APPEAL NO. 92207

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On April 13, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer, to consider the sole disputed issue, to wit: was appellant injured in the course and scope of his employment with (employer). Appellant contended that the repetitive motions involved in the performance of his several jobs in employer's "tank house" for over eight years caused the development of a Baker's cyst in his left knee which ruptured in late (date of injury). Respondent contended that appellant failed to meet his burden of proving by a preponderance of the evidence that his Baker's cyst and its rupture were caused by his employment urging that such condition was, for appellant, an ordinary disease of life. The hearing officer found that neither the Baker's cyst nor its rupture was caused by any of appellant's work activities, concluded that appellant had not met his burden of proving he sustained an injury in the course and scope of his employment, and decided he was not entitled to benefits under the 1989 Act. On appeal, appellant contends that respondent, its counsel, and the two employer witnesses all "acted in bad faith" at the hearing, committed "fraud" by false representations, omissions, and concealment of facts, and further disputes in general the sufficiency of the evidence to support the hearing officer's decision.

Respondent not only takes sharp issue with appellant's fraud and bad faith allegations but urges that the evidence is sufficient to support the determination that appellant failed to prove his Baker's cyst and its rupture were caused by work-related activity.

DECISION

Finding no error and sufficient evidence to support the hearing officer's findings and conclusions, we affirm.

Appellant testified he commenced working for employer in its "tank house" sometime in August 1983. He began this employment as a laborer and rapidly progressed through a number of jobs to a position called "hot sheet man." He apparently worked for approximately one and one-half years in this position which involved the lifting of between 40 and 50 "5 day hot sheets" (presumably copper) per day, each of which weighed between 40 and 50 pounds. He said this job involved squatting and bending down and picking up the sheets and also some bars. On February 28, 1984, appellant severely hurt his right knee playing softball on employer's team, was placed on light duty for a time, and was later returned to regular duty. He said that this injury caused him to favor his right leg and put more weight on his left leg when standing. He experienced difficulty working in the tank house areas with high heat and humidity and was subsequently reassigned by employer to a position called "slitter sheeter." Except for approximately one and one-half years when he worked in the "cellar," appellant had worked for approximately the past seven years, first as a slitter sheeter, then as a "sheet feeder," and again as a slitter sheeter. Apparently his

work in the cellar involved sweeping the "slimes" and shoveling them into a wheelbarrow and then lifting the wheelbarrow with several hundred pounds of slimes. It involved jumping in and out of the pan to get to the slimes. The sheet feeder and slitter sheeter positions were described as quite similar in terms of the physical activities involved. Three to five of appellant's years of employment after his right knee injury and prior to his Baker's cyst rupture on or about (date of injury), were spent as a slitter sheeter. In brief, appellant's duties as a slitter sheeter involved positioning a stack of 325 sheets of No. 1 copper on a forklift pallet at his work station. He had to climb two steps to the work station. He would lift each sheet, weighing approximately 13 pounds, from the stack and run it through the machine to cut the sheet into sixteen "loops" or strips for the fabrication of tanks. He would then squat 15 to 20 times a day to pick up the stacks of loops and put them in hoppers. In performing this process, pieces of scrap copper would fall into a can recessed below the work station. When the scrap can was full, appellant used a tow motor to pick up and remove the can and replace it with an empty can. Appellant said the job involved mostly standing at the machine and pivoting to obtain the sheets and back again to run them through the machine. Both the department head, (Mr. Y), and appellant's supervisor, (Mr. J), described appellant's duties as among the easiest and least physically strenuous of the several tank house jobs and rated it a "2" on a scale of "10" in terms of its physical demands as compared with the other jobs. Appellant, however, said: "It can be hard, strenuous work. It's production work." Appellant was provided a break in the morning, a lunch break, and an afternoon break, and in addition he could leave his station at will for periodic relief and smoke breaks. The job was self-paced and appellant could finish his work in less than eight hours depending on his pace.

Appellant several times posited his theory to the effect that it was the repetitious movements involved in the several jobs he performed for employer over the nine and one-half years of his employment that caused his Baker's cyst and its rupture. He said he did more squatting, bending, lifting and climbing in the jobs he performed in the tank house before being assigned to predominantly slitter sheeter (and sheet feeder) duties. The only features of the job's physical demands or motions on which the evidence conflicted involved the scrap cans below the machine and the length of time appellant had to stand at the machine. Appellant insisted that he left his slitter sheeter work station approximately every 20 minutes to go down, climb into the scrap can, stomp on and compress the scrap, and climb out. He seemed to rely on this activity, more than any other of the various jobs' physical requirements, as evidence of the repetitive motion which caused the formation and rupture of his Baker's cyst. However, (M). (Y) and (J) testified that such activity was not a part of appellant's job, would constitute a safety violation given the sharpness of the copper scraps, and denied seeing appellant perform that activity. It appears as though appellant's allegations of fraud and misrepresentation by these witnesses relate to this testimony. This was the sharpest area of evidential conflict. The other area of conflict involved the length of time appellant had to stand at the machine. The employer's witnesses testified about his breaks and freedom to move around and away from the machine at will.

At the hearing appellant objected to testimony from (Mr. Y) on the basis that

respondent had not exchanged a witness list within 15 days after the benefit review conference. The hearing officer, considering that both parties complained of seeing certain of the exhibits for the first time at the hearing, indicated she had given appellant, who was not represented, a "broad hand" to put on his evidence over respondent's objections and would do the same for respondent. Appellant did not make this objection an appealed issue though he did complain in a general sense of not seeing "most evidence." Though we find no harm nor abuse of discretion under the circumstances of this case, we note that specific provisions for the timely exchange of evidence and for good cause determinations for untimely exchanges are provided for in Article 8308-6.33 and in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (TWCC Rules).

(Mr. Y) was department head at the tank house and had known appellant since the commencement of appellant's employment. (Mr. Y) testified that the slitter sheeter job only requires squatting once a day to pick up the 13 pound sheets with another employee to weigh them, that the only climbing involved is up the stairs to the work station, and that appellant has ample opportunity to walk around. He said appellant had spent most of his time during the past seven years around the slitter machines. He also noted that appellant had been overweight since he had known him and that coworkers had complained that he needed to get in shape. When his testimony was concluded, appellant told Mr. Y: "Thanks a lot, (M). I think you've been pretty honest."

(Mr. J), appellant's immediate supervisor since 1984, said appellant had been given a job as a slitter sheeter for the past five or six years since his knee injury because the job didn't require a lot of moving. He said the job doesn't involve much squatting, climbing, or heavy work with the legs and that appellant never reported a knee injury. He denied that the job required appellant to stand for hours at a time with his knees locked. He denied seeing appellant climb down into and out of the scrap pans to stomp on the scrap. He also testified that the "hot sheet" job appellant did early on involved much squatting.

Turning to the medical evidence, appellant introduced evidence of the injury to his right knee incurred when playing softball, and also evidence of a chronic post-traumatic right shoulder joint condition initially suspected to involve a rotator cuff tear. These conditions and the documents did not appear to directly relate to the Baker's cyst injury. Appellant seemed to imply that since the shoulder problem had been treated as a work-related injury from repetitious movement, so too should his left knee problem be similarly accommodated. On or about (date of injury), appellant experienced pain and swelling in his left calf and was sent from employer's nurse's office to the medical clinic used by employer where (Dr. B) diagnosed acute thrombophlebitis in appellant's left leg and took him off work until the pain and swelling subsided. On a follow-up visit on (date), (Dr. B) discussed the matter with (Dr. O) at the clinic and they decided to send appellant to (Hospital) for therapy.

Appellant was admitted to the hospital on (date) and discharged on January 7, 1992. While in the hospital appellant was attended to by (Dr. W) who consulted with (Dr. M) and (Dr. L). According to the hospital records, (Dr. M) changed the diagnosis to a Baker's cyst

"which ruptured with work-related activities." The connection to work-related activities was based on a history, apparently provided by appellant, which included "standing with knees locked for hours favoring right knee" and "stepping into pit 4 feet deep and climbing out with left knee bent." As already noted, employer's witnesses disputed both that appellant stood for hours with knees locked in view of his periodic breaks and freedom to move around the work station, and also disputed that his job entailed climbing in and out of the scrap pit to stomp down the scrap pieces. This hospital record also stated weight reduction was advised for appellant. In his January 6, 1992 report of his January 4th consultation, (Dr. M) described appellant as a 41 year old man, 5 feet 11 inches tall and weighing 250 pounds, who had a 17 day history of pain, stiffness and swelling in his left lower leg and an inability to stand or to bend his knee. The report noted that in his job appellant had to stand for long periods but that his knee is locked, that he then has to move around and bend his knees, and that he has been favoring his right leg since arthroscopic surgery on his right knee nine years previously. The report stated that appellant denied any history of trauma or immobility, and that he had a ruptured left-sided Baker's cyst with pain and swelling to his left calf. Handwritten on both this typewritten report, and on a page of (Dr. M's) typewritten report of his January 15th consultation, following the words: "Impression: Ruptured Left Baker's Cyst," were the words: "most likely related to patient's occupation." Appellant also introduced a February 25, 1992 letter from (Dr. M) which stated that appellant's ruptured left Baker's cyst "resulted from his duties at work which involves standing for long periods of time, climbing on and off tow motors, jumping in and out of copper pans." (Dr. M's) February 19th report stated that appellant's leg had improved considerably and that he had lost six pounds and weighed 244 pounds. Appellant testified that he weighed 216 pounds when hired, that 190 pounds was his ideal weight, and that he had gained 35 pounds since April 1991. He said that the injury he was contending was compensable was the rupture of the Baker's cyst which with proper treatment, including weightlifting, leg exercises, ice packs and medications, is expected to resolve within a month so that he can return to work for employer.

Respondent introduced two reports from (Dr. S) to which appellant objected on the grounds that he had not been examined by that doctor. One report summarized (Dr. S's) research of the medical literature on Baker's cysts while the second report summarized his review of appellant's medical records. They were admitted over objection because (Dr. S) wasn't required to have examined appellant in order to research medical literature, review appellant's medical records, and render an opinion as to whether or not the Baker's cyst was work related. Respondent also introduced medical literature, apparently obtained by appellant from (Dr. M), which described "popliteal cyst (Baker's cyst)" as a swelling in the posterior aspect of the knee. This article stated that "[i]n adults, a Baker's cyst is usually secondary to underlying disease of the knee joint, such as internal derangement, osteoarthritis, or rheumatoid arthritis," and that a cyst may rupture "with any activity, but is especially common during repetitive squatting movements, such as taking inventory or redoing the stock in a store." The article noted the similarity of the symptoms with thrombophlebitis, the condition with which appellant was first diagnosed. (Dr. S's) review of the medical literature indicated that Baker's cysts are found in about 40% of the population

without symptoms, are most common in males, and are frequently seen in association with inflammatory traumatic conditions of the knee joint. According to this research, "rheumatoid arthritis, osteoarthritis and meniscal tears are the commonest causes of Baker cysts; . . . " and "[t]he work relatedness of this depends upon the individual patient's medical and work history . . . . Since Baker's cysts may also be related to meniscal tears and other knee injuries, if Baker's cysts occurred in a person with non-work related meniscal tears, it would be likely that the Baker's cyst was related to that injury and likely, non work-related. However, if the work situation exacerbated a preexisting condition, Baker's cysts could be considered work-related." (Dr. S's) research also noted that obesity is among the non-work related factors which may be involved.

In his report which reviewed appellant's medical records, (Dr. S) noted that an MRI scan of appellant's left leg, performed on January 3, 1992, revealed "abnormal lineal increased signal density in the posterior horn of the lateral meniscus compatible with meniscal tear" and opined that "[i]t is very likely the Baker's cyst is associated with this meniscal tear, since it is common that meniscal tears are associated with Baker's cyst . . . [i]t seems most likely that the Baker's cyst is related to the meniscal tear present in the left knee. The etiology of this tear is not documented. While it is possible the meniscal tear is related to work activities, it is also possible that it is related to non-work activities."

Respondent also introduced certain insurance forms submitted by (Drs. W), (Dr. M), and (Dr. O) for payment of their fees upon which was checked "No" the Item 10 question: " Was condition related to patient's employment." Appellant was concerned about these exhibits because he said they had not previously been exchanged and purported to contradict his evidence that his ruptured cyst was work related. None of these invoices was signed by the respective doctors. They were obviously mere forms submitted for payment of fees and didn't purport to be medical reports, as such.

"An insurance carrier is liable for compensation for an employee's injury, without regard to fault or negligence if: . . . (2) the injury arises out of and in the course and scope of employment." Article 8308-3.01(a). Appellant has the burden of proving by a preponderance of the evidence that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The 1989 Act defines "injury" to mean damage or harm to the physical structure of the body as well as diseases or infections naturally resulting therefrom and such definition includes occupational diseases. Article 8308-1.03(27). Article 8308-1.03(36) defines "occupational disease" to mean "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body. The term includes other diseases or infections that naturally result from the work-related disease. The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a compensable injury or occupational disease. The term includes repetitive trauma injuries." We have previously noted that "[p]robative evidence of a causal connection between the employment and a claimant's disease necessary to establish an occupational disease can

be provided in several ways. Causation can be found where: (1) general experience or common sense dictate that reasonable men know, or can anticipate, that an event is generally followed by another event; (2) there is a scientific generalization, a sharp categorical law which theorizes that a result is always directly traceable back to a cause; or (3) probabilities of causation articulated by scientific experts are sufficient and more than mere coincidence. (Citations omitted.)" Texas Workers' Compensation Commission Appeal No. 91004 (Docket No. redacted) decided August 14, 1991.

The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34 (1989 Act). As the trier of fact, the hearing officer is not required to accept a claimant's testimony at face value even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621, 625 (Tex. Civ. App.-Amarillo 1980, no writ). A claimant must connect the contended injury to the workplace, and the trier of fact may reconcile conflicting evidence concerning the injury against the claimant. Johnson v. Employers' Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Conflict among medical witnesses is a matter to be resolved by the trier of fact. Highlands Underwriters Insurance Co. v. Carabajal, 503 S.W.2d 336, 339 (Tex. Civ. App.-Corpus Christi 1973, no writ). In this case, the hearing officer was presented with conflicting medical evidence and had to resolve such conflict. (Dr. M) himself, apparently, wrote on his reports of January 6th and 15th that appellant's ruptured Baker's cyst was "most likely related to [his] occupation," and in his February 25th report stated that the condition "resulted from his duties at work which involves standing for long periods of time, climbing on and off tow motors, jumping in and out of copper pans." In contrast, (Dr. S's) opinion was that appellant's Baker's cyst was " most likely . . . related to the meniscal tear present in the left knee." As we have already observed, (Dr. S's) report indicated that asymptomatic Baker's cyst is present in up to 40% of the population. The Texas Supreme Court has stated that "[o]rdinary diseases of life are compensable only when incident to an occupational disease or injury." Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199, 205, Tex. 1980). *See also* Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ) for further discussion of "ordinary disease of life" vis-a-vis "occupational disease." The hearing officer was entitled to consider and weigh the credibility of the factual information upon which the opinions of (Drs. M) and (Dr. S) were grounded and find, as she did, that Baker's cysts are usually secondary to an underlying disease such as osteoarthritis, rheumatoid arthritis or internal derangement of the knee joint; that appellant has a meniscal tear in his left knee of unknown cause; that Baker's cyst ruptures may occur during any activity but are especially common during repetitive squatting movements; that appellant's job did not require excessive or repetitive squatting; and, that neither his Baker's cyst nor its rupture was caused by any activity appellant engaged in at work. The hearing officer had the discretion not only to weigh the conflicting evidence regarding the physical demands of appellant's various jobs over the years and the extent and nature of the repetitive motions involved, but also to give more weight to (Dr. S's) reports than to the medical evidence and opinions presented by appellant. Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). We may not substitute our judgment

for that of the hearing officer where, as here, there is some evidence of probative value in the record to support the findings and they are not against the great weight and preponderance of the evidence. Texas Employers Insurance Ass'n v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ).

We have carefully reviewed the record and are satisfied that appellant's broad assertions of "bad faith" and "fraud" on the part of respondent and its counsel are without merit insofar as the conduct of the contested case hearing is concerned. The conflicts, inconsistencies, and contradictions in all of the evidence, both documentary and testimonial, was for the hearing officer to resolve as the sole judge of the relevance, materiality, weight, and credibility of the evidence.

Appellant attached numerous documents to his request for appeal, some of which were prepared after the hearing. Among the attachments was a letter from a coworker, dated May 8, 1992, to the effect that slitter sheeters do indeed customarily stomp down on the copper scraps when the bins fill up. Appellant attached correspondence from (Dr. M's) office to establish that Item 10 on (Dr. M's) insurance claim form for his fees was originally checked "No" because he wasn't told appellant was a "worker's comp patient," and that it was later corrected. Appellant also submitted a letter dated April 16, 1992 from (Dr. W) which appeared to relate that his insurance claim forms also had Item 10 checked "No" because the original diagnosis was deep vein thrombosis. (Dr. W's) letter went on to state that he is "in agreement with (Dr. L) and (Dr. M) that the patient's injury is work related." Also attached to appellant's appeal were documents concerning the MRI studies of January 4th which revealed evidence of a meniscal tear, osteoarthritis, and degenerative changes in his left knee. As stated in Texas Workers' Compensation Commission Appeal No.92154 (Docket No. redacted) decided June 4, 1992, "[w]e have noted in prior decisions that our review is limited to the record developed at the hearing (Article 8306-6.42(a)) and we have rejected exhibits first tendered on appeal. (Citations omitted.)" As in those other cases we here too decline to consider documents not a part of the record developed at the hearing. Appellant has not shown that the information in such documents would probably produce a different result; that he only acquired knowledge of such documents after the hearing; or, that it was not a want of diligence which kept him from earlier learning of the documents. Even were we to consider such documents, however, they would appear to merely bolster somewhat the evidence on both sides of the issue.

Finally, appellant wrote the Appeals Panel after the hearing to advise he had not received a copy of the response filed by respondent in this matter; that he was not personally served with a copy, notwithstanding respondent's certificate of service; and, that he was in touch with respondent's attorney and would attempt to obtain a copy. Appellant's letter also stated he has been advised that according to respondent's attorney the copy was left behind the screen door of appellant's residence in his absence. Appellant asks that we review respondent's certificate of service, dismiss its response, and pursue administrative action against its attorney. This we decline to do. TWCC Rule 143.4 requires that the response be served on appellant and it contains a form for the certificate of service. The certificate

of service on respondent's "Carrier's Response to Appellant's Request for Review" certifies that a copy was hand delivered to appellant on June 3, 1992 in substantially the form provided by the Rule. Our jurisdiction was properly invoked by the filing of appellant's timely request for review. A response from respondent, while not required to invoke our jurisdiction, is provided for in the 1989 Act which says such a response shall be both filed with us and a copy served on the appellant party. The response in this case was timely filed and may be considered by us. We are aware of no authority, nor is any cited by appellant, which would empower us to employ the harsh sanction of striking the response, even if appellant, as he contends, didn't actually receive the copy which respondent certified to having served upon him by personal delivery. Compare Texas Workers' Compensation Commission Appeal No. 92034 (Docket No. redacted) decided March 19, 1992.

After a careful review of the record we are satisfied that no reversible error was committed by the hearing officer and that the findings were not based upon insufficient evidence nor were they 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.d 629, 635 (Tex. 1986).

Finding no error, the decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge