APPEAL NO. 92167

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 March 19, 1992 a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He found that claimant, respondent herein, was injured in the course and scope of employment on (date of injury) and incurred disability. He ordered the carrier, appellant herein, to pay benefits. Appellant asserts that disability was found without benefit of expert evidence and respondent is not qualified to determine a "physical disability" making the finding of disability unsupported.

DECISION

Finding sufficient evidence to support the hearing officer's decision, we affirm.

Respondent had worked for (employer) for 17 years as a pilot. On (date of injury), he was on a work assignment when his helicopter hit a powerline. The line broke the windshield but did not do catastrophic damage because it also broke, and the helicopter was able to land. Initially, injuries were thought to be minor or nonexistent. Respondent, later on the same day as the accident, noticed shoulder and head pain but did not consider it serious. By Monday, December 23, it was worse, and he called his family physician, who gave him an appointment for December 27, 1991, which he stated that he kept. His employer fired him on December 23, 1991.

On (date of injury) employer had assigned respondent to fly a helicopter to a Strategic Petroleum Reserve site near (city), Texas, in response to a request by (manager of the site). Upon arrival, respondent did not see a helipad so flew around the site several times looking for it and then landed in a lot just outside the site. (He testified that as a general rule, one does not fly over a Strategic Petroleum Reserve.) He met the environmentalist, (Mr. H), an employee of manager, who entered the helicopter and asked him to fly several missions (down the pipeline, hovering over water while samples were obtained). As these were completed and they were returning to the site, Mr. H asked him to fly around the perimeter fence so it could be visually checked. As they flew over the fence line, the helicopter hit the powerline. All agreed that it was within respondent's scope of employment with employer to do these missions for manager.

The first issue at hearing embraced the manner in which the last mission was flown. Minimum altitude standards were set by the Federal Aviation Administration (FAA) and by the employer. Carrier Exhibit G generally showed that in an other than congested area an aircraft should maintain a minimum altitude of 500 feet except in sparsely populated areas. Helicopters were specifically allowed to operate at clearances less than 500 feet if to do so would be without "hazard to persons or property on the surface." Carrier Exhibit J then indicated that it was employer's policy that a helicopter not be flown lower than the highest surrounding obstructions without first determining what obstructions are present. At the

hearing appellant took the position that respondent had deviated from the course of employment by flying the helicopter other than in compliance with regulations and policy. Respondent countered that in his interpretation of the instructions, he had not knowingly violated instructions since he had checked out the site earlier upon arrival when looking for a place to land and had just not seen the lone wire to the site. Appellant on appeal does not dispute the hearing officer's view that violation of relevant flying rules would only relate to the manner of doing the job and would not limit the scope of respondent's employment. Similarly appellant does not attack the finding that respondent was acting within the course and scope of employment.

While the second issue at hearing was whether respondent was injured in the accident of (date of injury), the issue on appeal, recited in terms of injury, primarily disputes the sufficiency of evidence submitted at the hearing to support a conclusion that disability was incurred. The respondent testified that the accident caused his shoulder to hurt and his head to ache, which he first noticed on the day of the accident. His testimony was uncontroverted that three days later he made an appointment to see a doctor seven days after the accident. He demonstrated the limited range of motion of his arm at the hearing, which he attributed to the accident and stated that he has not worked since the injury. Again, there was no evidence to contradict that assertion. While the hearing officer does not have to accept the testimony of an interested witness even though uncontradicted, Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ), probative value could be given to a claimant's testimony as to causation, Houston Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.-Houston [1st Dist] 1987, no writ). That court also said that generally injury and disability may be established by testimony of a claimant and other lay witnesses; an exception requiring expert testimony for scientific or technical questions was said to be "a narrow one and is not to be applied unless the facts come strictly within it." *See also* Daylin, Inc. v. Juarez, 766 S.W.2d 347 (Tex. App.-El Paso 1989, writ denied), which said, "[t]he lay proof of the sequence of events, his objective symptoms of pain and discomfort fortified by evidence of timely treatment, produced a logical, traceable connection between accident and result." In addition, Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. App.-Amarillo 1980, no writ), states that the jury (trier of fact) may believe all or none or part of any witness' testimony.

As Harrison, *supra* stated, not only injury, but disability may be supported by lay witness testimony without medical opinion. Both Houston General Ins. Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) and International Ins. Co. v. Torres, 576 S.W.2d 862 (Tex. Civ. App.-Amarillo 1978, writ ref'd n.r.e.) held that an injured party's testimony, even when contradicted by medical testimony, may establish disability. More recently, Director, State Emp. Wkrs. Comp. v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied) stated, "[t]he Texas Supreme Court has long held that incapacity and disability can be a question answered inferentially by a jury either through circumstantial evidence or lay witness testimony even if contradicted by medical experts."

The 1989 Act does not substantially change prior law found at TEX. REV. CIV. STAT. ANN. art. 8306 § 20 (repealed 1989) in defining injury. Where an area of prior law has not

been substantially changed, the appeals panel will consider relevant case law interpreting prior law. *See* Texas Workers' Compensation Commission Appeal 91002 (Docket No TY-00003-91-CC-01) decided August 7, 1991. While "disability" under prior law was defined by terms such as "total", "partial", and "incapacity", TEX. REV. CIV. STAT. ANN. art. 8306 § 6, 10, and 11 (repealed 1989) and therefore was somewhat different than the current definition, "[d]isability means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." (Article 8308-1.03(16) of the 1989 Act), the appeals panel has ruled that disability may be addressed by lay witness testimony. *See* Texas Workers' Compensation Commission Appeal No 91024 (Docket No LB-00015-91-CC-1) decided October 23, 1991. The appeals panel has also ruled that it may consider the testimony of a claimant in regard to inability to work because of the injury. *See* Texas Workers' Compensation Commission Appeal No 92147 (Docket No FW-91085735-01-CC-FW41) decided May 29, 1992. While medical evidence was not essential to a determination of injury and disability, the hearing officer did have evidence of medical care to consider. Respondent testified not only as to seeing his doctor, (Dr. M), about his injuries after the accident, but also that Dr. M prescribed hydracodeine and cyclobenzaprine (respondent characterized this as a muscle relaxer) plus one other drug for his injuries. Since Article 8308-6.43(g) of the 1989 Act provides that conformity to the rules of evidence is not necessary in contested case hearings, respondent's testimony as to what his doctor prescribed for him was admissible to be given the weight considered appropriate by the hearing officer. The respondent, who has 17 years' experience as a pilot and at hearing showed knowledge of FAA rules, also testified that while on these medications he could not fly for a living. No evidence was offered to contradict that respondent received these medications for his injuries or that while taking such medications his ability to work as a pilot would be compromised. While it is true that no medical records were in evidence, respondent did offer two medical exhibits but because he had not exchanged them with appellant, neither was admitted.

The determination that respondent had disability was based on sufficient evidence of record. The hearing officer is the judge of credibility of any witness, and just as was stated in regard to the injury question, he may believe all of the respondent's testimony. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The evidence was sufficient to support the hearing officer's findings, conclusions and decision. Texas Emp. Ins. Assoc. v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.).

We affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Philip F. O'Neill
Appeals Judge