proceeding in a manner consistent with past behavior. The evidence relating to statements on employment applications and purported omissions in sworn statements in other proceedings would fall within the scope of this prohibition. Lovelace v. Sabine Consolidated, Inc., 733 S.W.2d 648 (Tex. Civ. App.-Houston [14th Dist] 1987, writ denied); Nix v. H.R. Management Co., 733 S.W.2d 573 (Tex. Civ. App.-San Antonio 1987, writ ref'd n.r.e.). Furthermore, as pointed out by appellant, discovery in other proceedings is subject to being supplemented, and we would further note that testimony from other lawsuits, although sworn, exists in the context of those other proceedings rather than the one at hand. Whether or not appellant, in another proceeding, left out one of his prior injuries in response to interrogatories has little to do with whether an injury occurred on (date of injury).

But, assuming that it was error for the hearing officer to admit evidence of specific misconduct for purposes of credibility assessment, we would note that there is no indication that it was considered or given any weight by the hearing officer. To obtain reversal based upon error in admission or exclusion of evidence, a party must show that the determination was in fact error, and second that the error was reasonably calculated to cause, and probably did cause, rendition of an improper judgment. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.- San Antonio 1983, writ ref'd n.r.e.). The fact that the judgment went against appellant does not establish that the hearing officer made use of prejudicial evidence. *See* Texas Employers' Insurance Ass'n v. Poe, *supra*.

The record here, leaving aside evidence relating to former employment or other proceedings, contains sufficient evidence to support the decision that no compensable injury occurred on (date of injury). In this case, the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust. See Montes v. Texas Employer's Insurance Ass'n, 779 S.W.2d 485 (Tex. Civ. App.-El Paso 1989, writ denied). Her decision is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Joe Sebesta
Appeals Judge