APPEAL NO. 92061

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held in (city), Texas, on January 8, 1992, with (hearing officer) presiding as hearing officer. The two disputed issues for the hearing were (1) whether appellant sustained an injury in the course and scope of his employment, and, (2) whether appellant's difference in earnings were a result of his injury or a result of his alleged violation of work rules and subsequent termination. The hearing officer issued his Decision and Order on January 17, 1992, which, after reciting fourteen findings of fact and seven conclusions of law, determined that appellant was not entitled to receive any benefits from respondent as the result of his alleged injury on (date of injury). In his appeal the appellant states he "essentially agrees" with the hearing officer's "Statement of Case" and "Statement of Evidence" while at the same time objecting to the hearing officer's "highly subjective" evidentiary interpretation and findings. Appellant then goes on to agree with the hearing officer's 14 findings of fact and five of the seven conclusions of law. Appellant challenges only the sufficiency of the evidence to support the conclusions that appellant didn't prove by a preponderance of the evidence that he injured his back on (date of injury), while in the course and scope of his employment, and, that appellant is not entitled to medical benefits as a result of his alleged injury on (date of injury). Appellant does not pursue on appeal the second issue at the hearing concerning the difference in his earnings and the reasons therefore.

DECISION

Finding the evidence sufficient to support the challenged conclusions of the hearing officer and finding no reversible error, we affirm.

The evidence established that appellant commenced work for the (Employer) on May 28, 1991, as a laborer-helper at the site of a newly constructed warehouse built by Employer. Appellant was to sweep the floor and otherwise assist with cleaning the new building for presentation to the owner. Appellant's tasks did not involve heavy lifting. Appellant worked on May 28th, left the job at noon on May 29th due to stomach illness, called in sick on May 30th, and worked May 31st. Appellant testified that while at work on (date of injury), he hurt his back picking up a wooden pallet which he had been directed to move and which he estimated to weigh between 40 and 50 pounds. Appellant said he "felt a real sharp pain on my upper left-hand middle side of my back . . . ." He finished working that day though continuing to experience pain. He worked all the next day as well, hoping his injury was minor, but began to realize he may have seriously hurt himself. While at work on June 5th, he felt great pain, reported it to his supervisor about mid-morning, and asked about seeing the Employer's doctor. He was sent to the (Clinic) where he saw (Dr. V), that morning. The Employer's evidence showed he didn't return to work that day although appellant claimed he did. Appellant further testified that he had had two prior serious back injuries, in February 1986 and in May 1987, and that he had settled claims for these prior injuries. Appellant stated that he recovered from the two prior back injuries in approximately one

month after the settlements. According to appellant's testimony, his two prior injuries were to his "low back" and "lower back inside," and involved a bulging disc at L5-S1 and a herniated disc at L4-L5. However, the back injury he sustained on (date of injury) was to his "upper middle left-hand side" and gave him no problem with his lower back.

According to the Initial Medical Report (TWCC-61) signed by Dr. V on June 19, 1991, and which referred to appellant's initial visit on June 5th, appellant gave a history of lifting pallets and feeling a jerk in his back. This record shows appellant admitted to previous back injury strain about five years ago, had no other back problems, and was presently complaining of throbbing pain in both lower extremities with his legs feeling weak. In appellant's medical records was a "patient pain drawing" executed by appellant on June 5th on which he had marked as his areas of pain the lower back and backs of legs. Dr. V diagnosed "mechanical back strain" and prescribed 30 minute neuro-muscular stimulation treatments for three days. Dr. V returned appellant to light duty work on June 7th with a 20-pound lifting restriction which was increased to 35 pounds on June 14th. The medical evidence introduced by appellant also showed he received the electrical stimulation therapy from (Dr. B) at the (Clinic) on June 5th, 6th, and 7th. On June 7th appellant still complained of pain and was reinstructed in the correct manner of performing his exercise therapy. Apparently appellant was seen by Dr. V again on June 13th and for the last time on June 14th. Appellant testified he assumed that he couldn't receive further treatment from Dr. V or Dr. B after June 14th, the date his employment was involuntarily terminated.

A record introduced by appellant showed his visit to the (Rosa Verde) on "6/27/91" where the diagnosis of "strain of the thoracic and lumbosacral spine" was made and he was taken off work. He also introduced an "Initial Medical Report" (TWCC-61) signed by (Dr. H) at Rose Verde on July 11th which indicated appellant could return to limited type of work on "8/27/91," to full-time work on "9/27/91," and, that appellant was anticipated to achieve maximum medical improvement on "12/27/91." This record also reflected appellant's history of a low back injury in 1986. Appellant's treatment plan at Rose Verde called for moist hot pads and interferential current three times per week for two weeks. Appellant testified he hadn't received treatment from Dr. H since July 1991.

According to (JA), appellant's supervisor, the dimensions of the pallets at the job site were approximately 3 to 4 feet by 3 to 4 feet by 6 inches and they weighed about 20 pounds. Appellant was hired and worked on May 28th and was out sick one and one-half days during his first week of employment. During the second week, appellant told JA on June 5th about hurting his back lifting a pallet on (date of injury) and was sent to the Employer's doctor on June 5th. No one witnessed the pallet lifting incident on (date of injury). On June 6th appellant left work to go to the doctor for a treatment and asked to be off the rest of that day so he could move to another residence. On June 7th appellant arrived for work at 11:00 a.m. after having earlier gone to the doctor's office for a treatment. On June 10th, a woman called Employer to advise that appellant wouldn't be at work due to an emergency at home. On cross-examination appellant testified he was unaware of any emergency at home. On June 11th, appellant called Employer at 8:00 a.m. advising he couldn't come to work because his car had broken down. On June 12th, appellant called Employer at 3:20 p.m.

advising his car was still broken. On June 13th the appellant did not go to work but called to say he would come by for his paycheck and was indeed able to find transportation later that day to pick up his paycheck. At that point, JA, who badly needed appellant at work to help get the building cleaned up on a tight schedule, decided to terminate appellant's employment due to appellant's unreliability, his "constantly not coming to work." On June 14th, appellant came to work, was given a ride to the doctor's office and then back to work where he was then dismissed.

According to appellant, he has not worked since being dismissed on June 14th, has not looked for work, and was unaware of Dr. H's report indicating he could return to full-time work in September 1991. With regard to his moving on June 6th, the friends who were to help him move didn't appear and his girlfriend ended up moving his belongings. Appellant only lifted small items.

The hearing officer found, *inter alia*, that appellant had been asked to move a pallet on (date of injury), was sent to a doctor complaining of hurting his back while moving a pallet, was placed on light duty by the doctor, changed the location of his back pain from lower middle back when seeing the doctors to upper middle back at the time of the hearing, and did not receive "a disability" rendering appellant unable to return his employment. As previously noted, appellant does not challenge these or any of the other findings but does challenge the conclusions that appellant failed to prove an injury on (date of injury) in the course and scope of employment and that appellant is not entitled to medical benefits.

It is obvious that the hearing officer was not persuaded by appellant's testimony that he sustained a new, third back injury on (date of injury) during an apparently unwitnessed incident in which he lifted a pallet of disputed weight. While the medical records could be viewed as corroborative of appellant's testimony, it was appellant himself who provided the doctors with the history of his injury and of his prior back problems. In that regard, appellant's testimony regarding the number of prior back injuries as well as the relative location of his (date of injury) back injury varied from the information in the doctor's records. Appellant's medical records from the (Clinic) stated that spine x-rays showed no evidence of fracture or dislocation. The records from Rosa Verde contained no mention of x-rays or any other imaging and appellant adduced no other test results or medical evidence of an objective nature.

Article 8308-6.34(e) (1989 Act) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight to be given to the evidence. The Texas courts have frequently described the nature of the discretion given the factfinders in their evaluation and acceptance or rejection of evidence. In Aetna Ins. Co. v. English, 204 S.W.2d 850, 855-856 (Tex. Civ. App.-Dallas 1947, no writ), the following general rules were stated:

"Jurors may accept some parts of a witness' 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 instance the jury may form its verdict upon that part accepted along with any other testimony of probative value tending to support the same fact. Notwithstanding these general rules, the jury may not arbitrarily or capriciously reject the unimpeached and uncontradicted testimony of a disinterested witness. 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. (Citations omitted.)"

In Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.) the court instructed that the factfinders are "privileged to believe all or part or none of the testimony of any one witness . . . ." In Lopez v. Associated Employers Insurance Company, 330 S.W.2d 522, 524 (Tex. Civ. App.-San Antonio, 1960, writ ref'd), where the jury rejected the testimony of the allegedly injured employee that she had sustained an accidental injury when she slipped and fell and found instead that her incapacity was solely caused by preexisting ailments, the court said:

"It is true that [employee] testified that she slipped and fell and injured herself, but she is an interested witness and the jury was not compelled to accept her testimony as true. There is no other testimony that she fell and injured herself."

After carefully reviewing all the evidence in the record, we do not find the hearing officer's conclusion that appellant failed to prove he sustained a compensable injury on (date of injury), to be 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, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Joe Sebesta
Appeals Judge