APPEAL NO. 92435

On July 22, 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 back injury in the course and scope of his employment on (date of injury), and ordered appellant, the employer's workers' compensation insurance carrier, to pay income benefits and medical benefits to respondent as and when they accrue in accordance with the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that there is no evidence to support Findings of Fact Nos. 3 and 4, Conclusions of Law Nos. 2 and 3, and the Decision and Order of the hearing officer, and further contends that those findings and conclusions and the decision and order are against the great weight and preponderance of the evidence, and are arbitrary, capricious, and not reasonably supported by substantial evidence. Appellant asks that the decision be reversed. No response to appellant's request for review was filed.

DECISION

The decision of the hearing officer is affirmed.

At the hearing, respondent claimed that he injured his back at work on (date of injury). Appellant contended that the sole producing cause of the claimed injury of (date of injury), was respondent's prior work-related back injury of November 7, 1990.

Respondent is a mechanic and has worked for the employer, (employer), for about 18 years. In November 1990, he claimed he injured his lower back at work. Medical records relating to the November 1990 injury showed that he had complained of low back and leg pain, and a lumbar myelogram in December 1990 showed minimal L4-5 disc bulge without evidence of disc herniation. A CT scan of the lumbar spine taken the same month showed mild facet arthrosis on the right at L5-S1. The doctors who treated respondent for his November 1990 injury referred him to (Dr. M) and on July 17, 1991, (Dr. M) diagnosed chronic bilateral lumbar radicular syndrome, chronic cervical syndrome, deconditioning syndrome, and major depression on Prozac. (Dr. M) noted that respondent was taking physical therapy from (Dr. C), a chiropractor. In July of 1991, respondent had a caudal epidural steroid injection and bilateral L4-5, L5-S1 facet injections. There are no medical reports in evidence concerning respondent's medical treatment for the period of July 19, 1991 to the day after his claimed injury of (date of injury). In December 1991, respondent and appellant settled the claimed injury of November 1990 for $30,000 and reasonable medical expenses relating to the claimed injury through November 7, 1994.

Respondent testified that he had returned to work for about one month when the accident of (date of injury) occurred. He said that he and a coworker were removing a transmission from underneath a truck at work when the transmission partially slipped off the

floor jack. He testified that he strained his back when he caught the transmission and tried to support it. The coworker was not called as a witness and no statement from him was in evidence. Respondent said that he reported his injury to his foreman on the day of the accident, and that the next day he was in severe pain and called into work and again reported his injury and that he was going to see a doctor. An employee injury report showed that respondent called the employer on (date), and reported that he had strained his back working on a transmission on (date of injury).

A medical report from (Dr. M) showed that respondent visited him on (date) and complained of increased pain beginning the day before at work. (Dr. M) noted that respondent had general back soreness and recurrent facet syndrome with acute spasm. Respondent visited (Dr. M) several more times in February 1992 and was given bilateral L4-5, L5-S1 facet injections and a left sacroiliac joint injection. A February 1992 radiographic report of respondent's lumbar spine noted mild degenerative disc narrowing at L5-S1 with mild facet arthrosis at L5-S1, which is comparable to the test results of December 1990. In a report dated April 10, 1992, (Dr. M) noted that respondent visited him after several months' absence and that respondent was still complaining of pain. (Dr. M) wrote that it appeared that a dispute remained about "whether a new injury has occurred or whether this is simply an exacerbation," but he did not give an opinion on that matter. He stated that he understood that he had authority, apparently under the December 1991 settlement agreement for the November 1990 injury to "refresher rehabilitate" respondent back to some type of working status. On May 29, 1992, (Dr. M) released respondent to full-time employment on June 1, 1992. On June 2, 1992, the employer gave respondent 72 hours to return to work. Respondent said that he had returned to work.

In a letter dated June 3, 1992, (Dr. C) (the chiropractor that (Dr. M) said had treated respondent's November 1990 injury), stated that respondent had been her patient for quite some time and that on (date) (sic), (year), he reinjured his lower back, mid-back and neck at work lifting a transmission. She said she had consulted with respondent on February 14, 1992, examined and x-rayed respondent on February 21st, and had seen him a number of times since then. (Dr. C) further stated that "I am extremely familiar with [respondent's] back and neck, and with my test results and my own sets of x-rays on him, I am thoroughly convinced that he has reinjured himself and I am totally unwilling to send him back to work at this time." Among other diagnosed conditions, (Dr. C) diagnosed respondent as having lumbar discopathy, lumbar sprain/strain, and thoracic nerve irritation.

Respondent acknowledged that his pain from the (month year) accident was in the same area of his body as the pain he had experienced from his 1990 injury, but said that after his (month year) injury he had much more severe low back pain and numbness in his legs. He said "you might say its like an aggravation." Respondent's wife said that she had seen a tremendous change in respondent since "this last accident here," and that respondent experiences worse headaches and dizziness than before the accident.

The hearing officer made the following findings and conclusions:

Finding No. 3. The Claimant injured his back on (date of injury), while working for the employer.

Finding No. 4. There are no doctor's reports that attribute the Claimant's current disability, solely, to his injury of November 7, 1990.

Conclusion No. 2. The Claimant proved, by a preponderance of the evidence, that he sustained an injury in the course and scope of his employment on (date of injury).

Conclusion No. 3. The Carrier failed to prove, by a preponderance of the evidence, that the Claimant's preexisting injury of November 7, 1990, was the sole cause of the Claimant's current disability.

Appellant contends that there is no evidence to support the findings and conclusions set out above, and that those findings and conclusions are against the great weight and preponderance of the evidence, and that they are arbitrary, capricious, and not supported by substantial evidence.

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 his employment. Reed v. Aetna Casualty and Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). An injury that aggravates a preexisting bodily infirmity is compensable provided an accident arising out of employment contributed to the incapacity. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [14th Dist.] 1988, no writ). An aggravation of a preexisting back condition can be compensable even though the preexisting condition contributed to the incapacity. Oswald v. Texas Employers' Insurance Association, 789 S.W.2d 636 (Tex. App.-Texarkana 1990, no writ); Texas Employers' Insurance Association v. Thornton, 556 S.W.2d 755 (Tex. Civ. App.-Fort Worth 1977, no writ). To defeat a claim for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the workers' present incapacity. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977).

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 (Tex. Civ. App.-Austin 1967, no writ); Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). That different inferences might reasonably be drawn from the evidence is not a basis to set aside a fact finder's determinations. Garza, *supra*. The decision of the hearing officer will only be set aside if the evidence supporting the hearing officer's determination is so weak or against the great

weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92398 (Docket No. redacted) decided September 18, 1992.

Respondent's testimony and (Dr. C) opinion is some evidence of probative value supporting the finding that respondent injured his back at work on (date of injury). Appellant's no evidence challenge to this finding is rejected. Having reviewed all the evidence both in support of and contrary to the finding that respondent injured his back at work on (date of injury), we conclude that the finding is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Finding No. 3 supports Conclusion No. 2 that respondent sustained an injury in the course and scope of his employment, and Finding No. 3 and Conclusion No. 2 support the decision that respondent is entitled to benefits, as and when they accrue, under the 1989 Act.

Appellant had the burden of proof on its sole cause defense. Page, *supra*. As found by the hearing officer, there were no doctors' reports in evidence which attributed respondent's inability to obtain and retain employment solely to his prior injury of November 1990. Appellant's no evidence challenge to Finding No. 4 is rejected. Having reviewed the evidence both in support of and contrary to Finding No. 4, we conclude that the finding is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Finding Nos. 3 and 4 support Conclusion No. 3 that appellant failed to prove that respondent's preexisting injury was the sole cause of respondent's inability to obtain and retain employment. As previously mentioned, that different inferences might reasonably be drawn from the evidence is not a basis to set aside a fact finder' determination. Garza, *supra*.

We do not apply the "arbitrary and capricious" standard set forth in the Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a, Sec. 19(e) (APTRA) to a decision in a contested case hearing inasmuch as Section 19(e) of APTRA does not apply to contested case hearings or to judicial review of a final decision of the Appeals Panel regarding compensability or eligibility for benefits. Articles 8308-6.01, 8308-6.32, 8308-6.62. *See also* Texas Workers' Compensation Commission Appeal No. 92148 (Docket No. redacted) decided May 29, 1992. However, if we were to apply such a standard we would observe that the decision is not arbitrary and capricious, and that the decision is supported by substantial evidence.

A letter from (Dr. M) which is attached to appellant's request for review has not been considered in this appeal as it was not made a part of the record at the contested case hearing. Our review of the evidence is limited to the contested case hearing record. Article 8308-6.42(a); Texas Workers' Compensation Commission Appeal No. 92156 (Docket No. redacted) decided June 1, 1992. We have also not considered Claimant's Exhibit No. 2 which is attached to appellant's request for review. Appellant objected to the introduction of this exhibit when respondent (the claimant) offered it at the hearing and the objection was sustained thus excluding the exhibit from evidence. We will not now have

appellant use in support of its appeal an exhibit it objected to and kept out of evidence at the hearing.

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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Susan M. Kelley
Appeals Judge