APPEAL NO. 92281

On April 7, 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 compensable injury to his back while working for (employer) on (date of injury), and that appellant is liable for benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant, the employer's workers' compensation insurance carrier, contends that findings of fact and conclusions of law supporting the hearing officer's decision are so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Respondent contends that the appeal was not timely filed and that the decision is supported by the evidence.

DECISION

After reviewing the hearing record, request for review, and response, we affirm the decision of the hearing officer.

Appellant's request for review was timely filed in accordance with Article 8308-6.41(a) and applicable rules of the Texas Workers' Compensation Commission.

The issue at the hearing was whether respondent sustained an injury to his back on (date of injury), while working for his employer. Appellant does not dispute that respondent sustained a compensable injury to his shoulder in a slip and fall accident while working for the employer on (date of injury), and stipulated that he did sustain a compensable injury on that date. However, appellant does dispute respondent's claim that he also injured his back in the work-related accident on that date.

In 1983 respondent sustained an injury to his back while working for another employer. As a result of that injury he had a laminectomy performed in 1983 and a fusion in 1984. He obtained a job as a cook at the employer's fast food restaurant about a month before his accident of (date of injury). Respondent said his job required him to carry heavy boxes of chicken, and that although his prior surgeries caused him mild discomfort on the left side of his back near his hip and in his left leg, he was able to perform his job without difficulty prior to (date of injury).

While working at the employer's restaurant the evening of (date of injury), respondent slipped in a puddle of water. Respondent said he grabbed the counter with his left arm and hand and that he fell to the floor on his right side. Respondent's supervisor witnessed the incident and said that while respondent's whole body was jerked by the fall, respondent did not fall all the way to the floor but managed to catch himself with one arm on a door and the other arm on a steam well. He said respondent came within three inches of landing on the floor. The same evening, respondent told his supervisor that he had hurt his left arm and shoulder in the accident. He did not mention back pain.

The next day, respondent went to (Dr. P) who diagnosed a sprain of the left shoulder. Respondent explained that the reason he did not mention back pain in his recorded statement taken by appellant's claims representative on June 3rd was because he did not have back pain at that time. Respondent said that it was not until about a month and a half after the accident and while he was still being treated by (Dr. P) that he began having pain in the right side of his back which he attributed to his fall. He said he told (Dr. P) about his back pain; however, the doctor's records do not reflect this complaint. On June 28th a licensed physical therapist reported that respondent had weakness in his left upper extremity and that he presented a lot of sensory deficits which may indicate nerve impingement. On July 11th respondent went to (Dr. Sc) for complaints of left shoulder pain, but the doctor reported that he could not account for the difficulty appellant was experiencing. (Dr. Sc) examination was limited to respondent's shoulders and upper extremities. Respondent said that when he visited the physical therapist and (Dr. Sc) for injuries sustained in the accident of (date of injury), he told them that his back hurt; however, the records do not reflect that history, except that (Dr. Sc) noted residual back pain from prior surgeries. On July 24th respondent went to (Dr. S), who had performed the prior back surgeries, and complained of pain in the neck and back from his accident of (date of injury). (Dr. S)'s diagnostic impression included among other things, acute cervical sprain and acute lumbosacral sprain with radiculopathy. Respondent said that prior to July 24th, he had not seen (Dr. S) since his 1984 surgery.

Hospital records indicated that respondent was treated at one hospital for complaints of back pain from August 12 to August 20 1991, and was admitted to another hospital for the same complaint on September 12, 1991. The first hospital noted an injury date of (date), and the second hospital recorded a history of back injury at work on (date of injury). (Dr. S) reported that a magnetic resonance imaging showed evidence of a posterior mid-line disc herniation at L4-L5, and on or about August 14th recommended that respondent undergo a decompressive lumbar laminectomy with fusion. (Dr. W), the doctor appellant selected to give a second opinion on spinal surgery, did not concur with (Dr. S's) recommendation for surgery and said that in his examination of respondent he found nothing which indicated an injury was sustained on (date of injury). Respondent was also examined by a (Dr. B) pursuant to a medical examination order. (Dr. B) said he could not give a recommendation regarding spinal surgery until further tests are done.

Respondent testified that he experiences extreme back pain from his accident of (date of injury), and that he has right leg pain. He said he has difficulty walking, standing, and sometimes sitting. He said that since (date of injury) he has not been involved in any accidents, and that he has not worked since the accident (Dr. P) indicated that respondent experienced increased shoulder pain when he attempted to return to light duty work on June 4th so respondent was kept off work completely). Respondent said that due to the accident of (date of injury) he has new pain located around his right hip which he had not experienced prior to the accident. He said that his mild discomfort from his operations in 1983 and 1984 was on the left side of his back.

In Finding of Fact No. 10 the hearing officer found that respondent suffered an injury to his back in his slip and fall at work on (date of injury). In Conclusion of Law No. 4 the hearing officer concluded that respondent sustained a compensable back injury and that appellant is liable for benefits under the 1989 Act. Appellant's primary contention on appeal is that Finding of Fact No. 10 and Conclusion of Law No. 4 are not supported by sufficient evidence and are against the great weight and preponderance of the evidence. Appellant does not contest Finding of Fact No. 5 wherein the hearing officer found that respondent was undertaking an activity which furthered the business of the employer when he slipped and fell on (date of injury).

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). The claimant has the burden of proving that he was injured in the course and scope of employment. Reed v. Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In Lujan v. Houston General Insurance Company, 756 S.W.2d 295 (Tex. 1988), the Supreme Court of Texas observed that recovery has been allowed in workers' compensation cases where the manifestation of an injury occurs later than the precipitating event. The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness, and resolves conflicts and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ); Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). In this case there was conflicting evidence as to whether respondent sustained a compensable injury to his back on (date of injury), and the hearing officer apparently believed respondent's testimony and resolved the conflicts in the medical evidence in respondent's favor. Having reviewed the record, we conclude that the finding that respondent sustained an injury to his back at work on (date of injury), and the conclusion that respondent sustained a compensable back injury and that appellant is liable for workers' compensation benefits are supported by sufficient evidence, and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* Texas Workers' Compensation Commission Appeal No. 92184 (Docket No. redacted) decided June 25, 1992.

We find the appeals panel decision cited by appellant, Texas Workers' Compensation Commission Appeal No. 92108 (Docket No. redacted) decided May 8, 1992, to be distinguishable from the instant case. In that case, the occurrence of the alleged accident at work was strongly disputed, the claimant testified that his back did not bother him until he lifted a sack of groceries from his car after the date of the alleged work-related accident, the medical records showed that he did not consult any health care provider for his claimed work-related injury until more than five months after the alleged accident at work, and when he did consult a doctor he gave the doctor a history of the accident which directly contradicted his testimony at the hearing as to the onset of his back problems. In contrast

to the evidence in Appeal No. 92108, we believe that the evidence in the instant case establishes a sequence of events strong enough from which the hearing officer could properly find that respondent sustained a compensable back injury at work on (date of injury).

Appellant also asserts that Finding of Fact No. 11 is contrary to the evidence, and that Conclusion of Law No. 5 misidentified the issue and wrongfully shifted the burden of proof to appellant. The contested finding is that respondent had previous back surgeries in 1983 and 1984, which were healed by (date of injury), and that the prior back injuries were not the only cause of respondent's back injury on (date of injury). The contested conclusion is that because appellant has not shown that respondent's previous back injuries were the sole cause of his (date of injury) back injury, appellant may not avoid liability under the sole cause defense.

While we agree with appellant that an issue concerning respondent's previous back injury (it appears from the evidence that there was only one previous back injury occurring in 1983 for which respondent had surgery performed in 1983 and 1984) being the sole cause of respondent's back problem was not specifically identified as a disputed issue at the hearing, we note that appellant did point out to the hearing officer several comments in the medical records that indicated that respondent had residual pain from his prior injury. It is apparent that appellant wanted the hearing officer to infer from these comments that respondent's back problem was the result of his prior injury and not the accident of (date of injury), hence the hearing officer's finding and conclusion on this matter. In view of the issue to be determined at the hearing and appellant's position that sole cause was not an issue at the hearing, Finding of Fact No. 11 and Conclusion of Law No. 5 could be disregarded as being not necessary to the decision. However, notwithstanding that the contested finding and conclusion could be disregarded as being not necessary to the decision, we conclude that the contested finding and conclusion are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. The evidence relating to respondent's prior back injury was in conflict. Although medical reports do indicate residual back pain from the prior injury and respondent indicated that he continued to have mild discomfort from his previous operations for the prior injury, respondent also testified that despite that mild discomfort he had no problem performing his duties as a cook, which included lifting boxes of chicken weighing from 35 to 75 pounds, until his accident of (date of injury). Respondent also testified that after the accident of (date of injury) he felt pain on the right side of his back which he did not have prior to the accident. In addition, medical records indicate that respondent sustained an acute back strain and has a herniated disc, although other medical evidence disputes the existence of such problems. The mere fact that a claimant has a preexisting injury which enhances or aggravates the injury complained of, does not in itself defeat his right to recover. To defeat a workers' compensation claim because of a preexisting injury, the carrier must show that the prior injury is the sole cause of the claimant's present incapacity. *See* Texas Employers Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977). We overrule appellant's contentions concerning Finding of Fact No. 11 and Conclusion of

Law No. 5.

In Finding of Fact No. 9 the hearing officer found that respondent went to (Dr. S) on June 24th and that the medical records indicate that respondent told (Dr. S) that he injured his back at work on (date of injury). Although we agree with appellant's assertion that the evidence shows that respondent did not visit (Dr. S) until July 24th, we do not find the misstatement as to the date of the visit to be grounds for reversal in light of respondent's testimony that he had told two doctors and the physical therapist that his back hurt prior to visiting (Dr. S) and in light of the fact that (Dr. S's) records do show that respondent complained of back pain when he visited (Dr. S) on July 24th and attributed that back pain to his accident of (date of injury).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge