APPEAL NO. 92050

On December 16, 1991, a contested case hearing was held in (city), Texas. The case was continued until January 14, 1992. The Hearing Officer determined that the claimant, the appellant in this appeal, did not incur a compensable injury on _____, in the course and scope of his employment with ("employer"). The hearing officer determined that The Home Indemnity Company was not the carrier, and that the insurance carrier was in fact (carrier).

The appellant has asked that we review the decision of the hearing officer and determine that the evidence was sufficient to substantiate a finding that the appellant sustained a compensable injury in the course and scope of his employment. Respondent replies that the appeals panel cannot sit as a *de novo* fact finder, and must review the decision of the hearing officer on a standard of whether the findings are so against the great weight and preponderance of the evidence so as to be manifestly unjust. The respondent asks that the decision of the hearing officer be upheld. The finding regarding the carrier at the time of the injury is not disputed, and the respondent is now (carrier).

DECISION

We find that there is sufficient probative evidence supporting the decision of the hearing officer that appellant did not sustain a compensable injury in the course and scope of his employment, and we affirm his decision.

We would note that respondent has correctly stated the appeal panel's practice as to the scope of review. The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Texas Workers' Compensation Act ("1989 Act"), TEX. REV. CIV. STAT. ANN. Art. 8308-6.34(e). (Vernon's Supp. 1992). His decision should not be set aside provided that his decision is supported by sufficient evidence of probative value of is not against the great weight and preponderance of evidence 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 Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The burden is on the claimant to prove, by a preponderance of the evidence, that an injury occurred within the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). We will not reverse the decision, findings, and conclusions of the finder of fact, absent a determination that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Briefly, the facts presented at the hearing are as follows. Appellant, contended that he injured his neck and shoulder while pulling a slab of meat across a table with a hook on _____. He stated that he reported this injury and sought treatment from the employer's on-premises nurse. He complained again the following day, then sought treatment at a local hospital, where he was put off work for four days. As this time,

appellant's regular work week was Tuesday through Friday, so he returned to work on August 20, and worked until his last day of work August 30, 1991. He stated that he had not been hurt prior to this or at home.

("Mr. P"), Health Service & Safety Manager for the employer, stated that he also served as the company "nurse." He had been a medic in the military, was a certified E.M.T., and was studying toward a degree in nursing. He said that on _____, appellant came into his office twice, complaining that his shoulder hurt. Mr. P gave him ibuprofen and rubbed an analgesic ointment on his shoulder. Mr. P stated that he observed several bruises over appellant's left shoulder extending into the neck. When he asked appellant how he got the bruises, appellant said he did not know and denied having bruises. Mr. P stated he specifically asked appellant if he had been hurt at work, and that appellant continued to state that he did not know how he was hurt. Mr. P characterized the bruises as old, because they were beginning to change color to a yellowish brown. He stated that appellant complained of pain in this general area. Mr. P testified that, based upon his experience, he would not expect a pulling injury to produce bruises. Mr. P stated that he also put foam padding on the shoulder strap of appellant's wire mesh apron, which he stated weighed no more than 5 lbs. Mr. P stated that appellant was let off to go consult a doctor when he complained the next morning, (day after incident), that he could not work because of the soreness. He stated that appellant returned at noon with a doctor's statement from (Hospital) stating that he was to be off work for four days. Mr. P stated that he was under the impression that appellant had asked for that week off. Mr. P stated that the first he knew that appellant was claiming an on-the-job injury was when he received a doctor's report dated September 16, 1991, from appellant's doctor. He stated that individuals who did physical work for the employer would have occasional days of soreness, but that this did not mean that they were suffering from a cumulative trauma injury.

Ms. N testified that on _____, she served as training supervisor for the employer. She stated that it was her job to go out on the floor and observe workers, and assist them if needed or if they were experiencing problems. She stated that concern with safety of employees and their working conditions was part of her job. Ms. N, at Mr. P's request, observed appellant for 15-20 minutes in the morning of _____, and stated that he performed his job without apparent difficulty or pain. She agreed that it was possible that this observation occurred when appellant was experiencing the effect of the analgesic he had been given by Mr. P. She observed him in passing throughout the day and noted nothing indicating that he was in pain. Ms. N was in Mr. P's office when he asked appellant how he was hurt, and agreed that appellant responded he did not know. She said that she observed the bruises, which were scattered across his shoulder, with the largest being about silver dollar or half dollar size.

The medical evidence in the record consists primarily of doctor's slips taking appellant off work. An initial medical report based on an August 14, 1991, examination of

appellant lists a diagnosis of "tendinitis" and notes that a shoulder x-ray was negative. A medical report from Dr. F, dated September 4, 1991, diagnoses cervical facet syndrome and Grade III thoracic strain.

At the benefit review conference, the date of injury that appellant claimed was August 17, 1991; the conference report records, as "claimant's position" that a repetitive trauma injury occurred with complaints dating back to August 1, 1991. At the contested case hearing, an _____, date of injury was asserted and evidence presented on that theory. Respondent pointed out that, due to the change in the alleged injury date, it was apparent that the respondent had a 30-day notice defense based upon notice first being given September 16, 1991, and it had been unable to assert this at the benefit review conference. Appellant's attorney countered that appellant had experienced a repetitive trauma injury (although this was not the theory upon which the evidence had been presented) and that his last day of work would have been his last date of injury for purposes of giving notice. When the respondent countered that he was confused as to appellant's contentions, the hearing officer stated that he would continue the hearing. The hearing was continued to January 14, 1992, but, at that time, the hearing officer announced, and the parties agreed, that the sole issue was whether respondent was the insurance carrier on _____ (an issue that had also been raised and reserved at the beginning of the December 16, 1991, hearing). No evidence was produced at the continued hearing regarding a repetitive trauma injury, or the 30-day notice issue.

An insurance carrier's liability for compensation under the 1989 Act is for an "injury" that arises out of the course and scope of employment. Article 8308-3.01 (a). The Act defines "injury," in pertinent part, as: "Damage or harm to physical structure of the body . . . ." Art. 8308-1.03(27). An aggravation of a pre-existing injury can itself constitute a compensable injury. Gulf Insurance Company v. Gibbs, 534 S.W.2d 720, 724 (Tex. Civ. App.-Houston [1st Dist.] 1976, writ ref'd n.r.e.). Mere pain, without damage or harm to the physical structure of the body is not compensable under the workers' compensation statute National Union Fire Insurance Co. of Pittsburgh v. Janes, 687 S.W.2d 822 (Tex. Civ. App.-El Paso 1985, writ ref'd n.r.e.).

Taken as a whole, we find sufficient probative evidence to support the decision of the hearing officer that the appellant did not sustain a compensable injury on _____, and we affirm his decision.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Joe Sebesta
Appeals Judge