APPEAL NO. 92341

A contested case hearing was held in (city), Texas, on June 17, 1992, (hearing officer) presiding, to determine the following issues: whether respondent should be allowed to reopen the issue of the compensability of appellant's injury of (date of injury), and, if so, whether appellant sustained such injury in the course and scope of his employment and timely reported same to his employer; and, whether appellant's inability to obtain and retain employment is a result of his (date of injury) injury, or from cleaning his car at home on (date). The hearing officer concluded that no good cause was shown to allow respondent to reopen the issue of compensability and respondent has not appealed that determination. The basis for that issue was some conflict in the documentary evidence as to whether appellant, a cemetery worker, sustained his (date of injury) injury at work removing an auger from a gravesite, or when moving a funeral party tent. With regard to the disability issue, the hearing officer determined that while appellant had sustained a compensable injury on (date of injury), he received the equivalent of his preinjury wages from (date of injury) through (date); and, that appellant's inability to obtain and retain employment at his preinjury wage rate after (date) was due to his noncompensable injury at home. Based on these findings, the hearing officer concluded that appellant did not have disability from (date of injury), to the date of the hearing as a result of the (date of injury) injury. Appellant makes no appealed issue of the hearing officer's finding that appellant received the equivalent of his preinjury wages from (date of injury) through (date). Appellant's contention on appeal is, in essence, that the evidence does not support the hearing officer's determination that appellant's inability to obtain and retain employment at his preinjury wage equivalent after (date) was attributable to his injury at home, rather than to his injury at work on (date of injury). In its response, respondent supports the hearing officer's findings and conclusions, and asks that we affirm the decision.

DECISION

Finding sufficient evidence to support the challenged finding and conclusion, we affirm.

The evidence showed that appellant sustained a compensable injury at work on (date of injury) while lifting an auger from a prospective gravesite. He visited a local emergency room at the end of the next workday, a Friday, and according to the doctor's handwritten record of that visit, appellant had tenderness over his left lumbar muscle area and was diagnosed as having a strain of the left lumbar region. His supervisor gave appellant light duty at the cemetery for approximately two weeks after which appellant resumed his normal duties. Between November 18, 1991 and (date), appellant performed his normal duties and assisted with more than 65 funerals without complaint or evidence of physical incapacity, and he missed no work. Appellant and his fiance both testified that his back never really stopped hurting altogether and both insisted the injury was to appellant's lower back on the right side and always was.

On Sunday, (date), while seated in the passenger seat of his car cleaning it out,

appellant bent over to pick up a piece of paper from the driver's side floorboard when he felt more pain. He again went to the emergency room. The records of that visit state that appellant complained of pain in his lower back on the right side, and that physical examination revealed tenderness and spasm to his right paraspinous muscles. Appellant contended that his (date of injury) injury was to his lower right back and that the medical record entries referring to his lower left back were in error. He said that after visiting the emergency room on (date), he was taken off work for several days and cannot return to work without the doctor's release insisted upon by his employer. He said he cannot obtain such a release because the orthopedic specialist to whom he was referred wants certain imaging tests performed to reach a more definitive diagnosis, and he can't afford such tests.

Appellant's foreman, who was with him when the auger was used on (date of injury), as well as the employer's secretary-manager who completed appellant's report of his injury on (date), both testified that appellant told them he had hurt his lower back on the left side, not the right side, on (date of injury).

Appellant's theory was that on Sunday, (date), he aggravated his prior back injury of (date of injury), which had never stopped hurting, and has since had disability as provided for in the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Respondent's theory was that appellant sustained a new, noncompensable injury to a different area of his back on (date), which did not result in his having disability.

Article 8308-1.03(16) of the 1989 Act defines "disability" to mean "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(10) defines "compensable injury" to mean "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(12) defines "course and scope of employment" to mean "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. . . . " As the trier of fact, the hearing officer is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility it is to be given. Article 8308-6.34(e). It is for the hearing officer to resolve inconsistencies and conflicts in the evidence such as those presented in this case. Although appellant was a party with an obvious interest in the outcome, his testimony could only raise issues of fact. Gonzales v. Texas Employers Insurance Ass'n, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ). The hearing officer, as the trier of fact, is entitled to believe all, or part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer was at liberty and obviously did believe that appellant's injury of (date) was not an aggravation of his (date of injury) injury, and thus was not sustained in the course and scope of appellant's employment. Accordingly, appellant's inability to subsequently obtain or retain employment could not be related back to his (date of injury) injury so as to establish that he had disability under the 1989 Act.

After reviewing the evidence in the record, we do not find the hearing officer's findings and conclusions to be 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.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge