APPEAL NO. 92402

This appeal arises under the Texas Workers Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). At a contested case hearing held in (city), Texas, on June 25, 1992, the hearing officer, (hearing officer), took evidence on the following two disputed issues: (1) whether appellant's (date of injury) compensable eye injury caused his headaches; and (2), if appellant's (date of injury) compensable eye injury did cause his headaches, whether the headaches caused disability. The hearing officer, finding that the preponderance of the evidence failed to establish that the eye injury caused his headaches or that appellant has disability caused by the eye injury, concluded that his eye injury has not caused disability. In his timely request for review of August 8, 1992, appellant appears to challenge the sufficiency of the evidence to support Finding of Fact No. 6 that "[t]he preponderance of the evidence does not establish that [appellant] has disability caused by his (date of injury) eye injury, and Conclusion of Law No. 3 that "[appellant's] (date of injury) eye injury has not caused disability." He does not, however, challenge Finding of Fact No. 5 that "[t]he preponderance of evidence does not establish that [appellant's] (date of injury) eye injury caused his headaches." Appellant also appears to challenge Conclusion of Law No. 2 that venue was proper in the (city) field office of the Texas Workers' Compensation Commission (Commission). Appellant later filed an additional request for review which, in essence, further articulated his challenges to the challenged factual finding and legal conclusions. This additional request was not timely filed (Article 8308-6.41(a)) and will not be considered. Texas Workers' Compensation Commission Appeal No. 92003 (Docket No. redacted) decided February 12, 1992. In its timely response, the respondent urges our affirmance.

DECISION

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

At the outset, the hearing officer stated that she and the parties met on May 27, 1992 to discuss the disputed issue unresolved from the benefit review conference (BRC), namely, whether appellant's headaches were related to his eye injury of (date of injury). Appellant recounted that he had requested a BRC because he was not receiving temporary income benefits (TIBS) from respondent. He said the BRC had only addressed the issue of the relationship of his compensable eye injury of (date of injury) to his headaches, and that there was another disputed issue concerning whether he had disability. The parties then agreed to add by unanimous consent another disputed issue concerning disability. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.7(d). Since respondent was not then prepared to go forward on the additional issue, however, the parties agreed to continue the hearing until June 25th. The parties agreed with the hearing officer's description of the May 27th meeting, as well as to her framing of the two disputed issues.

The parties stipulated that on (date of injury), appellant resided within 75 miles of the Commission's field office in (city), Texas, and the hearing officer so found. Accordingly,

appellant's challenge to the hearing officer's legal conclusion that venue was proper in the Commission's (city) field office is without merit. *See* Article 8308-6.03 which provides that contested case hearings may not be conducted at a site more than 75 miles from the claimant's residence at the time of the injury without good cause.

The parties also stipulated that appellant received a compensable injury on (date of injury) as an employee of (employer), and, that respondent had not paid TIBS to appellant for that injury because it was "a no-lost-time claim." Appellant signed a workers' compensation claim form on May 18, 1991 which related that on (date of injury), he was working as a painter in some "water boxes" at a plant when some hot metal and dust from the blow torch of a welder working above him got into his eyes. This form stated that he started losing time on (date of injury) and had not returned to work. According to the Notice of Refused/Disputed Claim (TWCC-21) introduced by the hearing officer, respondent received its first written notice of the (date of injury) eye injury on July 12, 1991 and that same day prepared the TWCC-21 which disputed the claim and stated that "insured advises this is a no lost time claim." Attached to the TWCC-21 was a document signed by appellant's foreman and his superintendent on (date) stating "I saw no redness in his eyes and he decided to go back to work."

Appellant testified that he was a painter and that on (date of injury), while working in a "water box," some dust and pieces of hot metal got into his eyes from welders working above him. He had trouble sleeping that night because his eyes were burning. He returned to work the next day, thought his eyes were "weld burned," and reported his eye injury to his supervisor who told him it would go away and put him to work in the water box wirebrushing. He worked for a few hours that day and said his eyes were irritated and tearing. He maintained that while working in the water box on (date), his injured eyes were exposed to chemicals. Appellant contended that the combination of his eye injury of (date of injury) and his subsequent exposure to chemicals in the water box on (date) resulted in headaches from which he has disability.

The medical evidence showed he sought treatment in an emergency room on (date) where foreign bodies were removed from both eyes and he was referred to an ophthalmologist. A letter report from (Dr. L) to respondent's adjuster, dated February 14, 1992, stated that a (Dr. P) had been contacted; that (Dr. P) had not found evidence of any pre-existing disorder; that (Dr. P) felt appellant's injuries would not lead to any permanent impairment and would resolve. A March 27, 1992 medical report from (Dr. Sc), a neurologist who saw appellant on March 10, 1992 for headache complaints, noted that appellant had a history of foreign bodies in both eyes, and stated (Dr. Sc's) impression upon examination as "tension vascular headaches." This report went on to note that appellant had a history of headaches prior to his eye injury and that such headaches seem to have been exacerbated the eye injury. An electroencephalogram report of March 13th was normal.

Appellant introduced a neurological examination report addressed to respondent's adjuster from (Dr. S), dated May 28 1992. This report contained essentially the same

information that (Dr. S) provided in his deposition upon written questions introduced by respondent. (Dr. S) stated that appellant was examined on May 28, 1992, and gave a history of blurred vision, watering of the eyes, and headaches persisting from the time of the removal of the foreign bodies from his eyes on (date). Appellant also reported to (Dr. S) that he had been unable to return to work because of those symptoms. The report indicated that an ophthalmological examination on August 14, 1991 showed visual acuity to be 20/30 and 20/25, and that appellant's "visual-evoked responses were normal in both eyes." (Dr. S) stated he could not relate appellant's symptoms to the foreign bodies and that symptoms associated with ocular foreign bodies resolve within two to three days. He opined that "[a]ny problem with ongoing headache are . . . totally unrelated." (Dr. S) stated that, in all reasonable medical probability, appellant's headaches were unrelated to the trauma and were "merely a form of tension headaches." He said he found no evidence that appellant's eye injury impaired him in any way from working or performing normal daily activities. (Dr. S) also stated that the foreign substances in appellant's eyes caused no permanent medical injury, no physical disability, nor did such injury affect appellant's ability to obtain or retain employment. He saw no reason why appellant could not return to work as of May 29, 1992.

Much of the hearing was taken up with appellant's effort to expand the disputed issues to include the question whether his headaches were caused by his exposure to chemicals on the job following the introduction of the foreign substances into his eyes. Appellant introduced a "Material Safety Data Sheet" from the (Company), which contained safety data on a product identified as "thinner #15," possibly paint thinner. Appellant testified that at some time after his eyes were injured on (date of injury), he was exposed to paint thinner. According to this exhibit, the product could cause headache if inhaled. Appellant contended he had been asserting all along that his headaches were caused both by the eye injury and the subsequent chemical exposure, that he had told the doctors about the chemical exposure (none of the medical reports mentioned exposure to chemicals), and that it had taken him nine months to obtain the material safety data sheet exhibit. He did not contend, however, that he had specifically raised such as an issue at any time before the hearing. Respondent maintained that appellant, as he did on May 27th with the disability issue, was again attempting to add a new disputed issue as to whether his headaches were caused by chemical exposure after his eye injury. Respondent insisted that such would be a new claim and was not a part of the disputed issues then before the hearing officer. The hearing officer pointed out that when the parties met to discuss the issues on May 27th, appellant didn't then raise an issue concerning exposure to chemicals. The hearing was briefly recessed for appellant to talk to a disability determination officer about the issues, and was later recessed while the hearing officer and the parties unsuccessfully attempted to reach an agreement about the issues. Appellant did not want to proceed without the chemical exposure aspect of his theory being heard and respondent insisted that appellant was interjecting a new, different disputed issue. After the parties' documentary evidence was admitted and appellant had finished his testimony, the hearing was concluded. The hearing officer inquired of appellant as to the nature of the information appellant's wife, father, and neighbor possessed since they were present. No testimony

was adduced from these prospective witnesses and appellant has raised no appealed issue concerning such.

The hearing officer, after finding that appellant had sustained a compensable eye injury on (date of injury), further found that the eye injury did not cause his headaches. The hearing officer specifically refrained from making a finding as to whether exposure to chemicals, combined with the eye injury, caused the headaches and disability. However, she did find that the evidence did not establish that appellant has disability caused by his eye injury and reached a legal conclusion to that effect. We are satisfied that the evidence supports the determination that appellant's eye injury did not result in his disability. Under the 1989 Act, an employee who has disability and who has not attained maximum medical improvement is entitled to TIBS. Article 8308-4.23(a). However, such income benefits may not be paid for an injury that does not result in disability for a period of at least one week. Article 8308-4.22(a). Disability means "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). Appellant seemed to focus his efforts at the hearing almost entirely on the cause of his headaches, and failed to address how such headaches, even assuming their compensability, prevented him from being able to obtain or retain employment at his preinjury wages. Aside from his brief mention of headache pain and visual problems, appellant proffered no evidence, medical or otherwise, regarding his inability to obtain and retain employment at preinjury wages because of his compensable eye injury. He testified that he tried to work for a few weeks after (date of injury). However, the claim form he signed on May 18, 1991 stated that he started losing time on (date of injury) and had not returned to work. It was apparently appellant's position that he has been unable to work because of his headaches and is therefore entitled to TIBS. While the evidence that appellant was unable to work consisted entirely of his own testimony, we have previously observed that the testimony of the claimant alone may be sufficient to establish the existence of disability, and that pain could be the cause of disability. *See* Texas Workers' Compensation Commission Appeal No. 91023 (Docket No. redacted) decided October 16, 1991; Texas Workers' Compensation Commission Appeal No. 91024 (Docket No. redacted) decided October 23, 1991. *See also* Texas Workers' Compensation Commission Appeal No. 91045 (Docket No. redacted) decided November 21, 1991.

Article 8308-6.34(e) provides that the hearing officer is the sole judge of the materiality and relevance of the evidence, as well as the weight and credibility it is to be given. As the trier of fact, it was for the hearing officer to resolve any conflicts and inconsistencies in the evidence. Garza v. Commercial Ins. Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). The hearing officer here was obviously not persuaded that appellant's compensable eye injury caused headaches which resulted in his being unable to obtain or retain employment at his preinjury wage rate. We may not substitute our judgment for that of the hearing officer where, as here, there is sufficient evidence to support the findings. Texas Employers Ins. Assn. v. Alcantara, 764 S.W.2d 865, 868 (Tex. App. Texarkana 1989, no writ). The findings and conclusions are not 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 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge