APPEAL NO. 92529

On September 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that appellant, hereinafter the claimant, failed to show by a preponderance of the credible evidence that he sustained a compensable injury in the course and scope of his employment with his employer, (employer), and further determined that the claimant does not have disability and that the carrier is not liable for compensation under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The claimant contends that the hearing officer erred in concluding that he did not sustain a compensable injury and requests that we reverse the hearing officer's decision. Respondent, hereinafter the carrier, responds that the hearing officer's decision is supported by sufficient evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The claimant is a pipe welder. He injured his back in a work-related accident in 1988 for which he underwent a laminectomy at the L4 level in March 1989. He settled his workers' compensation claim, returned to work for a different employer, and injured his back in a work-related accident in April 1990 for which he underwent a laminectomy and fusion at the L4, L5, and S1 levels in January 1991. The claimant settled his workers' compensation claim and then (Dr. S), M.D., who performed the second operation, released him to return to work in October 1991. The claimant worked for the employer involved in the present case, (employer), from (date of injury) to (date). He testified that on or about (date of injury) he injured his back while welding at work when he grabbed a piece of pipe that fell off a stand. Prior to informing anyone at work that he had sustained a work-related injury, the claimant quit his job on (date), for the stated reason of wanting longer term employment. The claimant said his quitting was not related to his alleged back injury or back pain. After he quit his job, the claimant went to (Dr. S) on (date), with complaints of back and leg pain, and he continued to see (Dr. S) through at least June 1992.

The claimant testified that prior to his alleged injury of (date of injury) he was free of pain and had recovered from his January 1991 surgery. He said that his work release included a restriction on heavy lifting. The claimant admitted that he did not inform the employer of his two prior work-related injuries although such information was requested on the employment application. He also said that he had told his coworkers at work that he could not do heavy lifting because he had had back problems. The claimant said that he understood that he had "cracked" his back fusion in the (date of injury) incident. The claimant notified the employer of his alleged back injury on or about (date).

The claimant's supervisor stated in a written statement that whenever the crew had to lift anything the claimant would not help because he said he had a bad back, that the claimant did not inform him of any injury on the day the claimant quit work, and that when

he questioned the crew about the alleged injury he did not find anyone who had witnessed anything relating to the claim nor did he find anyone to whom the claimant mentioned a work-related injury. One coworker stated in a written statement that the claimant had told him he had back pain but that the claimant did not tell him he had an accident at work. Another coworker stated in a written statement that "to my knowledge, there was no accident."

In a letter to the claimant's attorney dated July 28, 1992, (Dr. S), who is an orthopaedic surgeon, stated that:

> This patient [the claimant] sustained an injury on (date of injury) to his back at work. He had had previous surgical intervention on his back, including a laminectomy and a laminectomy and fusion. The patient had been well and free of back pain, and able to return to work prior to his injury on (date of injury). He presently appears to have a disruption of his fusion mass and is in need of further testing and possible surgery.

On April 7, 1992, the claimant was examined by (Dr. W), M.D. In his orthopaedic consultation report of the same date, (Dr. W) set forth the claimant's history, his findings on examination, and his review of x-rays taken of the claimant's lumbosacral spine in July and November 1991, and in January and February of 1992, as well as a review of a magnetic resonance imaging of January 1992 and a computerized tomography of the lumbosacral spine done in the same month. (Dr. W) diagnosed: "1. Spondylolisthesis, first degree, L5 vertebral body. 2. Postoperative posterolateral and intertransverse fusions, L4-L5-S1." He noted that defects in posterolateral and intertransverse fusion masses on films dated January 9, 1992, were not apparent to him, although a (Dr. F) had concluded that the bilateral fusion masses did not appear to be intact on either side. (Dr. W) stated that: "On April 7, 1992 there were no objective findings to indicate an injury was sustained on (date of injury)."

On July 20, 1992, the Commission ordered the claimant to be examined by (Dr. B), M.D., an orthopaedic surgeon, pursuant to Article 8308-4.16 for the purposes of determining "1. Whether the claimant injured his back at work on (date of injury), or whether present disability is due to surgical fusion which resulted from a previous industrial injury in April 90. 2. Return to work, including any restrictions which may be indicated." In a letter dated August 24, 1992, (Dr. B) indicated that on August 18, 1992, he had taken a thorough history from the claimant, did a complete orthopaedic physical examination, and reviewed the claimant's "chart record," and diagnostic studies, including an MRI scan, CT scan, tomographs, multiple plain films and medical evaluation of (Dr. W). (Dr. B) stated that:

> It is my conclusion after thorough review of the above, history and physical examination that he [the claimant] most certainly does not have

> a solid fusion from L4 to the sacrum and that his current symptoms are related to this fact. It is quite clear that his current lumbar problems are related to his previous injuries and not related to his (date of injury) injury.

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). It is the claimant's burden to establish that an injury was received in the course and scope of employment. Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-[1st Dist.] 1989, writ denied). The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). Because the claimant was an interested party in this case, his testimony only raised issues of fact for the hearing officer's determination. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the expert medical testimony and judges the weight and credibility to be given the expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). That the trier of fact might have arrived at findings different than she did does not justify the abrogation of the determinations the trier of fact concluded from the evidence to be the most reasonable. Escamilla, *supra*. 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). However, it has been held that a medical expert need not use exact magic words that an injury or condition was the producing cause of incapacity for a workers' compensation claim to be denied based on a sole cause defense. Director, State Employees Workers' Compensation Division, State of Texas v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied).

In the present case, the hearing officer noted in the Discussion of Evidence portion of her decision that the claimant's credibility suffered because his testimony appeared to be inconsistent and then detailed the testimony she found to be inconsistent. The hearing officer further stated that the testimony reflected that the claimant had a bad back when he began working for the employer and that the preponderance of the medical evidence supported that fact, and the fact that the claimant's current problems are due to his back injuries and surgeries prior to (month year). The hearing officer found that the claimant's testimony that he sustained a back injury in (month or month year) while working for the employer was not credible, and further found that the claimant did not sustain a back injury in (month or month year) while working for the employer. The hearing officer concluded that the claimant failed to show by a preponderance of the credible evidence that he sustained a compensable injury on any date that he was in the course and scope of his employment with the employer. Having reviewed the record, we conclude that the hearing officer's findings, conclusion, and decision are supported by sufficient evidence and are not

so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. *See* Ledesma v. Texas Employers Insurance Association, 795 S.W.2nd 337 (Tex. App.-Beaumont 1990, no writ); Texas Workers' Compensation Commission Appeal No. 91085A, decided January 3, 1991.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge