APPEAL NO. 92171

On April 2, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), respondent herein, sustained a repetitive trauma injury to his back as a result of driving a truck for his employer, (employer), and that (date of injury), was the first date respondent was aware that he had sustained an injury due to driving the truck. She concluded that respondent had sustained an injury in the course and scope of his employment, and ordered appellant, the employer's workers' compensation insurance carrier, to pay benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that the evidence shows that respondent did not sustain an injury in the course and scope of his employment, and requests that we reverse the hearing officer's decision and render a new decision to that effect. Respondent represented himself at the hearing and has not filed a response to appellant's appeal of the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

Under the 1989 Act an "injury" includes "occupational diseases," which term includes "repetitive trauma injuries." Articles 8308-1.03(27) and (36). A "repetitive trauma injury" means damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Article 8308-1.03(39). It is the claimant's burden to establish that an injury was received in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). To recover for a repetitive trauma injury, one must not only prove that repetitious, physical traumatic activities occurred on the job, but also prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.).

Unless the record shows that a hearing officer's finding on an issue is factually insufficient, or so against the great weight and preponderance of the evidence as to be manifestly unjust, we do not interfere with the hearing officer's decision. *See* Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 92180 (Docket No. TY-91-131409-01-CC-TY41) decided June 11, 1992. Moreover, because the hearing officer is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we do not substitute our opinion for that of the hearing officer merely because we might have reached a different factual conclusion. *See* Spillers, *supra*; Texas Workers' Compensation Commission Appeal No. 92180 *supra*.

The employer is in the logging business. Respondent, who is 41 years of age, testified that he had worked as a truck driver hauling logs for the employer off and on for four years. He was last hired by the employer in July of 1991. In August of 1991 he began driving a particular tractor trailer owned by the employer which, he said, rode rough all the time, vibrated his back, and "beat him." He explained that the rough ride was the result of a "busted air bag" which was supposed to be between the frame of the truck and the truck cab. Without this air bag, the cab rode on the truck frame. The truck also had "busted shocks," a bad suspension, and a bad wheel alignment which "kept eating up tires." He described riding in the truck as a "dead bump" all the time. Respondent said he drove the truck four to six days a week hauling two or three loads per day for 14 to 16 hours per day from August through part of December 1991. On weekends he serviced the truck. From August through October 1991, the truck was in the shop four times for repairs to the suspension and alignment. He asked the repair people to fix the air bag and seat cushion but this was never done. He also told the owner's son, (Mr. D), that the air bag needed to be fixed, and told other people working for the employer that the seat cushion and suspension needed to be repaired. Although he acknowledged that repairs had been made to the truck shocks and suspension in October 1991, he maintained that the truck still rode rough, and that it wore out tires due to a bad suspension and alignment. December 20th was the last day he hauled logs with the truck. On that day he was told by the owner of the company, (owner), to take the truck in to the shop the next day for repairs to the suspension and alignment. When respondent took the truck in for repairs on December 21st, it had two "blowouts" and six tires were "showing steel." Because the truck was in the shop for repairs, respondent did not do any work for the employer or drive the truck again after December 21, 1991. Respondent testified that on (date of injury) his lower back began to hurt when he tried to get out of bed that morning. In a transcribed recorded statement which was in evidence (included in the record as part of Claimant's Exhibit No. 5 although the "Evidence Presented" portion of the decision failed to note same), respondent explained that his back "started really hurting" him the morning of (date of injury), that he had been taking aspirins, and that one of his legs had been "going to sleep" on him while driving the truck. He further stated that working with the truck caused his back to start hurting him, and that it was not until he had time off from work in December when the truck was not vibrating his back and beating him that his back started "really hurting." Respondent testified that on (date) he called the employer's secretary, (Ms. B), and told her that his lower back hurt as a result of "the situation of how the truck was and the period of time I had drove the truck the way it was." Although he said that this was the first time he had told anyone he had trouble with his back, he maintained that he had previously told (Mr. D), who worked on the trucks, that the truck was riding rough and had a bad suspension. Respondent testifed that at (Ms. B's) direction, he tried to see a doctor on (date), but the doctor was out sick. On December 28th, (owner) called and told him that he could not employ him any longer because the insurance company that insured the employer's trucks would not insure him because of his poor driving record. Respondent acknowledged that he had a poor driving record. On December 30th respondent saw (Dr. W) who gave a diagnosis of "lumbar spine strain" in his initial medical report to the Texas Workers' Compensation Commission. The report

notes the history of injury as "Riding in truck with seat sitting on frame. Injuring low back-causing numbness." Respondent said that on December 30th he saw (owner) at a convenience store and told him that he needed to go to the doctor. Respondent said he is not working now and that his back continues to hurt.

(Owner) testified that he did have problems with the truck respondent drove and that he spent about $10,000 getting the wheel alignment fixed. Part of the repairs consisted of having a "complete suspension put under it." He said the "air bag" respondent testified about was an optional feature on that type of truck. The week in December when the truck was back in the repair shop, the insurance company that insured his trucks notified him that it would no longer insure respondent, so on Saturday, December 28th, when the truck was fixed, he called respondent and told him that due to the insurance problem he could not let him drive anymore and had to let him go. He said that prior to and during his conversation with respondent on December 28th, respondent never mentioned a back injury or talked to him about a rough riding truck. This witness said that the first he knew that respondent was claiming an injury was on the Monday or Tuesday following December 28th when he talked to respondent at a convenience store and respondent told him that he hurt his back driving the truck and was going to a doctor. This witness also said that that day or the next day his secretary, (Mrs. B), told him three doctors had called to "verify workers' compensation."

(Ms. B) testified that toward the end of December, when respondent had been off work for about a week, he called and asked her if the truck had been repaired, but that he didn't mention anything to her about a back injury or being hurt on the job. After respondent had been terminated, she said he called again on a Monday or a Tuesday and said he was going to see (Dr. W) because he didn't get to see the doctor he wanted to see. She denied that respondent told her he was going to the doctor because his back hurt. She said he told her he was "just going to see what was wrong with him." After that conversation someone from a pharmacy called her and asked if respondent was covered under workers' compensation, to which she replied in the affirmative. She could not recall if anyone from a doctor's office called her. She denied telling anyone that respondent's condition was work-related.

In a transcribed recorded statement (Mr. D) said he does mechanical work on the employers' trucks for those problems that don't need to go to the repair shop; that he saw respondent at work almost every day; and that respondent never mentioned anything to him about a back injury or about the truck riding rough.

In Texas Employers' Insurance Association v. Ramirez, 770 S.W.2d 901, (Tex. App. Corpus Christi-1989, writ denied), a repetitive trauma injury case, the court held that the testimony of the claimant and her coworkers was sufficient to establish a causal connection between the specific activities of the claimant's work on a low ironing board and her back condition since the condition was one within the general experience and common sense of persons generally, so that it was appropriate to allow the jury, as fact finder, to know or anticipate that the condition could reasonably follow the specific events. Sprains and strains

suffered in the course and scope of employment have been held to be compensable. *See* Hanover Insurance Company v. Johnson, 397 S.W.2d 904, 905-906 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.). A low back injury suffered by a truck driver who drove a Mack truck which jarred and bounced him around has been found to be an injury in the course of the driver's employment (that jury finding was not challenged on appeal of the case). Ramsey v. Sentry Insurance, 564 S.W.2d 463 (Tex. Civ. App.- Waco 1978, no writ). In Lujan v. Houston General Insurance Company, 756 S.W.2d 295 (Tex. 1988), the Supreme Court of Texas stated that, often, the manifestation of an injury occurs later than the precipitating event, and noted that Texas courts have allowed recovery in delayed-action cases where the injury originated in the employment, but manifested itself at a later time.

In our opinion there is sufficient evidence of probative value to support the hearing officer's finding that respondent sustained a repetitive trauma injury to his back as a result of driving the employer's truck. There is evidence that the poor condition of the truck's shocks and suspension resulted in respondent's back being continually and repeatedly "beat" and vibrated over a period of several months. There is also evidence that the repeated beating incurred by respondent resulted in low back pain which "really" started to hurt him several days after he put the truck in for repairs for the fifth time. In addition, (Dr. W's) diagnosis of a lumbar strain shortly after respondent stopped driving the truck corroborated respondent's testimony that he, in fact, sustained an injury. Having reviewed the entire record, we conclude that the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be manifestly wrong of unjust.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge