APPEAL NO. 92645

A contested case hearing was held in (city), Texas, on October 28, 1992, (hearing officer) presiding as hearing officer. She determined the appellant (claimant) did not sustain an injury to his back in the course and scope of his employment on (date of injury), and denied benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Claimant disagrees with two of the hearing officer's findings of fact and her conclusion of law that he did not sustain a back injury in the course and scope of his employment. The claimant states that the issue sought on review "was whether or not the carrier would pay for a neurosurgeon's independent evaluation by (another doctor)." Respondent (carrier) urges that the decision of the hearing officer be sustained.

DECISION

Finding the determinations of the hearing officer to be supported by sufficient evidence of record and not finding those determinations to be so against the great weight and preponderance of the evidence as to clearly wrong or unjust, we affirm.

The hearing officer's Decision and Order sets forth the evidence in this case in considerable detail. We find it to be a fair and adequate rendition of the factors surrounding this case and adopt it for purposes of this appeal. Briefly, the claimant sustained an injury to his right thigh on (date of injury), when he bumped into a pipe as he was hurrying up a ramp. The claimant testified he never had any problems with his thigh before (date of injury). He told his supervisor that he injured himself and he subsequently went to a doctor (Dr. N) who diagnosed a contusion and prescribed some medication. Dr. N indicated the claimant could go back to work and set a follow up appointment for sometime later. The claimant did not miss any work and did not keep the appointment because he was "not impressed" with Dr. N. Claimant stated that he subsequently went to another doctor and had a Doppler study because of previous problems with blood clotting. The study was normal. The carrier introduced a medical record which indicated that the claimant had a Doppler study on "7/16/90" and which stated claimant ". . . was being seen for pain in the right thigh area, extending from inner to outer thigh." Claimant testified that he continued to have medical problems and thought that he might have a tumor in his stomach. He saw a (Dr. T) on July 8, 1992, apparently because he had previously seen a doctor in February 1992, who had diagnosed "chronic prostatitis," but Dr. T did not find any problem with his prostate. He was referred to another doctor, (Dr. Tu) who diagnosed the claimant's abdominal problems as an "irritable bowel or spastic colon" and prescribed medication. Claimant next saw a (Dr. C), a specialist in pulmonary diseases and internal medicine. Because the claimant was having symptoms similar to his previous blood clotting problems and was having chest pain, Dr. C hospitalized the claimant on July 28, 1992 and ran a series of tests including an MRI which showed "mild posterocentral herniated disc at L5-S1." Dr. C took him off work and subsequently referred the claimant to another doctor but he has not seen that doctor because the carrier refused to authorize it.

In a "To Who it May Concern" letter dated September 17, 1992, Dr. C states:

> (Claimant) sustained a leg injury on (date of injury). He is not on work status because of injury and a herniated disk (sic) which most likely is related to injury sustained on (date of injury).

A report dated October 23, 1992 from (Dr. L), an orthopedic surgeon, indicates he reviewed the medical records of the claimant and questions the basis and Dr. C's opinion that the disc herniation was related to the claimant's (date of injury) thigh injury.

The claimant was terminated from employment on July 22, 1992 (he is currently working elsewhere although his doctor has not released him to return to work) but testified he was not advised why he was terminated. Witnesses called and documents offered by the carrier show that the claimant was absent without excuse or permission on a number of occasions, was counselled about this on several occasions, was ultimately terminated for this repeated unexcused absenteeism and tardiness, and was so advised at the time of his termination on July 22, 1992 although he refused to sign the termination notice. It was only after his termination that he mentioned he was still having problems with his thigh and was going to a doctor. Witnesses for the carrier stated they saw the claimant on a daily basis, that he never mentioned any problems with the (date of injury) injury (although specially asked on repeated occasions by one witness), that between (date of injury) and July 22, 1992 he never manifested any problems and that he did not limp, appear impaired or complain of any pain or other discomfort. The employee benefits coordinator testified that during the period between (date of injury) and July 22, the claimant did come in and get some group health insurance claims forms but did not indicate such was related to his (date of injury) injury. In late May 1992, the claimant was observed carrying a heavy box of encyclopedias without any problem or difficulty.

The hearing officer's findings and conclusion with which the claimant takes exception are:

FINDINGS OF FACT

5. Between (date of injury), and July 22, 1992, CLAIMANT experienced various health problems unrelated to the contusion on his right thigh.

6. On July 22, 1992, CLAIMANT'S employment with EMPLOYER was terminated due to excessive tardiness and absenteeism.

CONCLUSION OF LAW

2. CLAIMANT did not sustain an injury to his back in the course and scope of his employment on (date of injury).

We believe there is sufficient evidence to support both of these findings and that the conclusion is supported by those findings. Claimant's position hinges on the acceptance of the September 17th letter from Dr. C which "correlates the work related injury to the herniated disk." (sic) In this regard, there was other medical evidence before the hearing officer along with evidence and testimony concerning the various facts and circumstances surrounding the period between (date of injury) and the results of the MRI following the claimant's hospitalization at the end of July 1992. The hearing officer found that Dr. C's letter did not "rise to a preponderance." The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). In Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. App.-Houston [1st Dist] 1981, writ ref'd n.r.e) the court noted that the law is fairly well settled in Texas that as a general rule the fact finder may accept or reject medical testimony in whole or in part. *See* also Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92491, decided October 30, 1992; Texas Workers' Compensation Commission Appeal No. 91022, decided October 3, 1991. Given the perfunctory nature of Dr. C's statement, the length of time between the thigh injury and the MRI, the lack of any indication from the claimant of any back related problem, the lack of any other medical evidence (given the number of doctors seen by the claimant for various symptoms and complaints), and the weight that the hearing officer could assess the claimant's testimony in view of some inconsistencies in the evidence, there is a sufficient basis for the hearing officer's findings and conclusion.

The finding of fact that the claimant was terminated for absenteeism and tardiness (unrelated to his doctor or medical appointments) was abundantly supported by the evidence, although was of only peripheral significance to the outcome of this case. It may well have been considered by the hearing officer in judging the credibility of the claimant's testimony and weighing the evidence. In any event, we find no basis to disturb the hearing officer's determinations in this case. *See* Pool V. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Susan M. Kelley
Appeals Judge