APPEAL NO. 92714

A contested case hearing was held in (city), Texas, on November 25, 1992, (hearing officer) presiding, to determine whether the respondent (claimant) suffered a compensable injury. The hearing officer, finding that claimant was struck by a forklift on (date of injury), while in the furtherance of his employer's business, and that he informed his supervisor of the incident that same day, concluded that claimant suffered a compensable injury on (date of injury). The appellant (carrier), in its request for review, asserts error by the hearing officer in improperly stating the disputed issue as whether claimant suffered a compensable injury when "the issue" was when the undisputed compensable injury was suffered, whether claimant timely reported the injury, and whether claimant had disability as a result of the injury. Carrier also attacks the hearing officer's "decision and order" as vague, ambiguous, and failing to state when claimant was injured and whether he "continues to suffer from any disability which may have been received while in the course and scope of his employment."

DECISION

Finding no reversible error and the evidence sufficient to support the hearing officer's findings and conclusions, we affirm.

Claimant testified that early in the morning of (date of injury), he commenced his workday for (employer) unloading trailers. His duties involved heavy lifting and loading and unloading trailers. He recalled he was kneeling down on the dock counting curtain rod boxes when he was struck in the lower back area by a forklift driven by (Mr. A). A pallet on the forklift pushed him forward and would have crushed him against another pallet had he not yelled out. He said he blacked out for a few seconds and when he came to, (Mr. A) was helping him up. Claimant said he felt he had been injured but kept working. Shortly later that day, claimant reported the accident to his supervisor, (Mr. D). According to claimant, (Mr. D) asked him if he wanted to see a doctor. When claimant declined saying he felt all right, (Mr. D) said the incident would not go on claimant's record. Claimant testified that a few days later, he asked (Mr. D) if he had made a report of the accident and was told a report had not been made because it had to be done in 72 hours. Claimant testified that he continued to work; that his back began to hurt approximately one to one and one-half months after the accident and gradually got worse; that the forklift accident could be the only explanation for his back pain; and that he has had back problems ever since the accident. He said he treated himself with Tylenol and did not go to a doctor. Claimant was able to fix the date of the accident because he took vacation during the first week in (month year) and returned to work on a Tuesday following his vacation. He acknowledged having erroneously stated to carrier that the date of injury was in (month year), and also having later erroneously stated the date as (date) on his amended claim form.

Some number of months after the forklift accident--the exact date of which claimant was uncertain--claimant's back pain, which he said had been bothering him since at least December 1991, increased after unloading 1,000 boxes of tea at Fleming warehouse. However, he said he was wearing a safety belt during that delivery and did not then injure

his back. Claimant insisted his back pain and injury stemmed from the earlier forklift accident, though acknowledging his pain increased after making the Fleming delivery. Claimant did not report an injury after the Fleming delivery to (Mr. D). Rather, he said he again discussed the forklift accident with (Mr. D) who responded, "why don't you just say you fell and use your own insurance." He said he subsequently sought medical treatment for his back pain on June 30, 1992, has been receiving conservative treatment from (Dr. B), is improving with therapy, and has since been released for "extreme light duty." Claimant stated he did not believe his employer had such light duty with the possible exception of administrative paper work. He acknowledged not having inquired of employer about light duty, however.

(Mr. A) testified that he did strike claimant with the forklift at about 5:00 a.m. on the day it happened, helped claimant up, and reported it to (Mr. D). However, he thought it occurred in the winter period because he and his coworkers were wearing jackets. (Mr. A) said he reported the incident about 8:00 a.m. that day to (Mr. D). (Mr. D) testified he recalled (Mr. A) mentioning that he accidently struck claimant with the forklift. According to (Mr. D), when he discussed the accident with claimant, he advised claimant of employer's policy of reporting accidents and claimant said to hold off and he would see how he was feeling. Later that day at the end of claimant's shift, (Mr. D) said he again spoke with claimant who said it was not necessary to report the accident because employer had a safety award program and he did not want to jeopardize his standing. Accordingly, (Mr. D) made no written report of the accident. He, too, recalled that the day of the accident was a cold morning and the employees would have been too warmly dressed for a summer day. (Mr. D) stated that claimant continued to perform his work without apparent problems until June 24, 1992, when he told (Mr. D) he was going to go on vacation and see a doctor about his back during that time. He wanted to know the exact date of the forklift accident. (Mr. D) reported this contact to employer's terminal manager who indicated he would file an injury report. He stated that claimant never reported having been injured during his delivery to the Fleming warehouse.

Claimant's medical records indicate he first saw (Dr. B) on June 30, 1992, reported a history of being hit in the back with a pallet jack eight or nine months earlier, has sharp pain intermittently, and was still working. (Dr. B's) plan was to obtain an MRI. The report of the MRI performed on September 2, 1992 contained the impression: "minimal degenerative disc disease L4-5 and L5-S1. No evidence of disc herniation or spinal stenosis." (Dr. B's) reports of September 8 and 24, 1992 indicated claimant was not released to work. (Dr. B's) letter report of September 22, 1992 stated claimant was under his care "for a back condition caused by an on the job accident ((," and that (Dr. B) was taking claimant off work and starting him on a physical therapy program. (Dr. B's) report of September 30, 1992 stated claimant's degenerative disc disease was aggravated by his accident and that he was not released to return to work "unless light duty is available." The October 19, 1992 report stated claimant was "not released to work yet," and the November 18, 1992 report stated "no work unless extreme light duty is available."

In its first appealed issue, carrier asserts that the hearing officer improperly stated the issue as whether claimant suffered a compensable injury in the course and scope of his employment; that the issue as framed by the benefit review officer (BRO) was whether claimant was still suffering disability as a result of his injury alleged to have occurred on or about (date); that the BRO's statement of the issue was changed with the understanding that the date of injury would be stated with some specificity by the hearing officer; and that the hearing officer concluded as a matter of law that claimant suffered a compensable injury on (date of injury). Carrier takes the position it never denied that claimant was hit by the forklift, then suffered a compensable injury, and timely provided notice of that injury to employer. However, carrier further maintains that claimant continued to work in excess of six months following the forklift accident without complaint of pain and, thus, that injury "produced no disability," and that any disability which claimant may have had followed his injury while unloading 1,000 cases of tea at the Fleming warehouse some eight or nine months later, an injury claimant failed to report to his employer. Carrier argues that the hearing officer's finding that claimant suffered a compensable injury "does nothing to resolve the issue of whether disability was incurred as a result of the forklift incident, or whether claimant properly notified the employer of the off-loading injury."

According to the benefit review conference report in evidence, the issue unresolved at the BRC, as framed by the BRO, was "[w]hether the claimant had disability resulting from his injury of [date]." At the outset of the contested case hearing, the hearing officer stated the disputed issue thusly: "Did claimant suffer a compensable injury in the course and scope of his employment." The hearing officer provided no explanation for such restatement of the disputed issue and did not indicate whether the matter had been addressed at a prehearing conference. However, she immediately asked if that was how the parties understood the issue and the record appears to indicate simultaneous affirmative responses from the parties' attorneys. Certainly, the carrier did not then, or later in the hearing, question such framing of the disputed issue, nor did carrier seek the addition of any other disputed issue pursuant to the provisions of Rule 142.7 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7). Under these circumstances, carrier has waived any complaint concerning the framing of the disputed issue by the hearing officer at the hearing.

This case turned on the credibility of claimant. He insisted his back was injured when he was struck by a forklift on (date of injury), that it began to hurt a month or two following that incident and continued to hurt, but that he treated himself and sought no medical treatment until his back began to hurt more after unloading the tea months later. He denied having injured his back while unloading the tea, however, and related his increased back pain to his undisputed forklift injury. Carrier, on the other hand, posited that while claimant did sustain an injury in the course and scope of his employment when hit by the forklift, and did timely report such to his employer, he had no disability therefrom, and any disability he did have resulted from his being injured unloading the tea, an injury claimant failed to timely report. As we have mentioned in earlier decisions, the concept of "disability" under the 1989 Act is an economic as distinguished from a physiologic concept, and it need not immediately follow a compensable injury. Article 8308-4.22(b) provides that "[i]f

disability does not follow at once after injury occurs or within eight days of the occurrence but does result subsequently, weekly income benefits begin to accrue on the eighth day after the date the disability began." Accordingly, it is possible for the claimant to sustain a compensable injury in (month year) and not have disability therefrom until the eighth day after September 22, 1992, as claimant was apparently contending.

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 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 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 find no merit to carrier's other appealed issue respecting the vagueness of the hearing officer's "Decision and Order." In the first place, the hearing officer entitled as "Decision and Order" the entire document she signed, including her statement of the case and the evidence, her factual findings and legal conclusions, and her order. The hearing officer also entitled as "Decision and Order" the order at the end of the decision and it stated as follows:

> CLAIMANT was injured in the course and scope of his employment. CLAIMANT shall be paid temporary income benefits if CLAIMANT has established or can establish that he had disability for eight or more days. Temporary income benefits are to be paid until disability ends or maximum medical improvement is reached. Accrued temporary income benefits are to be paid with interest in a lump sum. CARRIER is ORDERED to pay medical and income benefits in accordance with this decision and the Texas Workers' Compensation Act.

The hearing officer concluded that claimant suffered a compensable injury on (date

of injury). Claimant testified that he lost no time until he ceased working on August 14, 1992, that he had an appendectomy on August 17, 1992, and that he was not claiming temporary income benefits for the period August 17 to September 21, 1992. He apparently attributed his not working during that period to his appendectomy of August 17, 1992, rather than to his compensable injury. (Dr. B's) records indicated he took claimant off work to treat his back condition on September 22, 1992. Article 8308-6.34(g) requires the hearing officer to issue a written decision that includes findings of fact, conclusions of law, a determination of whether benefits are due, and an award of benefits due. In our view, the hearing officer's decision complies with Article 8308-6.34(g). It determines that claimant had a compensable injury on (date of injury), is entitled to medical benefits, and is further entitled to temporary income benefits if and when he can establish he had disability for eight or more days. *See* Articles 8308-1.03(16), 8308-4.10-4.11, and 8308-4.21-4.23.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge