APPEAL NO. 92527

A contested case hearing was held in (city), Texas, on July 21, 1992, (hearing officer) presiding, to determine whether appellant (claimant) sustained an injury to his back during the course and scope of his employment with (employer) on (date of injury). Finding that claimant did not suffer an injury to his back on (date of injury) while undergoing a back strength test as a part of employer's employment physical, the hearing officer concluded that claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury to his back under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). In his request for review claimant asserts that the hearing officer's decision was against the great weight and preponderance of the evidence. The carrier's response urges our affirmance.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, we affirm the decision.

Appellant testified he had worked for employer for approximately 19 years as a pipefitter and had hurt his back on the job several times in the 1970s and 1980s. According to his testimony, and an unsigned transcript of his telephone interview by carrier, admitted without objection, claimant had last worked for employer on March 6, 1991, worked for some other employer until sometime in December 1991, and was rehired by employer on (date of injury), to work as a pipefitter at the (DPMC), the job site. (Mr. H), employer's mechanical lead general foreman at DPMC, who actually hired claimant for employer, directed him on (date of injury) to undergo a physical exam at employer's downtown facility, which said examination the hearing officer found to be in the course and scope of claimant's employment. Claimant said he told employer's medical technician, (Mr. W), of his prior back injuries and back pain at the time of his examination, and he also wrote on the medical history form he completed that he had prior injurie s to the "back or lower spinal area" and was presently suffering from sciatica in his left hip and leg. During his examination, claimant was given an isometric test to measure his back strength. He said the test required him to stand on a board, grip a t-bar handle connected to a chain, and pull upwards for 20 to 30 seconds until a signal was heard. On the fourth and final pull, he said he felt a "little twinge" in his back, but not much pain. He regarded it as insignificant and did not mention it. Mr. W scheduled claimant to go to the WorkWell Institute the following Monday, January 27th, for additional back evaluation.

On Saturday morning, claimant's back was hurting bad. He said he sat in front of the refrigerator to help his wife clean it out and when he could not get up, he realized he was hurt worse than he had thought. He went to the WorkWell Institute on Monday for the scheduled back evaluation but was not tested because of his high blood pressure. He said Mr. W then told him he could go to work. On Tuesday (orientation day), he attended an employee orientation at DPMC and subsequently worked about two months, first as a pipefitter draftsman, and later as a field pipefitter. He said the sciatic nerve pain he had

had for years shifted to the other leg on the day of his orientation and that he discussed the pain with employer's medical technician at DPMC, (Mr. S), and was given a job of pipefitter draftsman. He said he told both Mr. S and Mr. H he thought it was the back test. He also stated he was told that day he had to make a written statement that he had not been hurt at DPMC. On January 29th, he completed and signed an investigation report reflecting that the accident location was employer's downtown medical office. His accident description referred to the back test and included the "slight twinge" he had felt in his right hip on the fourth pull. He also mentioned helping his wife clean out the refrigerator on Saturday morning and feeling pain as he bent down to help her. He further wrote that he did not know if the back test "had anything to do with this injury," that he had hurt his back years earlier while working for employer, and that he had been told by employer's doctor he would have to live with it for the rest of his life.

On January 29th claimant visited (Dr. S), his family physician who had treated his back and high blood pressure for 15 years. The record shows he complained of back pain on his right side and said he thought he strained a muscle. He was given an injection and medications. After three follow-up visits to Dr. S in February, claimant changed private health insurance carriers and saw (Dr. P) on March 2nd. Claimant said these doctors visits were paid for either out of his own pocket or by his private health insurance carrier. According to Dr. P's records, claimant complained of having back pain for five weeks which started after lifting, and that the pain had become very severe and radiated down his right leg. After several visits to Dr. P, claimant saw (Dr. L) on April 10th. The records of Dr. S and Dr. P contained no reference to claimant's back test and claimant explained the absence of that history by stating he had not yet filed a workers' compensation claim when he saw those doctors. However, at one point claimant testified his doctor explained that when he pulled on the chain taking the back test, he moved the disc from one side to the other and that is why his pain moved from his left leg to his right leg. Dr. L's record of his April 10th consultation indicated that claimant had a history of back and left leg pain from 1973 when he hurt himself lifting at work; that he had gone to the emergency room several times and had had plain x-rays taken "but never had any real studies;" that he did reasonably well working and managing his pain until he took the back test in January and "felt a pop in his back;" and that he had local discomfort which progressed over the weekend into severe pain in his back and right leg. Dr. L recommended surgery after reviewing an MRI scan on April 14th which revealed a large herniated and extruded disc fragment at L5-S1 on the right.

The records of (Dr. N), who performed claimant's spinal surgery on June 8th, reflected that claimant, while working for employer, reported holding something heavy and feeling an immediate pop in his back, and three days later noticed pain in his right leg with an increase in his symptoms. Claimant said he cannot return to his former occupation because he cannot bend, and that he cannot do any work until the nerves heal.

According to a written statement in evidence from Mr. H, claimant called him on March 2nd to advise that he was down on his back, and had seen a doctor who restricted

his movements for the next two to three weeks. Mr. H's statement recited that he twice asked claimant if his back problem related to anything he had done at DPMC and claimant responded that it was from a previous injury on another job. Mr. H's recorded interview transcript stated that when he talked to claimant on the orientation day, claimant stated he "either had injured his back downtown taking the physical or he had hurt it that previous weekend moving a refrigerator." However, claimant testified he told Mr. H he had hurt his back downtown during the test, and that Mr. H already had his statement on that.

Mr. W testified that he administers approximately 75 to 100 isometric back tests each day and could not recall an injury from such testing; that the back test does not involve movement or the lifting of weight, but rather pulling and the exertion of pressure for about two seconds; and that claimant's scores were well above the cutoff level for a pipefitter job. While he could not specifically recall claimant's testing, Mr. W said he would have reflected any problem with the test in his notes. He scheduled claimant for further back evaluation at Workwell Institute because of his history. He said the test equipment manufacturer's literature indicates that its use cannot result in either an injury or reinjury. Claimant introduced a letter from a management consultant to employer's general counsel which summarized information regarding the risks of injury to applicants taking employer's physical ability test. This letter reflected that over 2,000 test administrations by the designer resulted in no reported injuries; that over 5,000 administrations by employer resulted "in a few previously reported injuries of a muscle strain type;" that "anecdotal evidence indicates that a limited potential for minor muscle strains with short recovery times may be associated with any strength testing;" and that the equipment met or exceeded the standards of the American Industrial Hygiene Association Ergonomic Guide. The letter also outlined a number of steps taken by employer to even further minimize the risk of injury to applicants.

Mr. S, employer's medic at DPMC, testified that claimant told him on orientation day that his low back pain was either from moving a refrigerator with his wife, or perhaps from going through the back test, and that claimant felt the moving of the refrigerator caused the problem. Mr. S told claimant he would log in his problem as "non-occupational" and claimant registered no objection. He said he told claimant he would required a doctor's release and that claimant obtained one.

Mr. H, claimant's supervisor, testified that on orientation day, Mr. S told him he needed to talk to claimant about the work he would be doing in view of his back pain. When he talked to claimant about his back pain and his ability to work, claimant discussed his preexisting back injury and said he could do the work. It was someone else who mentioned the back test to Mr. H. He appeared to affirm his statement in the transcription of his earlier recorded telephone interview that claimant had said he either hurt his back moving the refrigerator or downtown taking the physical. He said he didn't ask claimant where he was injured but only whether he was injured at DPMC. He also testified that claimant worked for five weeks without complaining of his back.

The hearing officer found that claimant did not suffer an injury to his back while pulling

on the t-bar during his back test on (date of injury), and we find the evidence sufficient to support that finding as well as the conclusion that claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his back. The record clearly shows that claimant injured his back. However, the evidence would permit a finding that the back injury was sustained prior to his employment on (date of injury), or was sustained while taking the back test, possibly by aggravating a preexisting injury, or was sustained in moving a refrigerator at home. While we might well have found that claimant sustained the injury during the back testing, we will not substitute our judgment for that of the hearing officer where, as here, his finding is supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). 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 conflict and inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, 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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge