APPEAL NO. 93073

On December 15, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the respondent (claimant herein) sustained a compensable injury on (date of injury) while working for his employer, Austin Industrial; that the claimant timely notified his employer of his injury; and that the claimant has had disability from July 26, 1992. The hearing officer ordered the appellant (carrier herein) to pay compensation in accordance with the decision, the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), and the rules of the Texas Workers' Compensation Commission. The carrier disputes certain findings of fact, conclusions of law, and the decision of the hearing officer. The carrier requests that we reverse the decision of the hearing officer and render a decision denying the claimant workers' compensation benefits. The claimant responds that the carrier's appeal was not timely filed and that the evidence supports the hearing officer's findings, conclusions, and decision. The claimant requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The carrier's request for review was timely filed. The cover letter from the Commission's Division of Hearings and Review transmitting the hearing officer's decision to the representatives of the parties is dated January 7, 1993, but according to Commission records, the letter and decision were mailed to the representatives of the parties on January 8, 1993. The carrier's representative filed a date stamped copy of the cover letter showing receipt by the representative on January 12, 1993. The request for review was filed with the Commission on January 27, 1993, which was the 15th day after receipt of the decision. Thus, the request for review was filed no later than the 15th day after the date on which the decision was received as required by Article 8308-6.41(a).

The claimant has worked off and on for the employer for over four years. His usual job is welding, but on Saturday, (date of injury) he volunteered to work overtime to help his foreman and other coworkers work on an underground pipe which required the use of a jackhammer and shovels. The claimant said that while he was at work shoveling sand on that day he felt pain in his back which went down to his right leg, that his back was hurting real bad, and that he told his foreman, TS, that "I hurt my back." The claimant said he worked the next Monday and then went to Dr L., for his back pain on Tuesday, May 19, 1992. He said Dr. L told him he had a pulled muscle, gave him muscle relaxers and pain killers, and returned him to full duty work. A May 19th report from Dr. Lockwood indicates that the claimant was seen that day for complaints of pain in the right hip and leg the onset of which occurred four days before. Dr. Ls impression is shown as "sciatica/GERD." Several prescriptions for medications are shown in the report.

The claimant testified that he went to work on May 20th and told his foreman that he had seen a doctor, that his foreman asked him "did you hurt your back," and that he, the claimant, told the foreman that "[y]es, I did with the shovel." The claimant testified that when this conversation took place it was his understanding that he and his foreman were talking about the "incident" on May 16th, and that the foreman knew that he had hurt his back working with the shovel on May 16th. The claimant also said that on May 20th the foreman called William Barbee, who is a safety coordinator for the employer, and Mr. Barbee took from the claimant a list of medications that the claimant was taking.

The claimant testified that he continued to work under medication until July 25, 1992, but that he was unable to give 100 percent effort at work because of his lower back pain and that he had to take frequent breaks to sit down and rest. He said that his foreman was aware that he was resting at work, and that his foreman told him to take it easy and not to do anything that would hurt his back worse. He also said that his foreman assured him that he, the foreman, would take care of him, and that the foreman told him that he had told "all parties" involved of his back injury. The claimant said that he was unable to use a jackhammer or shovel after his May 16th injury.

The claimant testified that he was examined by Dr. L on July 27th, August 1st, and September 2nd for his lower back pain. Dr. L's reports indicate that the claimant complained of excruciating back pain which radiated down his right leg. Dr. L's diagnosis was L4-5 compression syndrome. He prescribed more medication, bed rest, and exercise. In a letter dated September 25, 1992, Dr. L stated that when the claimant presented to him on May 19th, the claimant stated that he did not wish to file for workers' compensation because he felt it might affect his job security, but that he had chosen to amend his coverage decision.

The claimant said that Dr. L released him to return to restricted work on August 4, 1992. The employer's senior foreman, LS, stated in a written statement that the employer did not feel that it could put the claimant back to work without a full release. The claimant said that he has not worked since July 25, 1992, that he is currently experiencing back and leg pain, that it is very uncomfortable for him to sit or stand for long periods of time, and that his legs "give out on him." The claimant testified that he had not injured his back before (date of injury), but said that he had seen two or three chiropractors for "a crick in my neck," and for treatment "in between my shoulders."

Dr. H, examined the claimant on September 4, 1992, diagnosed sacral root compression, and recommended an MRI. Dr. H' report reflects that the claimant reported the history of injury as occurring in May 1992 when he became aware of severe low back pain when using a jackhammer and shovel at work. The report also indicates that the claimant experienced the abrupt onset of severe lancing pain through his right leg on July

25, 1992. The claimant testified that the July 25th incident was not another injury, that it was the same injury from May 16th that had gradually gotten worse. An MRI scan of the claimant's lumbar spine done on September 4, 1992, revealed a disc bulge of the L5-S1 with encroachment upon the right nerve root, a disc bulge of the L1-L2, a disc bulge of the L3-L4, and mild loss of volume and water of the L1-L2 and L3-L4 disc. The claimant was also examined by Dr. H., who reported on November 17, 1992 that the claimant had findings consistent with a herniated nucleus pulposus and nerve root compression on the right side and that the MRI revealed a disc protrusion at the L5-S1 level. Dr. H opined that the claimant needs a decompressive type laminectomy with foraminotomies, excision of the disc at L5-S1, followed by fusion of L5-S1. The claimant said that he has not had surgery yet.

DM, a coworker, stated in a recorded statement that he recalled the day he, the claimant and other coworkers used shovels and jackhammers, that the claimant mentioned that his back was sore after digging, and that the claimant thought that it might have been because of the digging. He said that the claimant had not mentioned any back problems prior to that incident. He also said that the claimant appeared to have problems working through July. TC, another coworker, stated in a recorded statement that one day in May he worked with the claimant using jackhammers and shovels, that the claimant said his back was sore, and that the claimant seemed to be sore during June and July.

In a recorded statement, the claimant's foreman stated that the claimant was working on May 16th with a jackhammer and shovel; that the claimant mentioned back pain; that the following Monday, May 18th, the claimant appeared stiff and said his back was sore; that on May 19th the claimant called in and said he had hurt his back and was going to the doctor; and that when the claimant returned from the doctor he told the claimant to take it easy, to take breaks, and to take care of himself. However, the foreman denied that the claimant ever reported an injury to him. The foreman first said that the claimant did not tell him his back problem was from a previous injury, but then said that in August the claimant told him that he had hurt his back six years ago.

WB testified that he first became aware of the claimant's back complaints about May 19, 1992, when the claimant told him he was taking medications and the medications were written down by this witness. However, this witness said that when he asked the claimant if he hurt himself on the job, the claimant said he did not. This witness said the claimant told him he had hurt himself six years ago. He said he first knew on August 5, 1992 that the claimant was claiming that he was injured working for the employer. PM, the employer's senior safety coordinator, testified that he first became aware that the claimant was complaining of back problems in May 1992, when Mr. B brought him the list of medications the claimant was taking, but that Mr. B informed him that it was not work related. Mr. M testified that when the claimant brought him a light duty work release in August 1992, the claimant at first told him he had not been injured on the job and that he had been injured six years ago, but later the same day the claimant told him that his back started getting sore in

May 1992 when he was doing some "hammering and chipping" at work.

In reviewing the sufficiency of the evidence to support a hearing officer's findings and conclusions, we recognize that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). We do not substitute our judgment for that of the hearing officer where the challenged findings and conclusions are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

We hold that the hearing officer's determination that the claimant sustained a compensable injury on (date of injury), while working for the employer, and the underlying finding and conclusion supporting that determination, are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). The claimant is an interested witness and his testimony does no more than raise a fact issue for the hearing officer. Nevertheless, the hearing officer had a right to believe his testimony, and believing it, had a right to find that he injured his back while working for his employer with a shovel on (date of injury). Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). The claimant testified to the immediate onset of back pain while using a shovel at work on May 16th, he sought medical treatment for his back pain within a few days of the onset of his pain, and the medical evidence shows physical harm or damage to the claimant's back. Furthermore, the claimant's coworkers stated that the claimant complained of a sore back after digging with a shovel at work and his foreman acknowledged that the claimant complained of pain on that day.

We hold that the hearing officer's determination that the claimant timely reported his injury to his employer, and the underlying finding and conclusion supporting that determination, are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. For an injury other than an occupational disease, Article 8308-5.01(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs." The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the Supreme Court of Texas stated that the purpose of the notice of injury provision is to give the insurer an opportunity immediately to investigate the facts surrounding an injury; that this purpose can be fulfilled without the need of any particular form or manner of notice; and that to fulfill the purpose of the statute, the employer need only know the general nature of the injury and the fact that it is job related. In Associated

Employers Insurance Company v. Burris, 321 S.W.2d 112 (Tex. Civ. App.-Amarillo 1959, writ ref'd n.r.e.), the court held that there was sufficient evidence to support a finding of timely notice of injury where the employee swore he told his foreman about his injury on the day it occurred, the foreman swore he didn't, and the trier of fact believed the employee. In this case the claimant testified that he told his foreman that he hurt his back with the shovel and the foreman said he didn't. When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 697 (Tex. 1986). In the present case, the hearing officer believed the claimant's testimony concerning reporting of the injury which the hearing officer was entitled to do.

Article 8308-5.02 provides in part that an employee's failure to notify the employer as required under Article 8308-5.01(a) relieves the employer and the employer's insurance carrier of liability unless the employer or person eligible to receive notification under Article 8308-5.01(c) or the insurance carrier has actual knowledge of the injury. In this case, the hearing officer determined that the claimant's foreman had actual knowledge on (date of injury) that the claimant had injured his back at work on (date of injury). In our opinion, the evidence is insufficient to support a finding of actual knowledge of the injury by the foreman on May 16th apart from the notice of injury given by the claimant. *See* Miller v. Texas Employers Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.) where the court in discussing the concept of actual notice of injury stated that "[t]he fact issues, upon which the plaintiff has the burden of proof, is to decide from a preponderance of the evidence if the employer had facts that would lead a reasonable man to conclude that a compensable injury had been sustained by plaintiff in the accident which the employer saw." There is no evidence in this case that the foreman saw the claimant sustain an injury in an accident on May 16th, hence a finding of actual knowledge of the injury is not supported by the evidence. However, error in regard to the finding of actual knowledge of injury on May 16th does not present reversible error in this case because the hearing officer's determination that the claimant timely notified his foreman of his injury is supported by the evidence thus negating the need to find an exception under Article 8308-5.02 for failure to give timely notice of injury.

We further hold that the hearing officer's determination that the claimant has had disability from July 26, 1992, and the underlying finding and conclusion supporting that determination, are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. "Disability" means the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). We have already determined that the hearing officer's determination that the claimant sustained a compensable injury on (date of injury) is supported by sufficient evidence. The finding that the claimant has been unable to obtain and retain employment at wages equivalent to his preinjury wage since July 26, 1992 because of the compensable injury he sustained on (date of injury), is supported by the claimant's testimony that he has

pain in his back and legs and is unable to sit or stand for long periods of time, by Dr. Ls recommendation of bed rest, by the claimant's testimony concerning a release to restricted work in August 1992, and by the senior foreman's statement that the employer would not put the claimant back to work without a release to return to full duty work. There is no evidence that the claimant has been released to return to full duty work since he stopped working on July 25, 1992 because of back pain from his back injury of (date of injury).

We further hold that the hearing officer's determination that the carrier failed to show that the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage was solely caused by some preexisting or subsequent condition or injury, and the underlying finding and conclusion supporting that determination, are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. In Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977), the Supreme Court of Texas stated that "[t]o defeat Page's claim for compensation because of the preexisting injury, Texas Employers must show that the prior injury is the sole cause of Page's present incapacity." It has also been held that a subsequent injury must be the sole producing cause of the employee's disability. American Surety Company of New York v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.). In the instant case, the medical evidence revealed an injury to the claimant's lower back after he sought medical treatment for back pain he began experiencing on May 16th while using a shovel at work. He denied having prior back problems and indicated that he had previously been treated by chiropractors for neck and shoulder problems. Several of the carrier's witnesses indicated that the claimant had told them that he had injured his back six years earlier; however, the carrier offered no medical evidence to support its contention of a back injury of six years duration. The only evidence of a subsequent injury was contained in Dr. H' report of September 4, 1992 where that doctor mentioned in the history of the injury that the claimant had apparently experienced the abrupt onset of severe lancing pain through his right leg on July 25, 1992. However, the doctor also indicated in the history of the injury that the claimant had reported that he became aware of severe low back pain in May of 1992 while on the job using a shovel and jackhammer. The claimant testified that he experienced pain in his right leg when he had pain in his back on May 16th, and Dr. Ls report of May 19th and subsequent reports confirmed the claimant's continuing complaint of right leg pain. The claimant said that the July 25th incident mentioned in Dr. H' report was not another injury but was the injury of May 16th which had gradually gotten worse. As the trier of fact the hearing officer resolves conflicts and inconsistencies in the evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). We cannot conclude that the hearing officer erred in failing to find that the claimant's inability to obtain and retain employment at wages equivalent to his preinjury wage was solely because of a preexisting or subsequent injury or condition.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge