APPEAL NO. 92094
APRIL 27, 1992

On February 5, 1992 a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that the respondent, claimant herein, had sustained a compensable injury on (date in injury) in the course and scope of his employment with (employer), and gave notice of such injury to his employer on January 4, 1991. These were the two issues raised in the benefit review conference and the hearings.

In an emotionally-charged appeal filed with this body, the insurance carrier, carrier herein, asks that these determinations be reviewed and reversed by the Appeals Panel, on several grounds. The carrier argues that there was no evidence to support the decision of the hearing officer on both issues, that there was insufficient evidence to support those determinations, that the hearing officer's decision was arbitrary and capricious, that the hearing officer abused her discretion in her decision and an award of benefits, and that an award of benefits was improper also in that there was no proof that the claimant lost any time from work as well as the fact that outstanding medical bills were not in issue (and were thus improperly admitted into evidence). As part of its argument, carrier cites that claimant has a "history" of filing compensation claims, (although it has not disputed that claimant's prior injuries and claims were anything but *bona fide*), and that claimant is a chronic liar. The claimant also attacks the Act, Texas Workers' Compensation administrative rules, and decision on constitutional grounds.

DECISION

Finding no reversible error in the decision of the hearing officer, we affirm her findings, conclusions, decision, and order.

I

The claimant was employed for approximately a year and a half by the employer, primarily to work in its warehouse, and secondarily to serve as an occasional delivery truck driver. He stated that he was injured at his last refueling stop in City 1 in the evening of (date of injury) (an incident he initially recalled as occurring January 4 in City 2) when he slipped on an icy grid on his 18-wheel truck and fell on his back, and broke the radar detector in the truck as he grabbed for it in the fall. According to weather records submitted by claimant, the high and low temperatures that day in City 1 were below freezing. This happened at around 9:00 or 10:00 at night; he arrived back home around 4:00 in the morning, and the next morning at 8:00 a.m., which he recalled as a Friday, he reported this to Mr. T, the branch manager. He stated that he also reported the accident to Ms. M, Mr. T's assistant, as soon as he came through the door to tell her about the broken radar detector. He stated that Mr. T told him he needed to continue to drive because there was already another driver who was injured and could not drive. Claimant stated that his recollection on the location was refreshed when he reviewed a fuel ticket for his last stop

that indicated this occurred in City 1 rather than City 2.

Claimant continued to work for employer until he was terminated around the 7th of February, 1991. Claimant stated that he felt he was terminated for filing a complaint with OSHA alleging violations of Department of Transportation regulations. He first saw a doctor, Dr. N, for his injury on April 17, 1991. Dr. N's report notes pain, and an EMG reflecting acute and chronic left L5-Sl radicular changes, with mainly chronic changes on the right side in the same area. The doctor's impression is an on-the-job injury, with lumbar radicular syndrome. A CT scan a month later revealed a bulging disc at this location. Dr. N also notes that claimant was in an auto accident in 1989 and, at that time, was found to have a bulging disc, but the report notes that this cleared completely. Claimant has undergone physical therapy at Dr. N's direction. Medical bill forms from the doctor's office indicate "No" in response to "was the condition related to patient's employment" and are blank in response to an "accident" inquiry; however, these same bills are directed to carrier, to the attention of "Work Comp" and were entered into the record by carrier.

Claimant had filed three previous workers' compensation claims, all of which were resolved by settlement. In February 1985, claimant claimed he had injured his back and sustained a hernia. He testified that it later turned out that the primary condition was hernia, and that back pain related to that hernia. In February 1989 he injured his legs when pinned by a forklift. In June 1989, he injured his back, legs, ribs, and hips in an automobile accident. A settlement on his third injury was approved March 8, 1991; the settlement held open medical treatment as directed by Dr. D for claimant for his injuries through September 6, 1991. The claimant acknowledged that he did not disclose his prior compensation claim on an employment application he filed in October 1988 with a previous employer. However, the record indicates that, at the time, he had filed only one comp claim and the resulting hernia condition was disclosed on the application.

Carrier also cross-examined claimant on two other purported omissions or false statements: 1) a pre-employment physical conducted May 31, 1989 for employer on which claimant indicated he had no history of head or spinal injuries, and 2) claimant did not complete a part of his current employer's application which asked about any physical impairments that would preclude him from performing the job. As to the first, claimant pointed out (correctly, it would appear to us) that his prior compensation claims at that time did not involve spinal injuries. (The automobile accident, which he conceded involved injuries to his back, had not then occurred.) As to the second, claimant accurately pointed out that the entire side of that application was blank, and stated he did not recall seeing it before. (Indeed, the fact that none of it is filled out leads to an inference that he failed to turn over the application form, rather than an inference that he was "concealing" prior injuries.)

In 1989 the employer had filed a letter on claimant's behalf to substantiate lost wage related to his car accident claim, because claimant's starting date with employer had been deferred due to his injuries from the automobile accident.

Mr. T testified that he was branch manager for employer. There were fewer than 10 employees at the location where claimant worked. He stated that claimant's primary duties consisted of moving and loading products at the warehouse, and secondarily serving as utility driver on a back-up basis. Mr. T testified that he himself had driven trucks on occasions when only one other driver was available. According to Mr. T, he and claimant were friends as well as coworkers up until claimant's termination for refusing to take loads, refusing to turn in DOT logs, and refusing to load pails of product on a truck that was sitting in the yard. He stated that claimant was asked to make a West Texas run in early January 1991, because the usual driver was working light duty in the warehouse due to a work-related injury. Mr. T recalled claimant coming into his office the morning of January 4th but stated that he was never aware that claimant suffered a work-related injury until two months after he was fired. He testified that he knew about claimant's automobile accident at his previous job, and that employer deferred hiring him because of it, but had understood that a knee injury resulted. Mr. T confirmed an investigation occurred relating to a DOT complaint but said that the company was not cited for a fine or penalty.

Mr. T emphasized that DOT regulations preclude him from sending injured drivers on runs and he could be personally fined for doing this. Mr. T stated that if claimant told him on January 4th that he was injured, he would have covered future runs with another driver or himself. He stated he would not have hired claimant if he knew he had a back injury, as it was "not a good practice" to do so. Mr. T observed claimant doing heavy manual labor around the warehouse, including lifting of 50 lb. sacks, right up until the time he was fired, and that claimant never appeared to be in pain. Ms. M's testimony as to the notice issue, and claimant's continued activity at the job, was similar to Mr. T's. Both Mr. T and Ms. M held a supervisory status over claimant.

Two coworkers' affidavits were put into evidence essentially to the same effect on the notice and continued work-related activities. Claimant initially objected to their admission because he would be denied an opportunity to cross-examine these witnesses, who he understood were going to personally appear at the hearing. The hearing officer indicated that she would be inclined to grant a continuance if requested by either party; both declined, claimant stating that he desired to get the proceeding "over with". The hearing officer cautioned carrier that she would not give as much weight to affidavit testimony as she would to live testimony.

It must be noted that claimant claimed only medical benefits at the benefit review conference and the contested case hearing, stating that he has continued to work in order to adequately support his family. Bills for medical expenses were put into evidence over objection from carrier, who stated that medical bills were not in issue and there was no proof that the bills were reasonable and necessary treatment for the injury.

II

Carrier's last point of error, regarding the order to pay benefits, will be addressed first. Having found that claimant suffered a compensable injury and had given timely notice of same, she ordered that claimant "is to be paid any benefits to which he is entitled pursuant to the Act," and that carrier was liable for such benefits. The Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. art. 8308-1.03(5), defines benefit to mean a benefit received based upon a compensable injury, including medical benefits, income benefits, and death or burial benefits.

The hearing officer clearly intended that the insurance carrier consult the Act as to the full extent of its liability. For example, temporary income benefits (TIBS) are not payable unless the claimant had disability. *See* Art. 8308-1.03(16); 4.22; and 4.23(a). Medical benefits are due to treat the compensable injury regardless of whether an injured worker has lost time or not. Art. 8308-4.61 A health care provider is precluded from pursuing a private claim against an injured worker for all or part of the costs of health care unless the injury is finally adjudicated as non-compensable. Art. 8308-8.42. The carrier must promptly pay or dispute the medical bills submitted, Art. 8308-4.68(a), and can be liable for interest on unpaid health care provider billing. Art. 8308-8.27. While health care is subject to medical policies and fee guidelines of the Commission, and must be reasonable and necessary, it is the insurance carrier's obligation to perfect a dispute over entitlement or cost of health care in accordance with Art. 8308-4.68(d) and dispute resolution procedures described in Art. 8308-8.26, as well as applicable rules of the Commission. The general liability of the carrier for medical bills arises from the hearing officer's finding that a compensable injury was sustained, not from actual proof of each and every medical bill. There was no error in admitting such bills into the record; any error, however, would have been harmless.

Carrier's constitutional claims will be addressed by noting that we have no jurisdiction to rule on the constitutionality of state statutes. Aside from the fact that these issues were not raised in the proceeding below, we take official notice that these issues are currently under judicial review in the Fourth Circuit Court of Appeals in San Antonio (Texas Workers' Compensation Commission *et al*. v. Hector Garcia *et al*., Case No. 04-91-00565-CV).

An objective review of the record indicates that there is evidence on both sides of the issues addressed in the hearing. However, it is the hearing officer who is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. Art. 8308-6.34(e). Her decision should not be set aside 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). A court of appeals in reviewing and analyzing a "no evidence" point of error should and must consider only the evidence and reasonable inferences therefrom that support the trier of fact, and disregard inferences and evidence that are adverse to the determination. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. Civ. App.-Beaumont 1991, no writ). In reviewing a point of "insufficient evidence," if the record considered as a whole

reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Youngblood, *supra*. We do not substitute our judgment for that of hearing officer when, as here, her findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employer's Insurance Association v. Alcantra, 764 S.W.2d 865 (Tex. Civ. App.-Texarkana 1989, no writ). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The claimant has the burden of proving, through a preponderance of the evidence 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.). The fact of an injury may be established upon the testimony of a claimant alone, and need not be corroborated. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). An insurance carrier that asserts that pre-existing conditions are the sole cause of a current injury has the burden of proof. Texas Employer's Insurance Co. v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 91094, decided January 17, 1992.

Carrier is emphatic that it believes claimant not to be credible, and goes so far as to note its opinion that he is a chronic liar. However, many of the examples it gives (as noted in various portions of this opinion) are ambiguous or otherwise fall far short of establishing "a history of lying." Further, given that claimant does not assert entitlement to TIBS, and given further that it is no longer possible to settle one's lifetime medical benefits in the 1989 Act, Art. 8308-4.33(b), carrier's contention that claimant would lie to "collect money" is not well taken, as there seems to be no money for claimant to collect. We also note that claimant was not his only witness. The medical report from Dr. N clearly establishes the existence of damage or harm to the physical structure of the body, *i.e.* an "injury," within the definition set forth in Art. 8308-1.03(27), and this was completely uncontroverted by the carrier. The record does not show that the injury may have occurred after claimant was terminated.

The hearing officer apparently found the claimant credible, as it is within her express purview to do. We do not agree that her determinations have been made arbitrarily, in disregard of the facts, or that she has abused her discretion by finding that the facts weigh in favor of the claimant, and affirm her decision.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge