APPEAL NO. 92520

On August 21, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that (claimant) had not sustained an injury in the course and scope of his employment on (date of injury) and therefore claimant is not entitled to compensation as the result of his claim. Claimant took nothing from the claim and filed an appeal. Claimant assigns as point of error the hearing officer's Finding of Fact No. 5, that claimant did not sustain his back problem as the result of work-related activity on (date of injury), as being against the great weight and preponderance of the evidence. Claimant further alleges error in the hearing officer's Conclusion of Law No. 2, that claimant did not suffer a compensable injury to his back, as being so against the weight and preponderance of the evidence to be manifestly unjust. Claimant also alleges error in the hearing officer's Conclusion of Law No. 3 that claimant does not have a disability arising from a compensable injury. Here claimant argues the Act should be liberally construed. (County), the self-insured governmental entity and referred to as employer herein, filed no response to claimant's request for review. The hearing was held under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

DECISION

The hearing officer's decision is affirmed.

This case almost entirely turns on the credibility of the witnesses and interpretation of the testimony. (claimant) was a 32-year-old, 150 pound, 5' 11" man employed by (county), the self-insured (employer). On (date of injury) claimant was given an assignment by his supervisor to drive a dump truck of gravel to a road site in order to patch a pothole in the highway. The claimant alleges he accidently hit a lever which caused the tailgate of the truck to drop down. Claimant alleges that in the course of reconnecting the tailgate to the truck, the tailgate hit him in the back. It was agreed that the tailgate in question was approximately six feet long, four feet high and weights between 200 and 400 pounds. Claimant returned to the yard and reported he had injured his back to his supervisor and indicated he needed to see a doctor. The claimant consulted a chiropractic physician who diagnosed claimant to have "irritated lumbar plexus, lumbar muscle spasm and lumbar spondylolysis." Claimant was subsequently seen by at least two other doctors who found a "far lateral disc herniation on the left side at L4-5." A radiologist found "the L4-5 disc level reveals a moderate to large left lateral disc herniation."

Claimant returned to his job on the next regularly scheduled work day but separated from his employment a few days later (apparently on (date)). The claimant testified that his separation was by mutual agreement with the employer because he was not making enough money, because of his back pain and because he felt his coworkers were harassing him. During the next 12 months claimant worked intermittently as a roofer and a laborer for a fence company. Claimant testified that he has been unable to maintain or obtain regular employment because of his back injury.

The employer argues that the claimant's version of the accident was neither credible nor plausible. The employer produced two witnesses who stated that it was highly unlikely, if not impossible, for one man to be able to reattach the tailgate to the back of the truck or hook it into its "up" position because the tailgate was so heavy. One of the witnesses testified he specifically recalls that when claimant returned to the job site on the day in question the tailgate was in the same parallel to the ground position that it was in when the claimant left the job site. The claimant acknowledged on cross-examination that he had suffered from back problems for two years prior to the date in question, that he had injured his back two weeks prior to the date of injury while lifting some gas tanks and that he never told his employer or the doctors that the tailgate struck him in the back. The employer stresses it is not plausible for a 150 pound, 5' 11" man with preexisting back pain to lift and reattach a tailgate which weighs from 200 to 400 pounds to the back of a dump truck.

The employer also points out that claimant had filed for medical benefits on his wife's insurance with the claim indicating the injury was not due to an accident. According to the employer's representatives, the claimant returned to his regular job after the date of the alleged injury and indicated his back was not a problem and he did not have to go back to the doctor.

Article 8308-6.34(e), holds that the hearing officer is the sole judge of the weight and credibility of the evidence. As such, the decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or so 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.). Claimant, in his appeal, alleges that Finding of Fact No. 5 is indeed against the great weight and preponderance of the evidence and cites the various doctors who found a lateral disc herniation at L4-5. It is fairly clear that claimant has an injury. Finding of Fact No. 5, however, is that the back problems were not the result of a work-related activity on (date of injury). This finding is supported by the testimony of two witnesses who testified it was highly improbable or impossible for a 150 pound, 5' 11" man with a bad back to lift a tailgate which weighs between 200 to 400 pounds four feet and hold it while he inserts a pin. Further, the evidence was that the truck tailgate was in the same parallel to the ground position upon return to the job site as it was when claimant left. Other than claimant's testimony, no other evidence exists to support claimant's version. The finding that the back problems were not the result of work-related activity is supported by the evidence.

Claimant's second point of error challenges the hearing officer's conclusion of law that claimant did not suffer a compensable injury on (date of injury) because "there were no actual witnesses to the injury to refute Appellant's [claimant] testimony. . . ." Claimant cites Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ) in support of his argument. That case, in a somewhat similar fact situation, supports the proposition that when a finding is against the great weight and preponderance of the evidence ". . . the fact finding power of the Court of Civil Appeals . . . requires that court to

weigh all the evidence in the record. . . ." The court held in that case, as we hold here, that based on a careful reading of the record, the appellate court could not say that the fact finder's". . . finding of no injury is against the great weight and preponderance of the evidence." We too find there is a preponderance of the evidence to support the hearing officer's conclusion.

Claimant's last point of error is that the hearing officer erred in his Conclusion of Law No. 3 determining that "claimant does not have disability which arose from a compensable injury." Claimant argues that ". . . a herniated disc which may require surgery . . . clearly meets the definition of disability. . . ." Disability is defined in Article 8308-1.03(16) as ". . . the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(27) defines injury as ". . . damage or harm to the physical structure of the body . . ." Consequently, claimant may have suffered an injury but that does not equate to the definition of disability under the 1989 Act. In any event, the issue in this case is not whether the injury constitutes a disability, but rather whether the inability to obtain and retain employment at wages equivalent to the preinjury wage, arose from a compensable injury. The hearing officer found it did not, and we agree. Finally, claimant argues the Texas Workers' Compensation Act should be liberally construed and cites Trader's and General Ins. Co. v. Collins, 321 S.W.2d 178 (Tex. Civ. App.-Houston 1959, writ ref'd n.r.e.) and quotes Texas Employer's Insurance Association, 610 S.W.2d 208 (Tex. Civ. App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.) for the proposition that any reasonable doubt should be resolved in favor of the employee. The Texas Employer's case, *supra*, is clearly distinguishable as it involved the weight to be given certain medical evidence. In the instant case the issue is whether an accident occurred as described by the claimant. The hearing officer determined that it was not credible or plausible that the injury happened as described. This determination is supported by the testimony of two witnesses who testified as to the weight of the tailgate, the claimant's activities after the alleged injury and the position of the tailgate when the truck left the job site and when it returned.

The claimant has the burden to prove, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. *See* Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The hearing officer as the sole judge of the relevance and materiality as well as the weight and credibility of the evidence apparently chose not to believe claimant's version. That determination is not so weak or the findings so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951) and Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992. We will not substitute our judgment for the hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge