APPEAL NO. 92478

On June 12 and July 30, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to consider issues of whether the claimant, (claimant), the respondent, had sustained a compensable injury and whether she had disability as a result of such injury. The hearing officer determined that on (date of injury), the respondent aggravated a preexisting back condition when she fell on the job, and that this back injury caused disability from June 16, 1991 until the date of the hearing. Medical benefits from the date of injury were awarded, as well as applicable income benefits from the date of disability.

Appellant argues that the decision of the hearing officer should be reversed for five primary reasons: because it was error to find that the respondent had suffered back pain from the date of her fall to the date of the hearing; that it was error not to find that the preexisting condition was the sole cause of her complaints; that it was error to find that she sustained a back injury as a result of her fall on (date of injury); that it was error to indicate that employer terminated claimant on February 6, 1992; and that it was error to refuse to allow witness (Mr. B) to testify. The appellant also alleges that the findings on disability were erroneous.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The respondent, who worked as a clerk in the maintenance division of (employer), tripped and fell in a hallway of her building on some loose tile, at a little after 11:00 a.m. the morning of (date of injury). She stated that she fell on her knee and her entire leg hurt. Her back was also sore but was overshadowed by the more intense pain in her leg. She went right away to her supervisor, (BL), and told him she fell on the tiles. When BL testified, he agreed that she told him about the fall, and further said she refused medical treatment and told him she was not hurt.

Respondent said she administered first aid and did not see a doctor. She said she completed an accident report and left it on BL's office desk the next morning, and that was the last she'd heard of it. (This was disputed by BL). Respondent stated that she did not tell anyone else at work about her fall and she did not follow up to determine the status of her accident report. By way of some explanation, respondent noted that during this time her communications with her supervisors were strained because she had charged BL with sexual harassment and irregularities related to the bidding process. She worked until January 23, 1991, when she was told she had to transfer to another division and she refused, because she felt that she was not the person who was causing harassment. Respondent was under psychiatric care and taking medication which she felt masked her pain. After going on vacation leave, and not reporting back to work, she was terminated February 6, 1991 by personnel manager (Mr. B).

Respondent said that she drew unemployment compensation and sought work until sometime in June, when she woke up and could not move one morning. She stated that her back had hurt since (date of injury) and gotten progressively worse. Her daughter-in-law took her to a chiropractor, who treated her until sometime in August. Respondent said she next saw a doctor, (Dr. G), in December 1991 at the suggestion of her attorney. Dr. G treated her until March 1992, at which time he refused to treat her further because he was not being paid.

Respondent stated that she deferred medical treatment because of inability to afford a doctor. The front page of her 1991 income tax return was put into evidence and supported her testimony of a low family income. She stated that her son, (Mr. S) loaned her money to see the psychiatrist, but was unable to loan more money. Mr. S testified that he lived with his parents and made $300 a week, and that he loaned money to his mother for the psychiatrist after she lost her job.

Mr. S recalled that in January his mother told him she had fallen at work, and that since then she had been in a lot of pain and could not walk or move as well. Similar testimony came from respondent's daughter-in-law and a good friend of hers. Her daughter-in-law indicated respondent had trouble standing on her feet for periods of time.

Respondent had sustained a job-related injury to her back sometime in 1979. She stated that she occasionally wore a back brace to work when she had muscle spasms. Aside from this, there was no evidence presented by either party as to the nature of that injury or how, if at all, it contributed to her subsequent disability. On the issue of disability, respondent agreed that she had not left work because of her injury, and said she felt she was able to work until the day she woke up and was unable to move.

The appellant submitted an affidavit from (DP), which stated that he was employed as the claims administrator for the employer on the date of injury, and had personal knowledge of the facts stated therein, which had to do with the occurrence of respondent's injury. When called as a hostile witness by respondent's counsel, however, DP stated he had not been employed by employer until April 1991, and his knowledge about the incident came from company records or from what BL told him.

A July 22, 1991, medical report from the chiropractor, (Dr. N), indicates that beginning June 11, 1991, respondent was treated for persistent low back and neck pain; the diagnosis listed is osteoarthritis, cervical and lumbar strain/sprain. CT scans of the lumbar spine and magnetic resonance imaging (MRI) examination of the cervical and lumbar spine performed in January and February 1992 yielded findings of degenerated discs at L4-5 with mild bulging, a disc bulge at L5-S1, small protrusion of disc material at C5-6, and narrowing of spinal canal secondary to posterior osteophytes. On June 11, 1992, Dr. G completed a TWCC-69 report of medical evaluation and stated that the respondent had not attained maximum medical improvement and did not fill in an estimated date, but also assessed that respondent had a 5 percent impairment of the low back area.

Inconsistencies in the record were matters for the trier of fact to weigh and resolve,

and the decision should not be set aside because different inferences and conclusions may be drawn on review, even when the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer is the sole judge of the relevance and materiality, the weight and credibility, of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight 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.). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Texas Employers' Insurance Co. v. Page, 553 S.W.2d 98 (Tex. 1977). The testimony of a claimant alone may be sufficient to establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). While the gap in time in this record between the (date of injury) fall and the diagnosis of the injury after respondent had been gone from the employment for nearly four months might have led to an inference that another activity led to injury, the uncontroverted evidence in this case from respondent and other witnesses was that since falling at work she had been in progressively increasing pain. There is sufficient evidence to support the findings concerning the existence of an injury, pain, and disability.

An aggravation of a preexisting condition may itself be considered a compensable injury. INA of Texas v. Howeth, 755 S.W.2d 534 (Tex. App.-Houston [1st Dist.] 1988, no writ). To the extent that the appellant asserted that disability or such pain related solely to her preexisting back condition (whatever it may have been), it bore the burden of proof on such defense. Page, *supra*, at p. 100. Appellant argues that "it is much more conceivable" that respondent's back complaints evolved from her preexisting condition, but, aside from respondent's acknowledgement of an unspecified previous injury and occasional use of a back brace, appellant failed to present evidence from which such an inference could be drawn. The hearing officer was not in error in holding that the early back injury was not the sole cause of disability.

The hearing officer's determination that the respondent was terminated on February 6, 1991 is likewise supported by the record. In this proceeding, appellant was not harmed by such a finding, which relates to the issue of disability as that term is defined in Art. 8308-1.03(16), because the beginning of disability in this case was not found by the hearing officer to occur right after she left employment at the employer.

Finally, the appellant asserts that it was error to refuse to let (Mr. B) testify. The appellant does not establish how error was created through omission of his testimony. The identity of the witness had not been disclosed to the respondent. The hearing officer ascertained that the matters which he was ostensibly being called to rebut, whether a written accident report had been left on BL's desk, and circumstances of her departure from employment, were either not relevant to the issues or were facts already in evidence. Under such circumstances, refusal to let the witness testify is not reversible error.

The decision of the hearing officer is affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge