

APPEAL NO. 93003

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On November 19, 1992, a contested case hearing (CCH) was held in (city), Texas, with the record being closed on December 4, 1992, (hearing officer), presiding as hearing officer. The hearing officer determined that the respondent, claimant herein, suffered a back and right arm injury in the course and scope of his employment on Date of injury, and that claimant had disability from July 18, 1992 to December 10, 1992, the date of the hearing officer's decision.

Appellant, carrier herein, contends that the hearing officer erred in her findings of fact and conclusions of law that claimant suffered an injury in the course and scope of employment on Date of injury and that disability was caused thereby and requests that we reverse the hearing officer's decision and render a decision in carrier's favor. Claimant responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The issues framed at the CCH, and remaining unresolved from the benefit review conference (BRC) were:

1. Whether the claimant suffered an injury by slipping and falling in the course and scope of his employment on Date of injury.
2. If claimant suffered a compensable injury on Date of injury, whether this injury caused disability.

Claimant testified, and the hearing officer found, that claimant was employed as a heavy equipment operator and laborer for (employer). The claimant testified, and the hearing officer found, that shortly after lunch on Date of injury, claimant slipped and fell on his buttocks in a concrete-lined drainage ditch that he was cleaning, injuring his back and right arm. Claimant testified he reported the injury to his supervisor, (Mr. W) around 3:00 p.m., telling him that he had slipped and fallen, his back and arm were hurting and received permission to go home early. Mr. W in a transcribed statement denies being told of an injury in this conversation. Carrier's witness, (CB), testified that during the afternoon of the date in question, claimant had told CB, a coworker, that claimant had not had a cigar that day, and was going to get his paycheck and go to the store. Claimant disagrees with CB and states another coworker by the name of Mr F had seen him shortly after the injury. Employer initially denied any knowledge of a person named Mr F but subsequently, on cross-examination, Mr. W admitted there was another coworker named Mr F at the job site.

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Claimant testified he did not go to work the next work day, Monday, July 20th, but spoke with Mr. W on Tuesday, asking Mr. W about claimant's paycheck and complaining his back was hurting. Mr. W's testimony regarding this conversation was different. Claimant did speak with employer's owner, (Mr. S) on Friday, July 24th. There is also disagreement what was said then. Claimant testified he did not see a doctor until August 19, 1992 because he did not have money to see a doctor and the employer was denying the claim and refusing to pay for medical care. Claimant retained an attorney and claimant testified his attorney referred him to (Dr. M). Dr. M referred claimant for a CT scan of claimant's lumbar spine on September 23, 1992 which reported:

1.POSTEROCENTRAL DISK HERNIATION OF L4-L5 CAUSING SIGNIFICANT TIGHTNESS OF THE SPINAL CANAL.

2.POSTEROCENTRAL FOCAL BULGING DISK OF L5-S1 WITH ADJACENT BONY SPURRING IMPINGING ON THE SPINAL CANAL.

Carrier and employer's position is that claimant did not suffer an injury on July 17th, that claimant was motivated to file a claim because he owed employer, Mr. S, \$400.00 on a loan, and that claimant first saw an attorney before seeing a doctor. Carrier's further position is that claimant's injury, if any, is the result of a 1988 workers' compensation back injury claim that claimant settled in 1989. Claimant testified that the 1988 injury was to a different part of his back and that his back had completely healed from that injury. Carrier did not have the medical reports from the 1988 injury available at the CCH and the hearing officer left the record open for 10 days to allow carrier to obtain medical records of the 1988 injury and claimant to obtain the statement of claimant's witness, Mr F. Carrier submitted records of claimant's 1988 back injury including a July 19, 1988 CT scan which reported normal appearing intervertebral discs at L3-L4 and L5-S1 and mild concentrically bulging annulus at L4-L5. A brief undated statement from the witness, Mr F, is in the file but was not considered by the hearing officer because it had not been exchanged as had been directed by the hearing officer. We will not consider Mr Fs statement in our review.

As noted above, the hearing officer found claimant sustained an injury in the course and scope of his employment and the injury has caused disability. Both in carrier's appeal alleging errors in findings of fact and conclusions of law and in claimant's response, numerous basic precepts of law, with which we do not disagree, are cited. These include that claimant must show a causal link between his work and his "illness" and that the "illness" came within the 1989 Act citing Holgin v. Texas Employers Ins. Assn., 790 S.W.2d 97 (Tex. Civ. App.-Fort Worth 1990, writ denied), that claimant has the burden of proving he was injured in the course and scope of his employment citing Reed v. Casualty & Surety

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Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.), that the hearing officer is the sole judge of the weight and credibility to be given the evidence, citing Article 8308-6.34(e), that the trier of fact may believe a claimant received an accidental injury, but disbelieve the claimant's testimony that he received the injury during the course of his employment, citing Johnson v. Employers' Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ), that the hearing officer may accept some parts of a witnesses' testimony and reject other parts, citing Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth, 1947, no writ), that when the claimant's testimony is that of an interested party, his testimony raises an issue of fact for the trier of fact, citing Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ), and that the trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given his testimony in the light of the other testimony in the record, citing Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). As indicated we do not disagree with any of these basic principles. Carrier goes on to cite R.J. McGalliard v. Kuhlman, 722 S.W.2d 694, 697 (Tex. 1987) for the proposition that "[g]iven the conflicting testimony, the hearing officer could choose to believe the testimony of the (carrier's) witnesses over the testimony of the claimant." (Emphasis added.) We agree that the hearing officer could believe carrier's witnesses but note that she apparently did not, or at least gave greater weight to claimant's version of the disputed facts. We further note that McGalliard, supra, states "[t]he trier of fact . . . may believe one witness and disbelieve others (citations omitted) and . . . may resolve inconsistencies in the testimony of any witness (citation omitted)."

As both carrier and claimant agree, this case turns largely on the credibility of the witnesses and which of the disputed positions one believes. Ample authority has been cited, and as we have repeatedly held, 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) cited previously. The hearing officer clearly believed that claimant slipped and fell in a concrete drainage ditch on Date of injury based on claimant's testimony, notwithstanding that CB, Mr. W and Mr. S disagreed with claimant's testimony. The hearing officer had the opportunity to hear the testimony and observe the demeanor of claimant, CB and Mr. S, and to read the statement of Mr. W. Having done so, the hearing officer decided the testimony of claimant was more believable than the inferences that there was no accident or injury drawn by the employer and employer's witnesses. There is sufficient evidence in the record to support the findings and conclusions of the hearing officer.

Carrier maintains that the claimant's back condition was the result of a 1988 accident citing Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The doctor's records indicate claimant's last treatment for the

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1988 injury was in February 1989 and claimant states the injury was to a different part of the back and he was completely healed. Presley, supra, states "[p]laintiff was an interested witness and the jury was not required to accept his testimony" The evidence in Presley was different than the instant case, and it does not stand for the proposition that the trier of fact is precluded from relying on claimant's testimony. Obviously, the hearing officer, who had the medical records of CT scans of both injuries available, did not subscribe to carrier's position. Even if there had been a weakness to claimant's back due to the 1988 injury, we have held in Texas Workers' Compensation Commission Appeal No. 92010, decided March 5, 1992, and Texas Workers' Compensation Commission Appeal No. 92493, decided October 28, 1992, that under the 1989 Act the aggravation of a preexisting condition by a work-related accident is compensable, citing Osward v. Texas Employers' Insurance Association, 789 S.W.2d 636 (Tex. App.-Texarkana 1990, no writ).

We will reverse the hearing officer based on insufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951) and Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992. We do not so find. Applying this standard of review, we conclude that sufficient evidence exists to support the hearing officer's findings and decision. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge