

## APPEAL NO. 92221

On May 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issue to be determined at the hearing was whether the claimant's low back problems are related to his work-related accident of (date of injury). The claimant, (claimant), is the appellant in this case. The hearing officer determined that appellant did not sustain a compensable injury to his lower back on (date of injury), or at any other time, which was in furtherance of the business of his employer, (employer). Accordingly, the hearing officer denied benefits to appellant for his claimed low back injury under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), but ordered that her decision as to the low back injury would not be construed to affect the compensability of the head and neck injuries which appellant sustained as a result of the work-related accident of (date of injury).

Appellant contends that the decision of the hearing officer is against the great weight and preponderance of the evidence and asks that the decision be reversed and a new decision be rendered in his favor, or, in the alternative, that the case be remanded for another hearing. Respondent, the employer's workers' compensation insurance carrier, contends that the decision is supported by sufficient evidence, and is not against the great weight and preponderance of the evidence. Respondent asks that the decision be affirmed.

### DECISION

The decision of the hearing officer is affirmed.

Respondent does not dispute that appellant sustained injuries in a work-related accident on (date of injury), but does dispute appellant's claim that a herniated disc in his lower back resulted from the accident.

Appellant testified that on (date of injury), he was working for his employer installing duct guards when a 2"x 6" board fell 46 feet striking him in the head and knocking him unconscious for about 30 seconds. Appellant did not remember the way in which he fell down, but said he was told by a witness that he fell forward. Appellant said that from the time of the accident he had severe headaches, low back pain, and numbness in his hands, arms, and legs. The employer immediately sent him to (Dr. W). Appellant said that after he told (Dr. W) he hurt all over and that his arms and hands were numb, (Dr. W) told him he had "nerve damage" and prescribed pain medication. At some unspecified date after the accident, appellant said (Dr. W) released him to light duty work and that he was assigned a desk job but also did some welding. Appellant testified that his arms continued to remain numb and that his lower back continued to hurt. (Dr. W) referred appellant to (Dr. C) who, according to appellant, said he had nerve damage and would get over it. A few weeks later he reported to the company nurse that he was getting worse so the nurse sent him to (Dr. H). Appellant said that (Dr. H) told him he had nerve damage in his neck and had carpal tunnel syndrome in both hands. After appellant saw (Dr. H), a friend of appellant's

recommended that appellant see (Dr. B). Appellant said he told (Dr. B) that his hands were numb and that he hurt all over. Appellant said his main concern was his hands because he had lost feeling in them. According to appellant, (Dr. B) did not perform tests on him but did review the reports of appellant's other doctors. Appellant said that (Dr. B) told him he had nerve damage in his hands but that he, (Dr. B), did not want to get involved in a workers' compensation case. Appellant said that although he could have related his back and leg pain to the doctors he had seen to this point, he did not tell Doctors (W), C (H), or (B) about the numbness in his legs or about his back hurting because he was more concerned about his hands and thought that if he got his hands fixed it would straighten everything out. He said he was scared that he was going to lose his arms and that he told these doctors that he hurt all over.

Appellant next saw (Dr. J), who is his wife's doctor and who has seen appellant for other health problems since 1987. Appellant testified that the first time he had reported his back and leg problems to any doctor was when he reported those problems to (Dr. J) in September 1991. (Dr. J) told him he had nerve damage in his arms and recommended surgery. (Dr. J) performed tests on his lower back, told him he had a ruptured disc in his lower back, and treated his back with ultrasound treatments. (Dr. J) referred appellant to (Dr. B). Appellant said that (Dr. B) performed surgery on his left hand a few weeks later, and then performed surgery on his right hand about a month after that. Appellant thought the hand surgery was done about four months after his accident. Appellant said (Dr. B) also told him he had a lower back problem. Appellant said that he then went to (Dr. G) for another opinion about his back, and that (Dr. G) told him he needed back surgery. Appellant said that the numbness in his legs causes him to fall down now and then and that his back and leg problems started the day of the accident at work, but that no tests had been done on his back until after his hand surgeries. At respondent's request appellant next saw (Dr. F) who, according to appellant, said he did not think appellant sustained his herniated disc in his lower back on the job.

Appellant further testified that he had never had back problems before the accident on (date of injury), but acknowledged that he had been involved in a car accident in December 1990 and had had a sore back from that incident which he got over in a few weeks. Appellant also said that his back still hurts him and that he has not had back surgery as yet. He did not recall having hurt his back picking up a limb in November 1991.

Appellant introduced into evidence the signed written statements of two coworkers, (Mr. O) and (Mr. L). (Mr. O) stated that he saw the board fall and hit appellant's hard hat, that appellant grabbed the back of his head, wobbled, his legs went out from underneath him and he fell over backwards onto his back, and that appellant was unconscious. He described the board as a 2"x 6" about 2 feet long and said it fell straight down with the end of the board striking appellant. When appellant came to, this witness said appellant rubbed his head, shoulders, and the back of his neck. (Mr. L) stated that he saw the end of the board hit appellant's hard hat, that he thought the board had fallen about 15 feet before hitting appellant, that appellant's knees folded under him, and that appellant collapsed and fell on his back and side. When appellant came to he complained of neck pain.

Appellant also introduced into evidence the depositions upon written questions of all the doctors that he testified he saw except for (Dr. B). These depositions contain the medical records and reports of the doctors, including those of (Dr. B), relating to their examination and treatment of appellant. The depositions were taken at the request of respondent. The depositions, records, and reports reveal the following:

- 1.(Dr. W) was out of town on the day of the accident, (date of injury), so appellant was seen on that day by (Dr. C) who was covering for (Dr. W). (Dr. C) found tenderness of the neck with limited motion, but a neurological examination was normal. X-rays of the cervical spine (according to Dorland's Illustrated Medical Dictionary, 27th Edition, (W.B. Saunders Company 1985) cervical means pertaining to the neck) were taken and reported as negative by a radiologist. (Dr. W) first saw appellant on (date). (Dr. W) opined that appellant had sustained a neck strain, a contusion to the cervical spine, and left cervical neuritis extending down the ulnar nerve. (Dr. W) prescribed treatment and medications, and released appellant to light work. He examined appellant five times from (date) to August 30, 1991. Appellant's complaints of pain were limited to his neck, head, shoulders, and left arm. Appellant had no complaint of pain in the low back or legs, and (Dr. W) did not discover any signs or symptoms of injury to the low back during his examinations. (Dr. W) stated that he did not feel appellant's injury produced low back pain because appellant was struck on the head and there was no indication of injury to the low back during his examinations.
- 2.(Dr. C), an orthopedic surgeon, saw appellant on (date), for complaints of neck pain and numbness of the left hand and forearm. His examination revealed tenderness to the muscles behind the neck and the muscles in the top of the shoulders, and decreased sensation in the left forearm and the ring and little fingers of the left hand. X-rays of the cervical spine were negative except for curvature. (Dr. C) diagnosed a contusion of the cervical spine with an inflammation of the nerves on the left side of the neck extending to the arm and hand. Appellant did not complain of low back pain and (Dr. C) did not discover any signs or symptoms of injury to the low back.
- 3.(Dr. H), a neurologist, saw appellant four times from August 2, 1991, to January 22, 1992. Appellant complained of pain in the neck, left arm, and head. Appellant did not complain of pain in the low back or pain radiating into his legs, and (Dr. H) did not discover any signs or symptoms of injury to appellant's low back during his examinations. (Dr. H) concluded that appellant was having post-traumatic headaches and that he might have a herniated disc in his neck at C7 for which tests were done. An

EEG was normal, an MRI of the cervical spine was normal (no evidence of "HNP"), and a CT brain scan was normal.

4.(Dr. B), a neurosurgeon, saw appellant on September 5, 1991. Appellant complained of headaches, blurred vision, and pain in both arms. He did not complain of pain in the low back or pain radiating into the legs. A neurological examination was normal. In his examination of appellant, (Dr. B) did not discover any signs or symptoms of injury to the low back and none were reported to him. (Dr. B's) impression was that appellant had a post-concussive syndrome and that he might have bilateral radiculopathies which he explained was a possible pinched nerve in his neck causing the pain in his arms. (Dr. B) stated that if appellant were having symptoms in his low back from an injury in (date of injury), he would find it unusual that appellant did not report them to him when he saw appellant in September 1991. After being asked to assume that a CT scan in December 1991 revealed a herniated disc at the L5/S1 level, (Dr. B) was asked for his opinion as to whether appellant's low back lesion was caused by the injury of (date of injury). (Dr. B) opined that the history that appellant gave him of his symptoms would not suggest that appellant incurred a low back injury on (date of injury).

5.(Dr. J) initially examined appellant on September 15, 1991, for the injury of (date of injury). On that date, appellant complained of headaches, numbness in hands and fingers, pain in both arms, and pain at the base of the skull with radiation to upper thoracic and cervical region, but did not complain of pain in the low back or pain radiating into the legs, and (Dr. J) did not discover any signs or symptoms of injury to the low back. Appellant saw (Dr. J) on a continuous basis following the initial visit. Appellant told (Dr. J) that the fall on (date of injury) caused him to fall on both hands with arms extended. In a letter dated January 17, 1992, (Dr. J) opined that this fall caused injury to the lower back and thoracic region. In the same letter, (Dr. J) related that appellant began to complain of severe lumbar and lower back pain during the course of his treatment for the carpal tunnel syndrome and that appellant said that he had experienced the pain since his work-related accident in (date of injury). (Dr. J) first noted in his records on November 7, 1991, that appellant was complaining of back pain in an area of his back other than his upper back. The entry of November 7th states "c/c after picking up limb in yard 11/4/91 c/o pain to middle of back." A progress note dated November 22, 1991, states in part that "[t]he patient states that several days ago he bent over to pick up a piece of wood, however began to have pain of the lumbar area." Appellant was admitted to Doctors Hospital on December 3, 1991, for complaints of severe lumbar pain and severe headaches. A CT scan of the lumbar spine

done on December 5, 1991, and an MRI of the lumbar spine done on December 6, 1991, showed a large herniated disc at L5-S1. On January 6, 1992, (Dr. J) diagnosed, among other things, herniated nucleus pulposus, L5-S1 level with radiculopathy, and severe low back pain secondary to the HNP.

6.(Dr. B), an orthopedic surgeon, performed surgery on appellant's right wrist on October 18, 1991, and on appellant's left wrist on December 27, 1991. On December 17, 1991, appellant had a lumbar epidural blockade operation performed by (Dr. B) for lumbar strain. (Dr. B) noted in the history portion of his report concerning the onset and course of appellant's lumbar strain that "[t]his patient has had an on-the-job injury at which time he was hit in the back of the neck and head, injuring his shoulders, head, neck, and low back."

7.(Dr. G), an orthopedic surgeon, saw appellant on December 13 and 20, 1991, for complaints of pain in the lower back radiating into the legs. (Dr. G's) impression was that appellant had a herniated disc (at L5-S1) with radiculopathy and that he had some straining type injuries in his neck and thoracic region which were unrelated to the disc herniation. (Dr. G) opined that appellant's disc herniation and back injury were related to his injury of (date of injury). However, he also said that if appellant had been examined by a neurosurgeon in September 1991, he would defer to his opinion since that doctor would have seen appellant on a more timely basis. As previously noted, (Dr. B), a neurosurgeon, examined appellant in September 1991, and opined in his deposition, after being asked to assume that a CT scan in December 1991 revealed a herniated disc at L5-S1 level, that the history that appellant gave him of his symptoms would not suggest that appellant incurred a low back injury on (date of injury).

8.(Dr. F), an orthopedic surgeon, saw appellant on February 5, 1992, for complaints of pain in the lower back radiating into the right leg, and diagnosed a herniated disc at the L5-S1 level. (Dr. F) said that appellant told her that his back did not start bothering him until about a month after the accident of (date of injury). (Dr. F) said she found it very unusual for a patient not to have back signs and symptoms for a month following an accident that allegedly resulted in the type of lesion identified in the diagnostic testing she reviewed.

When reviewing a question of the factual sufficiency of the evidence to support a finding, we consider and weigh all the evidence, both in support of and contrary to the challenged finding, and uphold the finding unless we determine that the evidence is so weak or the finding is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951);

Texas Workers' Compensation Commission Appeal No. 92001 (Docket No. redacted) decided February 18, 1992. The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). A claimant's testimony, if believed, can support a finding of injury in the course and scope of employment. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). However, the trier of fact is not bound to accept the testimony of the claimant, an interested witness, at face value. Garza, supra. The trier of fact also judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.).

In the present case, appellant's failure to report low back pain or numbness in his legs to the first four doctors he saw during the first two months after his accident, and the failure of those doctors to discover any signs or symptoms of injury to the low back, cast some doubt on his testimony that he experienced low back pain and numbness in his legs from the date of his accident. The entries in (Dr. J)'s records recording the onset of back pain on November 4, 1991, when appellant picked up a limb in his yard casts further doubt on appellant's testimony connecting the onset of low back pain to the accident of (date of injury). Considering the doubt cast on appellant's testimony, we cannot conclude that the trier of fact was compelled to believe his testimony relating his low back injury to his accident of (date of injury). See Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

The medical evidence was conflicting. (Dr. J) and (Dr. G) related appellant's low back problems to the accident of (date of injury), although (Dr. G) said he would defer to another doctor's opinion if it were given by a neurosurgeon based on an earlier examination. (Dr. W) and (Dr. B) did not relate appellant's low back problems to his accident of (date of injury), and (Dr. B), a neurosurgeon, had examined appellant in early September 1991, three months before (Dr. G). Therefore, based on (Dr. G's) statement that he would defer to an earlier opinion of a neurosurgeon, it can be assumed that (Dr. G) would defer to the opinion of (Dr. B). (Dr. F) found appellant's delayed back symptoms to be very unusual. The conflict in the medical evidence was for the hearing officer to resolve.

After reviewing the entire record, we conclude that the hearing officer's finding that appellant did not sustain an injury to his low back as a result of his work-related accident on (date of injury), to be supported by sufficient evidence, and that such finding is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

The decision of the hearing officer is affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Lynda H. Nesenholtz  
Appeals Judge