APPEAL NOS. 92667 & 92668

A contested case hearing was held on November 9, 1992, in (city), Texas, with (hearing officer) presiding, to determine two disputed issues each of which had been the sole disputed issue at benefit review conferences (BRC), namely, whether respondent (claimant) continues to suffer the effects of his injury of (date of injury 1), and whether claimant was an employee or an independent contractor of (employer), on (date of injury 2). As to the first issue, the hearing officer concluded that claimant's back problems are the result of his (date of injury 1) injury, and that he has disability which began on May 18, 1992 and continues through the date of the decision. Respecting the second issue, the hearing officer concluded that on Thursday, (date of injury 2), claimant was an employee of employer. Appellant (carrier) has challenged the sufficiency of the evidence to support those conclusions. Claimant filed no responses to carrier's request for review.

DECISION

Finding the evidence sufficient to support the hearing officer's conclusions, we affirm.

The record indicates that this case involved two claims by claimant for compensation for back injuries. While the claim forms themselves were neither officially noticed nor otherwise made a part of the record, the two BRC reports indicate the dates of the claimed back injuries as (date of injury 1), and (date of injury 2). Each claim resulted in a disputed issue which was mediated at the respective BRCs without success. While the two disputed issues were consolidated for the contested case hearing, the hearing officer issued separate decisions bearing the respective claim and docket numbers. We have resolved the case in this single opinion but have assigned two appeals numbers to correspond to the two claim and docket numbers.

Claimant testified that he worked for employer in its (city), Texas, warehouse for approximately five years performing shipping and receiving and other warehouse duties for the most part, including loading and unloading trailers. On (date of injury 1), claimant lifted a box and felt a "twist" in his back. He reported the injury to his supervisor, Henry Finch, and later saw (Dr. P) who took x-rays, advised claimant he had a muscle spasm, and treated him with muscle relaxants, pain medication, and physical therapy (PT). Claimant said that (Dr. P) recommended light duty and that he mentioned such to his supervisor but was put back in the same position. Claimant said he advised his supervisor he had difficulty doing the work. According to claimant, the pain medication made him drowsy at work. Also, when he would complain to (Dr. P) that his pain was persisting and he was not improving, (Dr. P) response was simply to increase the dosages. Sometime in October 1991, claimant decided to discontinue treatment with (Dr. P) since he felt he was not improving under (Dr. P) care. He was not released by (Dr. P) nor advised his treatment was over, however, and he did not keep a scheduled appointment in November 1991. In December and in January 1992, claimant saw his uncle who provided him with massage therapy and a TENS unit, which helped.

Though he continued to work, his pain continued and he treated himself at home with

Tylenol, having stopped taking prescribed medications in December. Other than keeping his doctor appointments, claimant missed no time from work as a result of his injury until May 18, 1992, by which time he said his pain had become unbearable. Claimant said he had complained to his supervisor, (Mr. F), of his pain ever since the (date of injury 1) injury. On that date he saw (Dr. B) who, according to claimant, diagnosed a herniated disc, took him off work, and commenced a course of weekly treatment which included acupuncture, chiropractic treatment, and PT. Though his treatment is helping him and alleviates the pain, claimant has not worked since May 18, 1992. He admitted that at sometime in 1992 he was made aware that sometime in the future he and other employees would be laid off but denied having such knowledge as of May 18th.

Claimant also testified that on a weekend in (month year), the exact date to which he did not testify, pursuant to arrangements made with (Mr. Fr), who worked for employer, claimant pulled weeds outside employer's facility. The employer provided only gloves and a time schedule in which to have the weeds pulled. He knew where the weeds were having twice previously pulled them. Claimant was paid $300.00 by employer for that work with a company check which was not his regular pay check. On the two prior occasions, his pay for pulling the weeds was included in his regular paycheck. From the proceeds he paid the two relatives who helped him pull the weeds. Claimant insisted that he did not reinjure his back pulling weeds. He maintained he had the back pain before pulling the weeds, that it had persisted since his (date of injury 1) injury, and that he continued to have such pain which, by May 18th, caused him to see (Dr. B). The weekend he pulled the weeds preceded his visit to (Dr. B). He said the reason another claim--for a back injury on (date of injury 2)--was filed was because his lawyer advised it be done in view of the carrier's position that claimant hurt his back pulling weeds as an independent contractor. However, he insisted he neither sustained a new injury nor aggravated his (date of injury 1) injury when he pulled the weeds on a weekend in (month year), noting that his pain did not increase as a result of pulling weeds and that he had help.

(Mr. Fr) testified that employer was in the electric fuse business and that the weed pulling, done on a weekend, was not a part of claimant's regular duties. (Mr. Fr) arranged for the weed pulling with claimant who was interested in making some extra money. He said employer furnished only the gloves and schedule, and provided no tools nor supervision of the details of the job. (Mr. F), the supervisor, testified that claimant never complained to him of back pain after the (date of injury 1) injury, that claimant was a good employee, and that he had no problems with claimant's work. He said a meeting was held to advise the employees the (city) plant was to close in 1992 and that he had only one employee remaining.

Inexplicably, neither party offered any of claimant's medical records nor any other documentary evidence.

Carrier took the position that the evidence, including claimant's not having missed work from (date of injury 1) to May 18, 1992, his not having complained to his supervisor of

back pain, and his voluntary cessation of treatment with (Dr. P) in October 1991, established that claimant's back problems from his undisputed (date of injury 1) injury had resolved. Thus, argued carrier, the back problems for which he commenced treatment on May 18, 1992 resulted from his work as an independent contractor pulling weeds on a preceding weekend that month and were not compensable. Claimant took the position that his back problems were indeed attributable to his (date of injury 1) injury, and that he did not reinjure himself nor aggravate his prior injury pulling weeds in (month year). He further contended he performed the weed pulling as an employee, not as an independent contractor. We noted in an early decision that the 1989 Act limits liability for compensation to one who is an employee, and we discussed the determination of the existence of the employer-employee relationship in the context of the 1989 Act's definition of and application to independent contractors. *See* Texas Workers' Compensation Commission Appeal No. 91005, decided August 14, 1992. We would also observe that the term "employee," as defined in Article 8308-1.03(18), "includes an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business." (Emphasis supplied.)

Respecting the first issue, the hearing officer found, among other things, that claimant was injured in the course and scope of his employment on (date of injury 1), that he treated with (Dr. P) from September through October 1991 with little if any improvement, that he continued to work with a back support provided by employer and with a great deal of discomfort, that his discomfort became so severe that in (month year) he went to (Dr. B) where he was diagnosed with a herniated disc, and that (Dr. B) removed claimant from work status on May 18, 1992 and he has not since worked. Based on these factual findings, the hearing officer concluded that claimant's back problems resulted from his (date of injury 1) injury, and that he has disability which began on May 18, 1992, and which continues through the present.

Though not articulated as such in the BRC report nor in the hearing officer's framing of the disputed issues before the hearing, the first issue was actually one of disability under the 1989 Act. An injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed. Article 8308-4.61. As for income benefits, however, an employee must have disability and have not attained maximum medical improvement to be entitled to temporary income benefits which accrue on the eighth day of disability and which are paid weekly. Article 8308-4.23(a). Article 8308-1.03(16) defines "disability" as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Weekly income benefits may not be paid for an injury which does not result in disability for a period of at least one week, and if disability does not follow at once after the injury occurs but later results, weekly income benefits begin to accrue on the eighth day after the date disability begins. Article 8308-4.22. See the discussion of disability in Texas Workers' Compensation Commission Appeal No. 92064, decided April 3, 1992.

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). Although no medical records were introduced, the hearing officer obviously believed claimant's testimony that he sustained a compensable injury on (date of injury 1), and indeed the carrier did not contest such injury. We have said that "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." Texas Workers' Compensation Commission Appeal No. 92515, decided November 5, 1992. The hearing officer similarly believed that claimant neither sustained a new injury nor aggravated his prior injury when pulling weeds in (month year), and that he was taken off work by (Dr. B) and has subsequently been unable to work because of the effects of his (date of injury 1) injury. It is true that the evidence showed that claimant lost no time from work between his (date of injury 1) injury and May 18th, the apparent date he was diagnosed as having a herniated disc, and that he voluntarily stopped seeking further medical attention after October until May 18th. However, the matter of claimant's credibility, the resolution of the conflicts in the evidence, and the determination of the facts were all matters for the hearing officer as the trier of fact. 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).

As for the second issue, the hearing officer found, as the uncontroverted evidence established, that on a weekend in early (month year), claimant pulled weeds at one of employer's locations, that the job was not part of claimant's regular duties, that he was paid for the job and not out of employer's regular payroll account, that he was free to hire or not hire help, and that employer did not provide him with tools nor control his work for that weekend job. However, the hearing officer also found that (date of injury 2) fell on a Thursday, and not during a weekend. Claimant did testify he pulled weeds on a weekend. Based on these factual findings, the hearing officer concluded that on Thursday, (date of injury 2), claimant was an employee of employer. Since the second disputed issue was precisely framed (and agreed to at the hearing by the parties) as whether claimant was an employee or an independent contractor of employer on the specific date of (date of injury 2) (and not on some unidentified weekend in that month), the evidence quite obviously supported the hearing officer's determination of that issue.

The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge