APPEAL NO. 92211

On April 15, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding. The sole unresolved issue from the benefit review conference held on December 9, 1991, was whether the respondent (claimant below) sustained an injury in the course and scope of his employment on (date of injury). The hearing officer answered this question in the affirmative, and appellant carrier perfected this appeal. Appellant contended at the hearing that respondent's medical problems were not due to an injury arising out of the course and scope of his employment, but were solely caused by a preexisting condition, and evidence on that issue was offered by both sides. In its appeal, appellant contends that the decision rendered by the hearing officer was so against the great weight and preponderance of the evidence as to be manifestly unjust.

DECISION

Finding no error in the hearing officer's decision, we affirm.

According to the evidence in the record below, respondent worked for (employer) as a swamper, loading and unloading oilfield pipes from trucks. In that capacity on (date of injury), he was standing on a flatbed trailer tallying (measuring) pipes with another employee, (Mr. P). Respondent fell from the trailer, a distance of approximately 5½ feet, and hit the ground with his knees and head.

Respondent did no more work that day upon instructions of his employer, who sent him the next day to (Dr. H). Dr. H performed no tests or X-rays, but told respondent to start eating regularly and to stay out of the heat. Respondent returned to work the same day he saw Dr. H, and continued to work and perform his usual duties for approximately the next two months. Respondent testified that, as time went on following his injury, he experienced trouble walking and would stagger into things, being closer to them than he thought he actually was. He saw Dr. H. once more and was given a prescription, then was taken to (Hospital) where he was seen by (Dr. D), a neurosurgeon who became respondent's treating physician. Dr. D diagnosed right chronic subdural hematoma, secondary to a previous trauma, and on October 10th performed a right frontal craniotomy with evacuation of chronic subdural hematoma and stripping of membranes. He was referred for physical therapy, which resulted in "progressive change toward improved mobility." However, he testified that he continues to suffer dizzy spells and has not been able to work.

At the time of the injury, respondent testified, he had worked for employer for 17 years. He said that he had never suffered from balance or dizziness problems prior to his fall.

Appellant's notice of refused or disputed claim, dated November 7, 1991, alleged as follows:

Claimant's current medical problems are not related to an injury sustained in the

course and scope of his employment. Disability was solely caused by a preexisting condition. Disability is a result of an ordinary disease of life. Present medical problems could possibly be a result of a head injury which occurred as a result of a domestic quarrel approximately two months prior to the alleged injury.

There was conflicting testimony regarding the cause of respondent's fall. On cross-examination, respondent denied that he had blacked out before he fell, saying "If I would have blacked out, I wouldn't have known I fell." He also denied that when he found himself on the ground he looked up and said something like "How did I get here?" or "What happened?" His coworker on the truck that day, Mr. P, did not observe respondent fall, but he said when he helped respondent up, the latter looked at him and asked, "What happened?" When asked by appellant's counsel whether he remembered giving a statement to a carrier representative saying he didn't know what caused him to fall, respondent replied "I just tripped and fell was all." When asked what he tripped on, respondent said he didn't know, adding "one of the main things could have been that trailer, if they haven't fixed it... that trailer's got some boards that's missing, holes on it that you could actually fall through if you was walking down it...." Counsel for appellant claimed that this explanation conflicted with the statement respondent had given, but no transcribed copy of the statement was found and it was never made part of the record.

There was also much conflicting testimony as to whether respondent had bruised or injured his face or head some time before his injury. Respondent testified that he showed up for work one day with his face scratched up a little bit along his jaw, but that it wasn't bruised. He said he did not know how it happened, but that he had not been in a fight and had not been hit around the head. Three witnesses called by appellant testified that on one occasion prior to (date of injury), they had observed respondent with a bruised face. Respondent's employer, (Ms. T), testified that respondent came to work with a bruise on one side of his face and with his head and eye swollen. She said she did not discuss this condition with respondent, and that the apparent injury did not cause him to miss work. (Mr. B), a coworker, also testified that respondent came to work with a bruise on the side of his face. Mr. B said respondent told him someone had jumped him. Mr. P, the coworker who had been on the trailer with respondent at the time of injury, said respondent once came to work with a dark spot on his cheek or right around his eye. Mr. P said he asked respondent about it and was told "(Ms. J) hit me." (Ms. J), described as respondent's girlfriend during all time periods in question, testified that she did not hit him, did not know him to have been in a fight with anyone, and did not know him to have bruised or scratched his face in any other way.

Entered into evidence as an appellant's exhibit was a January 22, 1992, letter from Dr. D in response to an inquiry from appellant's adjuster. That letter said in part

As you know, [respondent] has reportedly had a couple of injuries; one, where he allegedly showed up at work after he had been beat up around the head and

another one where he had a fall out of a truck. Obviously, there is no way for me to determine which one of these injuries was the etiology of his subdural hematoma.

Also part of the record was a March 6, 1992, letter to Dr. D from respondent's attorney. The letter told Dr. D that the story which had been related to him concerning respondent's involvement in a fight or domestic disturbance wherein he sustained an injury was "nothing more than a rumor" which was being circulated "for no other reason than to create doubt and/or confusion in the eyes of the fact finder in [respondent's] upcoming hearing." The letter proceeded to ask Dr. D his opinion, based on medical probability, on several questions, including: whether respondent sustained an injury consistent with the history of a fall on or about (date of injury), together with post-fall symptoms and complaints; and whether the condition diagnosed and treated was consistent with a person sustaining a fall like respondent did; whether the onset of respondent's symptoms was consistent in time with a fall occurring on or about (date of injury). In a reply dated March 9th, Dr. D answered these questions in the affirmative.

The Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8303-1.03(10) (Vernon Supp 1992) (1989 Act) provides that "compensable injury" means "an injury arising out of and in the course and scope of employment for which compensation is payable under this Act." "Course and scope of employment" is defined as "an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer." Art. 8308-1.03(12) (exclusions omitted as not relevant here). "Injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm. The term also includes occupational diseases." Article 8303-1.03(27). It is claimant's burden of proof to establish that a compensable injury occurred. Washington v. Aetna Casualty and Surety Company, 521 S.W.2d 313 (Tex. Civ. App.-Fort Worth 1975, no writ).

In its appeal, appellant claims that the respondent fainted prior to falling; that the fainting was not the result of any work-related injury and/or incident, but was due to an ordinary disease of life or other factors unrelated to the respondent's job. Further, appellant claims that respondent was injured in a domestic argument prior to (date of injury), and argues that the subdural hematoma was a result of that incident rather than anything which occurred on (date of injury).

Under the prior statute (which had a similar requirement that the injury be "sustained by an employee in the course of his employment," *see* TEX. REV. CIV. STAT. ANN. art. 8306, Section 1 (repealed)) for an injury to arise out of employment, and thus be compensable, it was necessary to show a causal connection between the conditions under which the work must be done and the resulting injury. Nations and Kilpatrick, Texas Workers' Compensation Law, Sec. 3.01(2)(a). This issue has arisen in cases involving falls

which originated from causes other than work-related ones.

In its first pronouncement on the issue, the Texas Supreme Court considered the case of an employee who, in suffering an epileptic fit at work, fell and fatally fractured his temple on the sharp edge of a post at his workplace. The jury found that the fracture could have in all probability caused the death. The court held the death compensable, saying that the fall resulted in an injury which was in turn a producing cause of death, "although the fall may have been due to a preexisting idiopathic condition....It is the injury arising out of the employment and not out of disease of the employee for which compensation is to be made. Yet it is the hazard of the employment acting upon the particular employee in his condition of health and not what that hazard would be if acting upon a healthy employee." Garcia v. Texas Indemnity Insurance Company, 209 S.W.2d 333, 337 (Tex. 1948), citations omitted.

See also American General Insurance Company v. Barrett, 300 S.W.2d 358 (Tex. Civ. App.-Texarkana 1957, writ ref'd n.r.e.) (claimant blacked out, fell to ground and fractured skull; death compensable where caused or contributed to by fracture; pavement was instrumentality essential to work of employer and falling against it was hazard to which employee was exposed because of employment.); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977) (claimant's injury from fall to ground at work caused by buckling of his knee from idiopathic origin raises fact issue of whether parking lot surface contributed to injury and, if so, whether surface represented such a hazard within the scope of employment as to allow recovery).

In this case, there was conflicting testimony as to whether respondent tripped and fell or fainted and fell. Regardless of the cause, or whether no cause could be identified, it was uncontroverted that respondent's employment required him to stand on the back of a flatbed trailer some 5½ feet from the ground. There was also sufficient medical evidence in the record for the hearing officer to conclude that the hematoma was the result of the fall from the truck itself. These facts would place this case within the parameters of Garcia and like cases cited above.

Appellant also argues that respondent's medical condition was the result of a preexisting cause, an injury from a domestic conflict. To defeat a claim of compensable injury because of a preexisting injury, the carrier has the burden of showing that the prior injury was the sole cause of the employee's present incapacity. Texas Employers' Insurance Association v. Page, *supra*.

It is the hearing officer's exclusive province as fact finder to resolve conflicts in testimony presented at trial and to resolve conflicts and inconsistencies in the testimony of different witnesses. This rule is equally true regarding medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. Civ. App.-Houston 1984, no writ).

In this case there was conflicting testimony concerning the existence of a preexisting injury. Even if preexisting injury had been found, however, there would have to have been evidence to support a conclusion that such was the sole cause of the injury or condition for which compensation is sought. On this point medical opinion was equivocal at best. A review of the record evidence indicates that the findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660,662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The hearing officer's decision and order are thus affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge