APPEAL NO. 92069

A contested case hearing was held at (city), Texas, on December 16, 1991, and January 3, 1992. The hearing officer determined the respondent received an injury in the course and scope of his employment and was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp 1992) (1989 Act). The appellant, the workers' compensation carrier for the employer, urges error in one of the hearing officer's findings of fact and conclusions of law and in his decision and order. He urges there is no evidence to support them, they are against the great weight and preponderance of the evidence, and they are "arbitrary and capricious/not reasonably supported by substantial evidence." The appellant also claims error in awarding benefits because there was no finding of disability to support the award of benefits.

DECISION

The hearing officer's decision is affirmed.

In reviewing a "no evidence" challenge on a request for review by the appeals panel we consider only the evidence and reasonable inference drawn therefrom which, when viewed in their most favorable light, support the hearing officer's determinations. All evidence and inferences to the contrary are disregarded by the appeals panel. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ). Points of error based upon insufficient evidence warrant our reversal only if, after reviewing the entire record, a hearing officer's determinations are so contrary to overwhelming weight of evidence as to be clearly wrong and unjust. Hutchinson, *supra*; Texas Workers' Compensation Commission Appeal No. 92048 (Docket No. SA-A125235-01-CC-SA45) decided March 18, 1992.

The respondent testified that he worked as a salesman for (PLM) on (date of injury), when, in the morning, he slipped on a wet substance on the garage floor and injured his back by wrenching it in a near fall. He stated he noticed an individual laughing at him and thought he might have witnessed the near fall.

The respondent claims he told a supervisor, (TR) about the near fall and about the other employee laughing at him. Respondent also claims he told another employee in the garage area, (DL), about slipping and advising that the spill should be cleaned up. The respondent also claimed he told a girlfriend and his mother about the slip and near fall in two separate telephone conversations later in the day.

The respondent worked the remainder of the day but claims he was up most of the night treating his painful back. He worked all day on (date) and states he again was up most of the night treating his back. Around noontime on the 11th he states he asked TR where an employee went if he was injured. He later went home and called PLM to get the name of PLM's workers' compensation carrier and then went to the (MC hospital) where he was admitted. He was in the hospital for several days and on September 13th, saw (Dr.

L), an orthopedic consultant, for a short period.

Following his discharge on September 13th, the respondent went to PLM to fill out a report of injury. He listed a (JH) as a witness as that was the name told to him by TR when he, the respondent, described the person who he thought might be the person who laughed at him on (date of injury). After the report was filled out, the respondent was terminated.

The respondent was extensively cross-examined about, and there was other evidence admitted concerning, four prior back injuries which resulted in workers' compensation claims. These occurred in 1970 or 1971, 1980 or 1981, 1986 or 1987, and in 1989. Medical records were also offered by the appellant and admitted concerning the respondent's back problems in 1989, 1986, 1981, and show the respondent has had a number of back problems over the years including two laminectomy surgeries, left lumbar herniated nucleus pulposus, and acute lumbosacral strain. Other medical records show the respondent has had serious coronary problems over the last six years including two bypass surgeries.

Medical reports from the respondent's admission to MC hospital on (date), state that:

> "The patient presented on 9/11 with complaints of pain noted since the following Monday, at which time the patient had sustained a near-fall with twisting of his back. Since that time, the patient had development of low back pain with radiation of numbness into the left posterior thigh and lateral calf. The patient, during the same time, also developed mild anginal pains which he states were not significant. The patient was admitted for further evaluation."

The final diagnosis in this report indicated, *inter alia*, "acute lumbar syndrome with lumbar radicular syndrome, status post-previous lumbar surgery by history."

An initial medical treatment report by Dr. V dated (date), shows a diagnosis of sprained back.

Later medical reports from HCA Medical Center of (city) indicate the respondent was admitted on September 21, 1991, and was described as "a very pleasant gentleman" and complained "of numbness on the lateral aspects of his left calf" related to the slipping and near fall on (date of injury). The report indicates he later became irritated with his treatment, was uncooperative and threatening at times, and that he was being transferred to (Dr. G). Also admitted into evidence was a letter from Dr. G to the appellant dated November 18, 1991, advising that he was treating the respondent. He states his diagnosis of "foraminal stenosis with tearing of scar tissue. He did sustain a significant on-the-job injury which is preventing him from working."

A report from the appellant's selected physician dated January 3, 1992, indicates that he reviewed the additional medical records of the respondent following his examination and that, in his opinion, there was "no demonstrable change in [the respondent's] condition

following the alleged slip and fall in (date of injury)" and that there is "no evidence of an additional injury on (date of injury)" and that "no treatment, after the initial visit, was reasonable and necessary as a result of the alleged (date of injury) incident."

The respondent called three witnesses, his mother, sister and a good friend, who generally affirmed their affidavits and related the respondent was well and not having back pain prior to (date of injury), and that he was in pain following the incident. His mother indicated the respondent told her about the slip and near fall incident during a telephone conversation shortly after it happened on (date of injury). All indicated they were not present when the incident occurred and they did not witness the respondent slip and nearly fall.

The appellant presented affidavits or statements from four PLM employees including JH, DL and TR who stated they did not see the respondent slip or nearly fall on (date of injury) and that the respondent did not tell them about his slipping or falling. TR indicated the first he knew of the alleged injury was on (date) when the respondent went to the Emergency Room.

The appellant also presented evidence which indicated the respondent lied on his employment application by checking boxes which indicated he had not filed or been paid any prior workers' compensation claims and established the respondent has lied about his educational level in the past.

To be certain, this was a very vigorously presented and defended claim. The hearing officer noted that determining the facts in this case, because of the nature of the injury and the circumstances surrounding the claimed incident, hinged largely on the believability of the witnesses and the opportunity to question them thoroughly. In arriving at his resolution of the issues, that is, whether the respondent slipped and nearly fell on (date of injury) at PLM and, if so, did he suffer a compensable injury or was his condition after slipping solely caused by previous injures, he recognized certain aspects of the respondent's evidence. Specifically, he commented that the respondent brought in witnesses "who established, based on [respondent's] lack of apparent pain prior to (date of injury) and apparent pain on and after that date, that something did occur on (date of injury)." These witnesses were all cross-examined and apparently were believed by the hearing officer. He also commented that the respondent himself testified about the incident and injury and was also vigorously cross-examined about prior claims, his employment record and statements made on application forms. The hearing officer quite apparently found his testimony regarding his injury to be credible, after considering the whole of his testimony. The hearing officer also considered the affidavits presented by the appellant and then observed there was no opportunity for cross-examination of these witnesses. Of course, affidavits and statements are fully acceptable methods for bringing evidenciary matters before the contested case hearing. Article 8308-6.34(a)(5), Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.8. (TWCC Rule 142.8). The hearing officer is the ultimate decider of the weight and credibility to be given the evidence in the case. There was also the medical evidence, albeit somewhat conflicting given the respondent's prior extensive back

problems, which indicated he sustained some injury or aggravation of an injury to his back. Consequently, we can find absolutely no basis to sustain the appellant's challenge of "no evidence" to support the hearing officer's decision and order or his findings and conclusions. Hutchinson, *supra*. Nor do we find his findings, conclusions, decision and order to be so against the great weight and preponderance of the evidence as to be clearly or manifestly wrong or unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.); Appeal No. 92048, *supra*.

Clearly, resolving conflicts in the evidence and assessing credibility was the major task facing the hearing officer in this vigorously contested case. In this regard, we are very mindful of the provisions of Article 8308-6.34(e) of the 1989 Act which provide in pertinent part:

> 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, . . .
>
> The hearing officer can believe all, part or none of the testimony of any one witness [Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)] and give credence to testimony even if there are some admitted discrepancies in the testimony and previous testimony. *See* Texas Employers' Insurance Association v. Stephenson, 496 S.W.2d 184 (Tex. Civ. App.-Amarillo 1973, no writ). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark. N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1978, no writ); Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ).

Appellant argues there is no objective medical evidence of any new injury. Aside from the medical reports of Dr. G which indicate "foraminal stenosis with tearing of scan tissue" and the medical reports of other doctors examining the respondent after his admission to the hospital, the respondent gave testimony concerning his injury of (date of injury). The respondent himself can provide probative evidence concerning his injury and it can support the establishment of an injury even where it may be contradicted by some other medical evidence. Stephenson, *supra*; Texas Workers' Compensation Commission Appeal No. 92040 (Docket No. BU/91133013/01-CC-BU31) decided March 16, 1992. We are satisfied there was probative evidence before the hearing officer from which he could find and conclude the respondent suffered an on-the-job injury.

The appellant in its original statement of controversion and throughout the contesting of this case concluded the respondent was "disgruntled employee claimant" and that he was not worthy of belief. As observed above, there was evidence that the respondent did not disclose any prior workers' compensation claims on his employment application and was not truthful in stating his educational background, however, this was a matter for the hearing officer to consider in weighing and assessing the credibility of the respondent's testimony. That respondent was not truthful about his workers' compensation claims concerning his prior back injuries and surgeries would not, in and of itself, defeat his recovery for an injury

sustained on (date of injury). *See generally* State Department of Highways and Public Transportation v. Thrasher, 805 S.W.2d 798 (Tex. App.-Tyler 1990 no writ).

The appellant urges that the respondent's previous back injuries and surgeries prior to his employment with PLM were the cause of any back problems he may have had on or after (date of injury). Initially we note that the employer takes an employee as he finds him and just because the employee has some preexisting condition does not defeat an otherwise newly established injury or aggravation of an injury arising in the course and scope of employment. Appeal No. 92040, *supra*; Texas Workers' Compensation Commission Appeal No. 91119 (Docket No. BU-00041-91-CC-1) decided February 7, 1992. And, an insurance carrier contending that a preexisting injury is responsible for incapacity has the burden to prove that it is the sole cause, rather than any subsequent accident. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). Here, the hearing officer did not find that to be established and there is evidence sufficient to support that determination.

The matter raised in appellant's brief concerning the quantum of the benefits due the respondent was not an issue before the hearing officer and was not determined in his decision and order. The respondent is entitled to those benefits provided by the Texas Workers' Compensation Act and in accordance with the decision. If the amounts of benefits become a contested issue, such issue can be resolved in a separate dispute resolution process.

Considering the entire record and the matters submitted by both parties to this appeal, we do not find that the findings, conclusions, and decision of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly or manifestly wrong or unjust. Accordingly, the decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge