APPEAL NO. 92619

A contested case hearing was held on October 13, 1992, in (city), Texas, (hearing officer) presiding. The hearing officer held that the appellant (hereinafter "claimant") failed to establish that he suffered an injury that arose out of and in the course and scope of his employment on (date of injury), and accordingly denied his claim for workers' compensation benefits under the Texas Workers' Compensation Act, Article 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

In his request for review, claimant challenges Findings of Fact 4 and 5 and Conclusions of Law 4 and 5, pointing to evidence which he contends leads to a different conclusion. The respondent (hereinafter "carrier") basically contends that the decision is supported by sufficient evidence.

DECISION

We affirm the decision and order of the hearing officer.

Claimant had been a bus driver for the (employer) since 1983. He testified that on (date of injury), as he was changing the destination sign on his bus, he developed a cramp in his calf and fell to the floor. He said he felt "an explosion" through his back and leg, and that he called a dispatcher and asked for an ambulance. He was taken to (Hospital), where he was seen by (Dr. O), the same doctor who he said had treated him a few days earlier for a shoulder injury. Later, he was seen by (Dr. F), who admitted him to the hospital where he stayed 22 days. Shortly after his release he began seeing (Dr. C), who took him off work and who he was continuing to treat with at the time of the hearing.

(Mr. S), employer's street supervisor, testified that on (date of injury) he was notified by the dispatcher of a "Code 1054," which refers to a sick operator. He said that when he arrived at the scene claimant was slumped in the driver's seat and was not on the floor.

The medical history taken by Dr. O on (date of injury) says that claimant mentioned falling that morning. However, it also states, in part: "[claimant] was involved in a bus accident approximately two or three years ago, in 1990, when he hurt his back. He is here in the Emergency Room stating that he has been having pain to his back and had not had any improvement after taking Soma compound with codeine. He was seen two days ago. . . ." Claimant testified at the hearing that his back had been injured in an accident a few years before. He also acknowledged he had seen Dr. O and had been given medication, but stated on cross-examination that the problem had been with his shoulder blade. The transcription of claimant's telephone interview with carrier's representative contains claimant's statement that at the time of the incident he had been taking pain pills for over a year because of pain in his spine. Medical records in evidence show claimant was treated for back and neck pain from a bus accident in 1990, and again in early 1992 as a result of a motor vehicle accident.

As claimant testified, he was admitted to the hospital by Dr. F. The admission report dated (date of injury) stated that claimant was admitted with acute onset of lower back pain radiating to the right lower extremity. It also states in pertinent part: "[Claimant] tells me that he was in his usual state of health until about six weeks ago when he had the insideous (sic) onset of right-sided lower back pain. There was no precipitating event. . .[claimant] says that his pain actually went away after about one or two weeks. The pain did return again without any precipitating factor. The pain has become progressively worse, especially over the last week." Dr. F stated his impression at that time as acute mechanical lower back pain with a radicular component.

On referral by Dr. F, claimant was examined by (Dr. Fr) who on (date) noted claimant's fall at work and said, "He then picked himself up and proceeded over the next little while to have muscle spasms in his back." Dr. Fr looked at claimant's x-rays and noted decreased disc space at L5-S1, and he opined that claimant had an L5 radiculitis with a potential herniated nucleus pulposus at L5. He noted that claimant's claustrophobia had prevented his undergoing an MRI. Dr. Fr concurred with Dr. F's recommendation of bed rest, physical therapy, and medications.

On Dr. F's referral, claimant also saw (Dr. W). In a May 8th report, Dr. W noted the work-related incident as given by claimant. He also said claimant reported lumbar discomfort four weeks prior to admission after carrying his 11-month old son. His symptoms resolved, then recurred after carrying both his daughters approximately two weeks prior to admission. Dr. W said claimant's symptoms progressed over the week prior to admission and he was seen in the same hospital emergency room three days prior to admission, with a follow-up referral to Dr. F.

Following a telephone call from carrier, Dr. F on May 20th wrote a "To Whom It May Concern Letter" in part as follows: "It is of note that when I first saw this patient in the office at my initial consultation he gave me no history whatsoever of any injury. He later told [Dr. Fr] and [Dr. W] that he had an on-the job injury. When I confronted him, the patient told me that he did indeed have an on-the-job injury. However. . .[claimant] could not give me the date or even an approximate date of his injury. . .This patient also, at the time of my initial consultation, denied any previous back injury. After three weeks of being in the hospital he finally told me that he had had a previous back injury and had been treated by (Dr. P)."

Dr. F reported basically the same information in his discharge summary dated May 22nd. His discharge diagnosis remained mechanical lower back pain with radicular component. Dr. F also prescribed medication and recommended a course of physical therapy for claimant. Medical records indicate that claimant underwent physical therapy at Memorial Hospital System's Department of Physical Medicine and Rehabilitation from May 6th through May 21st.

On June 25th, claimant began treating with Dr. C. His initial evaluation of that date recited the facts of claimant's fall in the bus, his past medical history, and his treatment to

date. Dr. C's working diagnosis was lumbar contusion with lumbar disc disease and right sided sciatica, and he also prescribed physical therapy. Dr. C also stated, "It is a medical probability that the injuries sustained and the treatment and diagnostics that will be rendered necessary have been directly caused by the incident which occurred at work on (date of injury)."

Claimant challenges Findings of Fact 4 and 5, as follows:

4.Claimant received medical treatment for a lumbosacral strain in 1990, cervical and lumbar flexion type injury in early 1992, and lumbar pain with radiculopathy several weeks prior to (date of injury).

5.Claimant experienced a cramp in a lower calf muscle while changing a destination sign in his bus on (date of injury). Claimant may have fallen to the floor of his bus as a result of this cramp. However, claimant failed to establish that this incident, even if claimant fell to the floor, either caused a back injury or aggravated or contributed to his pre-existing back condition.

He also challenges Conclusions of Law 4 and 5:

4.The preponderance of the evidence did not establish that claimant suffered an injury that arose out of and in the course and scope of his employment on (date of injury).

5.[Employer] is not liable for Workers' Compensation benefits on this claim.

In support of this contention, claimant cites this panel to several exhibits in the record, including medical records from his doctors, along with the testimony of the other witnesses. Upon review of the record in this case, however, we cannot say that the hearing officer's findings and conclusions do not find support in the evidence.

The claimant in a workers' compensation case has the burden of proof to establish that a compensable injury arose in the course and scope of employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. App.-Beaumont 1976, writ ref'd n.r.e.) The bulk of the evidence in this case consisted of claimant's own testimony and the medical records of the physicians who treated claimant. While the testimony of a claimant can establish the existence of a compensable injury, even the uncontradicted testimony of a claimant nevertheless raises but a fact issue for the trier of fact to resolve unless such testimony is clear, direct, and positive, and there are no circumstances in evidence to discredit or impeach such testimony. Anchor Casualty Co. v. Bowers, 393 S.W.2d 168 (Tex. 1965). The hearing officer as fact finder was entitled to weigh claimant's recitation of facts against those as contained in the medical records. In this case, sufficient inconsistencies existed to allow the hearing officer to determine, as she did, that claimant

failed to meet his burden of proof to establish that any fall he may have suffered at work either caused or aggravated the condition for which he was subsequently treated. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weights 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 inconsistencies in the testimony. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ). We will not disturb the hearing officer's decision unless it is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

We note that claimant has attached to his request for review a document--an affidavit given by his mother--which was excluded by the hearing officer upon carrier's objection that it had not been exchanged. The hearing officer gave the claimant an opportunity to show good cause for failure to exchange this document; claimant's response was that his mother's name was contained in the dispatcher's report, which was admitted into evidence. The hearing officer found that good cause did not exist.

The appropriate test for the existence of good cause is that of ordinary prudence; that is, the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). The determination of good cause is a decision best left to the discretion of the hearing officer, as is the case with a trial judge. Morrow v. HEB, Inc., 714 S.W.2d 297 (Tex. 1986). In this case, the hearing officer noted that the affidavit was notarized October 10, 1992, and was a statement that could have been available much earlier than that. Under these circumstances, we find that the hearing officer did not abuse her discretion in finding an absence of good cause and in excluding the affidavit.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge