APPEAL NO. 92663

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On November 16, 1992, a contested case hearing was held in (city), Texas, (hearing officer) presiding, to determine whether respondent (claimant) sustained an injury in the course and scope of his employment on (date of injury), or whether preexisting back problems were the sole cause of his condition. Appellant (carrier) contends the evidence was both legally and factually insufficient to support the hearing officer's conclusions that claimant sustained a compensable injury on (date of injury), and that his preexisting back problems were not the sole cause of his condition. The claimant's response urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant, a six year employee and delivery salesman for (employer) at its (city), Texas, terminal, drove to work at approximately 5:00 a.m. on (date of injury), loaded and delivered a truck load of gasoline to a customer, and then reloaded and drove to (city), Texas, to deliver gasoline to a station in that city. He climbed out of his truck, retrieved a tool to remove the tank lids from the ground, and as he bent down or squatted down to remove a tank lid, he felt a sharp, severe pain in his back and right hip. His knees buckled from the pain and he tried to straighten up and walk the pain out, but the pain continued. It was worse when bending, and he had to move very slowly. After finishing the delivery and while returning to the (city) terminal, claimant called the terminal to report he was hurt. He also called his wife and asked her to call (Dr. D) to get advice. When he reached the terminal, claimant was helped out of the truck and into the terminal where he reported his injury to his supervisor, (Mr. S). He had his wife come to the terminal to drive him home as he could not make the 45 minute drive himself.

On the advice of (Dr. D), relayed by claimant's wife, claimant stayed in bed the following day and over the weekend, took the pain medication (Dr. D) prescribed, and saw (Dr. D) the following Monday. Claimant tried a conservative course of treatment including two weeks of bed rest followed by two weeks of physical therapy (PT) at a rehabilitation hospital; however, he ultimately required surgery. He underwent a right L5-S1 diskectomy by (Dr. Dr) on July 6, 1992, and returned to work after five weeks. (Dr. Dr) reported that claimant reached maximum medical improvement on August 10, 1992, and that he had a whole body impairment rating of seven percent.

Claimant testified that approximately 10 years earlier, while working for another employer, he had back problems which caused him to miss four days of work, but which apparently resolved. In July 1991, he hurt his back while painting his house and underwent a course of chiropractic treatment for a number of months, the last such treatment being in February 1992. However, because his back pain persisted from July 1991, he saw (Dr. D),

a neurologist, on May 6, 1992. Claimant described his continuing back pain from the summer of 1991 as irritating and ever present, but tolerable. He said that the pain, which was in his lower right side and hip, had not increased and that he worked all year with no lost time. However, he described the pain from the (date of injury) incident as severe for the first few days, and then persistent and radiating down his right leg. (Dr. D's) impression on May 6th was chronic right lumbosacral radiculopathy and he scheduled claimant for MRI and EMG studies. The MRI, performed on (date), revealed a herniated disc to the right at L5-S1. Claimant testified that on the day of his injury, (Dr. D's) office advised his wife of those test results. He insisted he was unaware of those results when he was injured that day and did not become aware of them until his wife told him later that day. (Dr. D's) deposition stated that on (date of injury) his office notified a member of claimant's family of the results and that subsequently on that day, his office was notified that claimant's back had gone out on him. Carrier's attorney advised the hearing officer that carrier felt claimant concocted the (date of injury) reinjury scenario to get his prior noncompensable back injury covered. The hearing officer specifically rejected such contention in his discussion of the evidence.

Claimant's supervisor, (Mr. S), testified that claimant went on vacation in July 1991 and that his back was then bothering him from painting his house. (Mr. S) heard no more about claimant's back until (month year) when claimant took off work on (date) (for the MRI and EMG studies). Claimant worked the following day, and on (date of injury) claimant called in to report his back was hurting badly. He said he was "bending over to pull a cap" at work when the pain hit.

(Dr. D's) record of claimant's May 18th visit recited a history of his having bent over at work and having a sudden increase in pain radiating down his right leg. (Dr. D's) physical examination indicated no new reflex change but did show a slight weakness of the right gastrocnemius muscle, and changes in claimant's straight leg raises; that is, the left leg raise radiating pain into the right hip and buttocks region, and the right leg raise causing more back pain and right lower extremity pain than previously. Claimant's records from the rehabilitation hospital where he underwent PT before surgery also reflected his history as involving an initial back injury on July 11, 1991, and a reinjury on (date of injury). In his deposition, (Dr. D) opined that "there had been an acute exacerbation of [claimant's] chronic lumbosacral radiculopathy which [he] presumed to be related to the lifting or bending incident which [claimant] described as occurring on (date of injury)." (Dr. D) went on to state that in his opinion the lifting or bending incident of (date of injury) could have and probably did increase claimant's need for disc surgery.

The carrier called (Ms. M), a vocational rehabilitation specialist, who reviewed claimant's medical records. In his deposition, (Dr. D) was asked for "objective" evidence of a new injury which would have occurred from the bending or lifting episode of (date of injury) and he cited his findings regarding slight weakness in claimant's gastrocnemius muscle and the increased straight leg raise pain. In (Ms. M) opinion, such findings were "subjective." Also "subjective" in (Ms. M) opinion was (Dr. D's) diagnosis of acute exacerbation of

claimant's chronic lumbosacral radiculopathy because it depended on claimant's reporting of increased pain. Carrier did not further elaborate as to why the findings on a physical examination by a neurologist would not be characterized as "objective," nor on the significance of such distinction in this case.

Carrier asserts there is both no evidence and insufficient evidence to support the hearing officer's conclusions that claimant sustained a compensable injury on (date of injury) and that his preexisting back problems were not the sole cause of his condition. In determining a "no evidence" point, we consider only the evidence and inferences which tend to support the finding, disregard all evidence and inferences to the contrary, and we should uphold the finding if any evidence of probative force supports it. An "insufficient evidence" point requires our review of all the evidence which supports and contradicts the finding, and we should uphold the finding unless we conclude it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

As we have previously stated, there is abundant authority for the proposition that the aggravation of a prior condition is an injury in its own right and can be compensable. *See* Texas Workers' Compensation Commission Appeal No. 92515, decided November 5, 1992, and cases cited therein. We said in Texas Workers' Compensation Commission Appeal No. 92463, decided October 18, 1992, that "a bare assertion that an aggravation has occurred does not relieve the proponent of the burden of proving that an injury, as defined in Article 8308-1.03(27), has been sustained." Further, "a claimant can provide probative evidence concerning his injury and it can support the establishment of an injury even in the absence of medical evidence or even where it is contradicted by some other medical evidence." Appeal No. 92515, *supra*. Not only did claimant promptly report his (date of injury) injury shortly after it occurred, such reporting being corroborated by his supervisor, but his medical evidence also supports his testimony concerning the occurrence of an aggravating injury.

We also stated in Appeal No. 92515, *supra*, that "where there is a preexisting injury and the carrier contends that the preexisting injury is responsible for the claimant's incapacitating condition, the carrier has the burden to prove that it is the sole cause rather than any subsequent accident or incident. (Citation omitted)" Claimant testified to having hurt his back painting his house in July 1991 and to a series of chiropractic treatments the last of which was provided in February 1992. Because his pain persisted, he saw a neurologist on May 6, 1992, and an MRI on (date) disclosed claimant had a herniated disc. Claimant also described his bending or squatting down to remove a tank cover lid on (date of injury) and the sudden onset of very severe pain which ensued for days and which did not respond to weeks of conservative treatment. Claimant differentiated the pain from his preexisting condition, which resulted in no lost time from work, from that which ensued from his bending or squatting down on (date of injury). "An injured party's testimony may be believed to the exclusion of other evidence and such testimony merely raises a fact issue for the trier of fact. (Citations omitted.)" Texas Workers' Compensation Commission

Appeal No. 91051, decided December 2, 1991. While the evidence showed claimant had a herniated disc on (date) before his (date of injury) bending or squatting incident, (Dr. D) made certain findings upon physical examination on May 18th which led him to the opinion that claimant had acutely exacerbated his prior chronic back condition by the bending incident he described. We find such evidence both legally and factually sufficient to support the challenged determinations of the hearing officer. *Compare* Texas Workers' Compensation Commission Appeal No. 92060, decided April 1, 1992.

The carrier attacked the subjectivity, and apparently the credibility, of claimant's medical evidence. However, the credibility of the evidence, including claimant's testimony, was a matter for the hearing officer as the trier of fact. The hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. Article 8308-6.34(e). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' 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.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge