APPEAL NO. 92632

This appeal arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992). A contested case hearing was convened on September 8, 1992 and concluded on October 27th. The hearing officer, (hearing officer), determined that the respondent, claimant herein, suffered a compensable injury on (date of injury), and that beginning January 14, 1992, the claimant could not obtain or retain employment at wages equivalent to his pre-injury wage because of his compensable injury. The appellant, carrier herein, is appealing the hearing officer's decision and order that it pay claimant medical benefits and temporary income benefits (TIBS) as authorized by the 1989 Act and the rules of the Texas Workers' Compensation Commission (Commission). No response was filed by the claimant.

DECISION

We affirm the hearing officer's determination that the claimant suffered a compensable injury on (date of injury). We affirm the hearing officer's determination that claimant had disability beginning January 14, 1992; however, we reverse his determination on disability insofar as it is for an indefinite term, and we render a new decision that claimant's disability ended on October 5, 1992.

The claimant was employed by (employer) from March 1, 1991 to May 5, 1992, when he was terminated due to "budgetary constraints." He testified through an interpreter that on Friday, (date of injury), he was required to move a shipment of appliances into apartments; he said he asked his supervisor, (Mr. F), for some assistance but was told that there was no one to help him since it was after 5:00 p.m. Because there was no working dolly, claimant was required to manually move the appliances in their boxes. Claimant stated that as he was moving a refrigerator it slipped and he felt a pain in his back as he stood it back up.

Claimant said an individual standing outside, who he said was (Mr. G), saw him when he yelled and came over to see if he was all right. An unsigned and unsworn summary of a statement of (Mr. C) (identified as the same person mentioned by claimant) which was obtained by carrier's representative stated that in September or October of 1991 he saw "(J)" (sic) struggling with a refrigerator, trying to get it into an apartment. The statement said that when the two men started to lift the refrigerator, claimant dropped his end, grabbed his back and screamed, saying he had hurt his back.

Claimant did not tell Mr. F that evening that he had been injured, because he said Mr. F was no longer at his office. He said he telephoned Mr. F the following Monday; he said Mr. F told him he would have to speak to (Ms. M), employer's manager. He did so, and an employer's first report of injury was completed by Ms. M on September 17th. Ms. M's unsigned and unsworn "Recorded Statement Summary" says that on that date she suggested that claimant see a doctor, but he refused any medical attention. It also says claimant called Ms. M on January 13, 1992 to tell her he had gone to the emergency room because of experiencing "the same pain as before" when pulling on his shoes.

Although his back continued to hurt, requiring him to take nonprescription pain medication, claimant said he did not go to a doctor because he could not afford to and because he needed to keep working. Although the testimony was somewhat confused on this point, claimant said it was his understanding from Mr. F that employees should be careful at work because there was no workers' compensation insurance coverage. He continued to work full days, plus overtime, until January 12, 1992, when he experienced pain and immobility at home while putting on his shoes. That afternoon, after calling Mr. F and asking permission to use employer's insurance card, he went to the emergency room at (city) Medical Center. The report of that visit states, in part ". . . sudden onset rt. flank pain that radiates to rt. leg and low abdomen . . . onset last night was putting on boot when problem occurred. Denies any other injury." The claimant testified that he did not deny he had been injured earlier, but that there was a language problem between himself and the person to whom he first spoke. Later, he said, he was examined by an emergency room doctor but he did not discuss the cause of his problem with the doctor. The radiological consultation disclosed disc spaces within normal limits, and stated the impression of mild spondylosis changes in the lumbar spine.

Employer's bookkeeper, (Ms. G), testified at the hearing that she had served as interpreter in a telephone conversation between claimant and her supervisor, (LC), on January 23, 1992. According to her testimony and a written statement made part of the record, claimant told her he was injured while putting on his shoes and that he felt pain in the central part of his lower back, his waist, when he bent over. Ms. G also said she asked claimant if this was the only injury he suffered, and he replied affirmatively.

Claimant first saw (Dr. A), who became his treating doctor, on January 22, 1992. A January 31st letter from Dr. A and an initial medical report prepared the same day notes the claimant's history of low back injury approximately five months before when attempting to avoid a refrigerator falling. The letter went on to state, "[h]e had pain and was treated for some time and the pain did subside but now has recurred; 1-12-92." Because of claimant's continued pain, Dr. A recommended an MRI exam, the February 29th report of which contained the following impression: "Posterior herniation of L5-S1, L4-5, L3-4 and L2-3 discs as described. There is decrease signal of all these discs, indicative of dehydration, desiccation and degenerative changes. There are some inflammatory changes in the adjoining vertebral endplates of L4-5, indicative of degenerative disc disease."

Dr. A continued to see and treat claimant through October 1992. He recommended claimant undergo physical therapy and work hardening. Following a March 9th office visit Dr. A noted the results of the MRI study and the four levels of posterior herniation, but stated, "I think [this] is a little bit too much because the patient does not look that bad. As a matter of fact, he moves fairly easy." Following an office visit on April 6th, Dr. A wrote, ". . . basically, the patient states he is feeling about the same. It is difficult for me to believe that this patient could have a ruptured disc in the areas previously stated, especially since he does not have symptoms." On June 15th, Dr. A noted that claimant continued to have pain,

"which is understandable," and he advised claimant to continue with medication. On July 21st Dr. A reported that claimant was still having trouble and should continue taking medication. Dr. A noted continued pain running down claimant's left leg on August 25th, and said, "[i]t would be useful to have EMG studies in order to see if there is any radiculopathy related with the possible disc." On October 5th Dr. A wrote, "[t]here is no evidence of any problems of the roots on the EMG studies. I advised [claimant] that I can not fine (sic) anything wrong with him except for a subjective complaint of pain. He is advised to see another doctor of his choice [and] return here in one month."

The claimant testified that the last day he worked for employer was January 13, 1992. He said the doctor at the emergency room took him off work for three days, although this is not readily evident from the emergency room report which is a poor quality photocopy. Dr. A initially took claimant off work for two weeks; toward the end of that time, on February 4th, Dr. A advised claimant to begin attending physical therapy sessions "on a daily basis for two weeks to see if he can return to work soon. If not, will possibly have to send him for an MRI study." As noted above, the claimant had an MRI on February 29th and returned for further examination on March 9th. On April 6th Dr. A. sent claimant to work hardening to see if claimant would be a candidate, and stated "[claimant] can not work, meanwhile." On May 5th and June 15th, Dr. A advised claimant to continue with work hardening. On July 21st, Dr. A stated, in part, "[claimant] is unable to work at this moment." On October 5th, Dr. A made the statement, noted above, that he could not find anything wrong with claimant.

The claimant also testified that he has continued to have pain about four times a week since (date of injury), and that he suffered no other accident or injury to his back after that date.

The carrier challenges the following findings of fact and conclusions of law:

Findings of Fact

4. The Claimant suffered a work related injury to his low back on (date of injury) when he bent over to prevent the refrigerator he was moving from hitting the ground.

6. The Claimant has herniated intervertebral discs at L2-3, L3-4, L4-5 and L5-S1 from his work related accident and injury of (date of injury) (sic).

7. The Claimant has been unable to work since February, 1992 because of his low back pain which now goes down into his right and left legs.

8. The Claimant suffered no other injury since (date of injury) to which his low back condition would be attributable.

Conclusions of Law

2.The Claimant suffered damage to the physical structure of his low back, herniated discs at L-2 through S-1, (date of injury) when he bent over to stop the Employer's refrigerator from falling to the ground; therefore, he sustained a compensable injury in the course and scope of his employment for which the Carrier is liable. [citations omitted]

3.Claimant's injury on (date of injury) was the sole cause of the injury to his back. [citation omitted]

4.Beginning January 14, 1992 Claimant could not obtain or retain employment at wages equivalent to his pre-injury wage because of his compensable injury of (date of injury). [citations omitted]

Basically, carrier points to several inconsistencies in the record relating to the (date of injury) incident, the fact that claimant continued to work thereafter, and the history as related by claimant at the emergency room and to Ms. G in support of its position that claimant suffered no injury until January 12th.

A claimant has the burden of proof to establish that an injury occurred in the course and scope of his or her employment. 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 sole judge of the relevance and materiality of the evidence offered and of its weight and credibility, Article 8308-6.34(e), is entitled to believe all or any part of a witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer could choose to believe claimant's testimony that he felt immediate pain upon moving the refrigerator, a fact that is somewhat corroborated by the summary statement of (Mr. G) (C). He could also believe the claimant's statements that he promptly reported an injury to his employer, and that he also related the same history upon admission to the emergency room, despite the fact that this was not so recorded. As we have held previously, a claimant's testimony alone may establish the occurrence of a job-related injury. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). We will not reverse the decision of the hearing officer where it is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

This panel has previously addressed situations where it was contended that an intervening event was the cause of the injury in question, and not the work-related event. In Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992, the claimant alleged she injured her back on the job in March. She did not miss any work until she was laid off some three weeks later. She stated that her back continued to hurt, but that she did not seek any medical attention until late August, when her back began to hurt badly after she turned from her back to her side on a couch while watching television at home. There was no medical evidence as to whether the claimant's back problems were caused by the on-the-job injury or some intervening cause, although the claimant testified

that her back pain was continuous from the first incident. The Appeals Panel upheld the hearing officer's determination that the claimant had suffered a compensable injury.

In Texas Workers' Compensation Commission Appeal No. 91111, decided January 30, 1992, the claimant injured his back while unloading a washing machine from a truck. While the carrier did not dispute that this accident occurred, and claimant reported it promptly to his employer, because the claimant later assisted in moving furniture for a friend, the carrier contended that the "producing cause of [claimant's] incapacity" was not the incident with the washing machine. (Claimant testified that he only moved light items, although his friend stated that he had assisted with moving furniture such as a couch, a bed, and a dresser; however, there was no evidence that claimant injured his back while moving the furniture.)

The Appeals Panel upheld the hearing officer's determination that the claimant injured his back while unloading the washing machine, a job-related activity. In that opinion we stated in part as follows:

> The term "producing cause" is not contained in the 1989 Act. However, the Texas courts have over the years used that term to describe the causal connection that must be established to prove that the disability or death of an employee was caused by the injury in the course of employment . . . It is apparent that "producing cause" is broader in its scope than is "proximate cause". . . In actions at common law to enforce liability for negligence the act or omission to be the proximate cause need not be the sole cause. It may be a concurrent or contributing cause . . . The same principal is given effect in compensation cases which hold that when injury is sustained by an employee in the course of his employment which results in his disability or death, compensation therefor will not be denied, although the injury may be aggravated or enhanced by the effect of disease existing at the time or afterwards occurring." (citation omitted)

In both these cases, as in the instant case, we upheld the hearing officer's determination that the claimant had met his burden under the 1989 Act. Upon review of this record, we hold that the findings of the hearing officer concerning the existence of an injury in the course and scope of claimant's employment are not against the great weight and preponderance of the evidence. In re King's Estate, 244 S.W.2d 660 (1951).

The hearing officer also held that claimant had disability beginning January 14, 1992, finding that the claimant has been unable to work since February 1992 because of his low back pain. The hearing officer also found that on January 22, 1992, the claimant was taken off work for two weeks and subsequently was given two additional weeks off by his treating doctor.

The 1989 Act defines "disability" as "the inability to obtain and retain employment at

wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). Although not entirely clear from the medical reports in evidence, it appears that Dr. A kept the claimant off work for a period of time longer than the four weeks found by the hearing officer. However, we have previously held that even an unconditional medical release to return to full duty employment does not, in and of itself, end disability, although the employee in those circumstances has the burden to establish that disability is continuing. *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991.

Looking at all the remaining evidence in the record, we find that a determination that claimant had disability past October 5, 1992, when Dr. A found nothing wrong with him, is against the great weight and preponderance of the evidence. In Re King's Estate, *supra.* It is true that claimant testified that he had pain, and we have previously held that an injured party's testimony, even when contradicted by medical evidence, can establish disability. Texas Worker's Compensation Commission Appeal No. 92167, decided June 11, 1992. However, claimant also testified the pain he would experience if he returned to work would be the same pain he experienced between (month year) and (month year), a period of time during which he was clearly able to work. The record also contained this exchange:

Q:Do you feel like you are able to work now?

A:Well, yes, I can work. The problem that I have is when I wake up in the morning.

Based on the foregoing, we affirm the determination that claimant suffered a compensable injury on (date of injury), and beginning January 14, 1992, he could not obtain or retain employment at wages equivalent to his pre-injury wage because of his compensable injury. We reverse in part the determination of disability and render a new decision that claimant's disability ended on October 5, 1992. The decision and order of the hearing officer is reformed to require the carrier to pay temporary income benefits to the claimant for the period January 14 to October 5, 1992. This decision does not preclude the claimant from establishing a recurrence of disability should such occur at some future time and be causally connected to the injury of (date of injury). *See generally* Texas Workers' Compensation Commission Appeal No. 92318, decided September 4, 1992; Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Thomas A. Knapp
Appeals Judge