APPEAL NO. 92515

A contested case hearing, consolidating two separately filed claims, was held at (city), Texas, on August 26, 1992, (hearing officer) presiding as hearing officer. The hearing officer determined that the respondent (hereinafter called claimant) sustained compensable injuries when he aggravated his preexisting low back condition on (date of injury) and (date of injury). He determined the claimant was entitled to medical and temporary income benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant (hereinafter called employer) cites error in several of the hearing officer's findings of fact and conclusions of law and urges that they are against the weight of the evidence and factually insufficient to support the decision.

DECISION

Determining the findings and conclusions of the hearing officer are supported by sufficient evidence and that they are not against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm his decision.

The claimant testified that while at work on light duty on (date of injury), he aggravated his prior lower back condition when he experienced a sharp pain as he attempted to move a file cabinet. He stated he reported this incident to his supervisor but continued on the job. Two days later he felt the pain again and stayed home. Exhibits admitted into evidence show the claimant reported the incident to his supervisor and also show that he was absent from work on March 25th. The claimant also testified that on March 27th, he went to see Dr. L. (a neurologist at the Diagnostic Clinic of (city)) with whom he had already made an appointment (apparently before the incident of (date of injury)), but that he did not tell him about what had happened on the (date) because he was not feeling any pain and he "felt okay" at the time. He testified that he went back to work the following Monday. He stated that sometime on (date of injury), he was doing a report and attempted to lift a briefcase to put it on a shelf when he twisted and felt a sharp pain, "sharper than the one from before." He reported this to his supervisor and said he was going to get medical treatment. He subsequently went home and then went to an emergency room at V.B. Medical Center. He saw his family doctor, Dr. C., who checked him and advised him to see Dr. L. He subsequently saw Dr. L. and advised him what had happened. The claimant has not returned to work since and states that the reason is that the employer now does not have any light duty for him.

Evidence in the record shows that the claimant has been under the care of several doctors resulting from low back injuries suffered in 1982, 1989, 1990 and 1991, two of which are in litigation. One of the on-the-job incidents involved a scuffle when the claimant was attempting to arrest a suspect and another involved carrying some heavy "no parking signs." An October 3, 1991, report in the record from Dr. L., who the claimant had seen for an examination and evaluation, sets forth the prior back injuries sustained by the claimant. Included was a non-work related incident wherein the claimant aggravated (according to Dr.

L.) his back condition by bending over to pick up some paper on August 31, 1991. It appears from the record that the carrier asserts that this latter incident resulted in a "new injury." Dr. L.'s report indicated a diagnostic impression of:

> The clinical picture is characterized by repetitive trauma to the lower back manifest by L4-L5 disc protrusion or disc herniation, midline and to either side, left more than right. There is involvement of the left L5 or S1 root to a moderate extent.

Dr. L. recommended several diagnostic studies and a subsequent MRI revealed "at L3-L4 an asymmetrical 2mm subligamentous disc herniation centrally and to the left of the midline, a 2-3mm subligamentous disc herniation centrally and slightly to the left of the midline and a mild annular disc bulge at L5-S1." Dr. L's interpretation was disc protrusions at L5-S1, L4-5 and L3-4 confirmed on two different views. A statement of Dr. L.'s dated June 19, 1992, sets forth in pertinent part as follows:

> Apparently, on (date of injury), the patient was attempting to move a file cabinet and aggravated his lower back symptoms. On (date of injury), he was lifting a satchel. At this time symptoms were potentiated or aggravated. I have been able to find no evidence of a true re-injury or new injury. This has been primarily aggravation.

Dr. L. went on to say that the "patient is perfectly capable of doing light work but should avoid pushing, pulling or lifting weight more than 35 pounds. He should avoid repetitious jolting."

Although disability or employment opportunities were not an issue at the contested case hearing, there was evidence in the record that the employer did not have any light duty position for the claimant and that the claimant had attempted to obtain other employment but had been unsuccessful.

The thrust of this appeal goes to the sufficiency of the evidence that the claimant suffered any compensable injury on (date of injury) and (date of injury). The record clearly shows that the claimant had a rather significant prior back condition at the time of the claimed incidents in March and April. However, there is abundant authority that an aggravation of a preexisting condition is an injury in its own right and can be compensable. Texas Workers' Compensation Commission Appeal No. 92463, decided October 18, 1992; Texas Workers' Compensation Commission Appeal No. 91094, decided January 17, 1992. However, as we stated in Appeal No. 92463, "a bare assertion that an aggravation has occurred does not relieve the proponent of the burden of proving that an injury, as defined in Article 8308-1.03(27), has been sustained." An injury means damage or harm to the physical structure of the body. A claimant himself can provide probative evidence concerning his injury and it can support the establishment of an injury even in the absence

of medical evidence or even where it is contradicted by some other medical evidence. Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. That does not mean however, that a fact finder must always accept as fact the testimony of the claimant, an interested party. *See* Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2nd 758 (Tex. Civ. App.-Amarillo 1973, no writ). In Appeal No. 92069, we upheld the hearing officer's determination of a compensable injury or aggravation of a prior condition in a "slip and near fall" situation although there was considerable evidence of a preexisting serious back condition including two laminectomy surgeries, left lumbar herniated nucleus pulposus, and acute lumbosacral strain. Appellant in that case also urged there was no objective medical evidence of any new injury.

In Hanover Insurance Company v. Johnson, 397 S.W.2d 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.), the court stated "[i]t is held that strains, sprains, wrenches and twists due to unexpected, undesigned or fortuitous events, even where there is no overexertion, and the employee is predisposed to such a lesion, are compensable." In that case, an award of benefits was upheld where the claimant was stooping or squatting to paint a water tank and he stood up and turned around to respond to an employee and experienced pain in his back and leg. There was evidence that the claimant had sustained a previous back injury resulting in a narrowed disc space and a protruded disc, and was suffering from a degenerative condition in the spine.

Where there is a preexisting injury and the carrier contends that the preexisting injury is responsible for the claimant's incapacitating condition, the carrier has the burden to prove that it is the sole cause rather that any subsequent accident or incident. *See* Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977).

Regarding damage or harm to the physical structure of the body, the claimant in the case before us testified to a specific incident at work (attempting to move a file cabinet) that occurred on (date of injury) and which resulted in a sharp pain in his back, that he reported this incident to his supervisor, that he subsequently was off work for a day and that he ultimately told his doctor of the incident who stated it was an aggravation of his prior back condition. He also testified to a specific incident at work (lifting a briefcase onto a shelf) that occurred on (date of injury) and which resulted in his twisting and sustaining a sharp pain in his back, that he reported this matter to his supervisor and stated he was going to seek medical treatment, that he subsequently went to an emergency room where he was treated and that he told Dr. L. about the incident who stated it was an aggravation of his prior back condition. The hearing officer, as the finder of fact, determined from the evidence of record that the claimant had sustained a compensable injury, that is, an aggravation of his preexisting back condition. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). The hearing officer resolves conflict and inconsistencies in the evidence. *See* Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1978, no writ). 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. *See* Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). This is so even thought we might have drawn different inferences from the evidence. Garza, *supra*; Texas Worker's Compensation Commission Appeal No. 92435, decided October 5, 1992.

Finding there is sufficient evidence to support the determinations of the hearing officer and not finding them to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge