APPEAL NO. 92692

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). A contested case hearing was held in (city), Texas, on October 30, 1992, (hearing officer) presiding, to determine the two disputed issues, namely, whether respondent (claimant) sustained a compensable injury on (date of injury 1), which has resulted in disability, and if so, the correct rate for his temporary income benefits (TIBS). The hearing officer determined that claimant sustained a compensable back injury on (date of injury 2), while employed at the (Employer A), that he later returned to work on a part-time basis and sustained another compensable back injury on (date of injury 1) (ownership of the store having by then changed to (Employer B)), that he has disability as a result of the latter injury, and that his average weekly wage (AWW) shall be computed as if he were working on a full-time basis on the day of his latter injury. The hearing officer's order stated, in part, that claimant is entitled to medical and income benefits from appellant (Carrier B)-- Employer B's workers' compensation carrier--as a result of his (date of injury 1) injury, that the interlocutory order entered by the benefit review officer (BRO) on September 1, 1992, requiring respondent (Carrier A)--Employer A's workers' compensation carrier--to make TIBS payments is revoked, and that Carrier B is liable to Carrier A for TIBS payments it made from May 15, 1992, until Carrier A's TIBS payments cease pursuant to the hearing officer's order. Carrier B challenges those findings and conclusions which determined that claimant sustained a compensable injury on (date of injury 1), and that Carrier A is entitled to reimbursement for TIBS payments it made pursuant to the interlocutory order. Carrier B further challenges certain of the provisions in the hearing officer's order.

DECISION

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

At the outset of the hearing, the hearing officer stated it appeared that the hearing was being held at the request of the claimant and claimant seemed to agree. According to the benefit review conference (BRC) Report in evidence, a TWCC-1 (Employee's First Report of Injury or Illness) was filed on 1/9/92, and a Notice of Injury and Claim for Compensation was filed on March 2, 1992, for a back injury. The record does not indicate whether Carrier A paid medical and income benefits prior to (date of injury 1). The BRC report indicates that at the BRC, held on September 1, 1992, claimant's position was that he did not think he was reinjured on (date of injury 1) but felt he was entitled to TIBS from one of the two carriers involved. Carrier B's position was that claimant was not reinjured on (date of injury 1). Carrier B also maintained that since claimant was working on a part-time basis during the 13 weeks prior to (date of injury 1) (albeit pursuant to his doctor's restrictions following the (date of injury 2) injury) his TIBS should not be calculated on the same basis as those for a full-time employee. The BRC report does not indicate that Carrier A was present or represented at the BRC.

Claimant testified that on (date of injury 2), while working at a store owned by Employer A, he was pulling a pallet of juice into the dairy case when the pallet became stuck in the doorway. While pulling on the pallet, he slipped and hurt his back. He said he had muscle spasms and numbness and tingling in his right leg thereafter, on a continuous basis up to and after (date of injury 1). He was taken off work by his doctor in January 1992. Sometime in March 1992, claimant, who had worked 40 hour weeks before his injury, resumed work at the store, but on a part-time basis (20 to 25 hours per week) because of his doctor's restrictions. He said he continued to experience back pain and right leg numbness and tingling, and that his back condition deteriorated after resuming part-time work. He felt he was not improving after (date of injury 2), and would disagree with any indications in his medical records to the contrary.

On (date of injury 1), while stocking shelves at the store (then owned by Employer B), claimant said he bent over to lift a box, experienced a muscle spasm and tensed up, like he did every night about that same time when doing too much lifting. He testified he "felt it pull like it had pulled any other time before." He said he did not think some specific incident occurred during that shift which caused a new injury, and that the problem he then experienced with his back and right leg were the same as before. However, according to a transcript of a telephone interview of claimant by Carrier B on June 25th, claimant was asked for the date and time of his injury and responded that it occurred at about 3:00 a.m. on (date of injury 1). When asked how he was injured claimant stated he was stocking boxes and cases, and "was lifting a case and [he] felt something pull in [his] back, and [he] reported it to who was in charge and [he] was sent home." When asked whether he had had a prior injury claimant said he had, that "it was the same injury," and that his herniated disc had not been previously diagnosed. He testified, however, that he had not experienced numbness and tingling in both legs before (date of injury 1), and that an MRI obtained sometime after (date of injury 1) revealed that he had a herniated disc.

Claimant apparently again stopped working and when he resumed part-time work on June 26th (three hours per day), he worked for about one week because he realized he could not do the work pulling heavy pallets. He said he has not since been able to return to work. He stated that when he resumed working part-time in March 1992, his back began to slowly deteriorate and continued to steadily decline until he stopped working altogether.

According to his medical records, claimant was diagnosed with a lumbar and mid-back skeletal injury involving muscle strain and spasm following his (date of injury 2) accident and his x-rays were within normal limits. He was taken off work initially and later given work restrictions against any lifting, pushing, pulling, and bending. By March 16, 1992, claimant's treating doctor felt he had improved to the point where he could try six hours of work per day up to 24 hours per week. After a brief trial, however, the doctor on March 24th reduced claimant's work hours to 20 per week. The records of his May 18th visit reflect that claimant advised his doctor he had strained his back again during the

normal course of his work and was having an exacerbation of his pain and some tingling in both legs. His doctor then decided to obtain an MRI of claimant's lumbar spine "because this patient is not getting any better." An MRI was subsequently obtained and it revealed desiccation of the L4 and L5 disc with a small central disc herniation and slight extension to the left at L4-5.

At the hearing, Carrier A contended the evidence, including the MRI and claimant's experiencing numbness and tingling in both legs, showed that claimant sustained a new injury on (date of injury 1) which ultimately resulted in the cessation of his employment. Thus, Carrier A argued, it should be released from the interlocutory order to pay TIBS and should receive reimbursement for TIBS it already paid pursuant to Article 8308-6.15(g). Carrier A also argued that Carrier B had not filed a TWCC-21 (Notice of Refused/Disputed Claim) setting up a sole cause defense based on the earlier injury and thus should not be allowed to pursue that defense. Carrier B contended at the hearing that there was no new injury on (date of injury 1) but rather a continuation of the (date of injury 2) injury; therefore, Carrier A should remain liable for payment of claimant's benefits and no sole cause issue was involved. Claimant's position was stated at the hearing as being unsure whether the (date of injury 1) incident was a separate, new injury but as knowing it aggravated the (date of injury 2) injury, and that he was entitled to TIBS from one of the carriers based on his full-time (not part-time) wage history.

Carrier B disputes the following findings, conclusions, and portions of the hearing officer's order:

FINDINGS OF FACT

5.Claimant injured his back on (date of injury 1), while pulling a pallet of juice.

6.Claimant was acting in the furtherance of [Employer B], his employer's business, when he pulled the pallet on (date of injury 1).

CONCLUSIONS OF LAW

2.On (date of injury 1), Claimant suffered a compensable injury while in the course and scope of his employment with [Employer B].

5.Carrier A is entitled to reimbursement for [TIBS] paid pursuant to the Interlocutory Order entered on September 1, 1992 (Article 8308, V.A.T.S. § 6.15(g)).

DECISION AND ORDER

Claimant is entitled to medical and income benefits from Carrier B as a result of his

> (date of injury 1), injury. . . . The interlocutory order requiring Carrier A to make [TIBS] payments is revoked. Carrier B is liable to Carrier A for [TIBS] payments made to Claimant from, and including, May 15, 1992, and until such payments by Carrier A are ended pursuant to this decision. Carrier B is ordered to pay benefits in accordance with this decision and the [1989 Act].

Carrier B did not challenge Conclusions of Law Nos. 3 and 4 that claimant has disability as a result of his (date of injury 1) injury and that his AWW should be computed as if he had been working full-time. The hearing officer's rationale was that claimant's part-time status was not a regular course of his conduct. However, for the AWW computation, that analysis under Article 8308-4.10(c) would still require consideration of the 13 weeks of employment immediately preceding the injury. Article 8308-4.10(a). The hearing officer's determination can be supported, however, under Article 8308-4.10(g). Carrier A has not challenged that portion of the hearing officer's order entitling Carrier B to contribution for any future IIBS or SIBS payments. However, contribution was not a disputed issue before the hearing officer, nor even ripe for decision, and this provision in the order is surplusage.

Carrier B's theory on appeal is that claimant had the burden to prove he sustained an injury on (date of injury 1), and that if he met that burden, Carrier A acquired a burden to prove that the (date of injury 1) injury was the sole cause of disability in order for the hearing officer to order Carrier B to pay benefits after that injury and to reimburse Carrier A. Carrier B cites us to Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992, as being similar on the facts and as stating that "where a subsequent injury is alleged to be the sole producing cause of disability, this must be proved." However, in Appeal No. 92463, unlike the present case, the hearing officer determined that the claimant had not sustained a new injury (by the aggravation of a previous injury) when she returned to work for her employer--who had changed workers' compensation insurance carriers after the injury--and that the appellant carrier, not the respondent carrier, remained liable for the injury. Such determination was one of fact for the hearing officer and we affirmed. We did note in Appeal No. 92463 that where a subsequent injury is alleged to be the sole producing cause of disability, such must be proved by the proponent. In the present case, there was no disputed issue, as such, concerning a sole cause defense, and the carriers at the hearing treated the first disputed issue as simply a question of whether an injury on (date of injury 1) was proven. Carrier B argued that no new injury was proven and thus it had no liability for claimant's benefits. Carrier A argued that the evidence proved a new injury did occur on (date of injury 1) and noted that Carrier B had not contested the claim on the grounds that the earlier injury was the sole cause of claimant's disability. Neither party presented specific evidence on sole cause, as such, nor argued the evidence on that theory.

We agree with Carrier A that Carrier B appears to misplace the burden of proof

regarding the sole cause defense. In Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992, we considered a case in which the appellant carrier's contentions seemed to suggest the sole cause defense. After observing that a claimant must prove an injury is compensable under the 1989 Act, we cited authority for the propositions that a claimant need not prove that the injury was the sole cause of disability; that an injury may be compensable even though aggravated by an existing injury or condition, or by a subsequently occurring injury or condition; and, that the mere fact that a claimant had a preexisting injury which aggravated the injury complained of does not in and of itself defeat recovery since the carrier must show the preexisting injury to have been the sole cause of the claimant's present incapacity. As Carrier A points out, Article 8308-4.30, while not providing relief to a carrier paying TIBS, does provide a mechanism for contribution from another carrier should a claimant become entitled to IIBS or SIBS.

Carrier B further contends that an injury on (date of injury 1) was not proven because claimant did not think he sustained a new injury on that date, his physical therapy record for May 15th reflected he was doing well, he had previously experienced back pain and tingling in his right leg from his (date of injury 2) injury, and the MRI was not taken until after (date of injury 1) and does not prove exactly when the herniated disc occurred. Carrier A urges, and we agree, that it did not acquire a burden to prove that an injury on (date of injury 1) (should such injury be determined to have occurred) was the sole cause of claimant's disability, and further urges, and we agree, that the evidence was sufficient to support the challenged findings and conclusions (except for a misstatement of fact in Finding of Fact No. 5 addressed below). The hearing officer could consider that claimant both testified, and stated in an earlier interview, that while stocking shelves on (date of injury 1) he bent over, lifted a box, and felt something pull or a muscle spasm in his back. He reported that occurrence to his supervisor, left work, and was unable to return until June 26th. A subsequent MRI revealed a herniated disc and claimant's doctor's records mentioned a history of an exacerbation of pain and claimant's having strained his back again at work. While the evidence could be argued to the effect that no new injury occurred on (date of injury 1) and that claimant simply experienced more of the symptoms he had been experiencing since (date of injury 2), the evidence could just as reasonably be argued the other way. *Compare* Texas Workers' Compensation Commission Appeal No. 92681, decided February 3, 1993, where the hearing officer determined that the claimant had not sustained a new and distinct injury and that the first carrier was liable for the claim.

Both parties have noted that in Finding of Fact No. 5 the hearing officer misstated that claimant injured his back on (date of injury 1) "while pulling a pallet of juice," although the undisputed evidence established that claimant's (date of injury 1) injury occurred when he bent over and lifted a box while stocking the shelves, and that it was his (date of injury 2) injury that occurred while pulling the pallet of juice. While the parties disputed whether claimant sustained an injury at all on (date of injury 1), there was no disagreement respecting the causative mechanisms of the two claimed injuries. Under these

circumstances and the posture of the evidence, we can infer a finding that the (date of injury 1) injury, found by the hearing officer, occurred when claimant bent over and lifted a box, and we accordingly reform Finding of Fact No. 5 to so reflect.

Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer 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 (Tex. 1986).

We also find no error in the challenged portions of the hearing officer's order. Having concluded, based on adequate factual findings supported by the evidence, that claimant sustained a compensable injury on (date of injury 1), which resulted in disability, and that Carrier B was employer's carrier on that date, the order quite properly revokes the interlocutory order and provides for Carrier A's reimbursement. Article 8308-6.15(g) provides that "[o]n final determination of liability, any insurance carrier determined not be liable for the payment of benefits is entitled to reimbursement for the share paid by the insurance carrier from any insurance carrier determined to be liable."

Finding of Fact No. 5 is reformed to read that claimant injured his back on (date of injury 1), while bending over and lifting a box. The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge