APPEAL NO. 931103

This appeal is filed under the Texas Workers' Compensation Act, TEX. LABOR CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly TEX. REV. CIV. STAT. ANN. Article 8308-1.01 *et seq*.). On October 28, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether claimant (claimant), who is the respondent, had sustained an injury in the course and scope of his employment with (employer)., employer herein, and if so, whether he had disability as a result of that injury. The hearing officer determined that claimant injured his back (with an apparent date of injury of (date of injury)), and that he had disability from (date), through June 25, 1993, (but not after that date).

The carrier has appealed, basically arguing that the hearing officer's decision and findings on the injury and disability issues are against the great weight and preponderance of credible evidence. As part of its appeal, the carrier asserts that there is no evidence of a specific injury, that the claim was not filed as a repetitive trauma, and that claimant has therefore failed to meet his burden. No response was filed.

DECISION

We affirm the hearing officer's decision.

Claimant was stationed by the employer to work with (employer) delivering dairy products to its customers. He stated that during the week of April 5, 1993, the delivery crews were called upon to work overtime hours not customarily worked; he indicated that work that week was 55 hours as opposed to the usual schedule of under 40 hours. Claimant stated that part of the job was to manually load and unload cases milk and other dairy products both at the dairy and the customer's location.

Claimant said that around Wednesday ((date)), he began to ache all over, and the pain increased on Thursday and Friday. He stated that his back was aching on Thursday and Friday, and he attributed it to the flu. From the very beginning of the claim, according to a telephone transcript put into evidence that was taken from claimant by the carrier's adjuster on April 15, 1993, claimant has stated that he could not recall any specific incident, but that the back pain was progressive.

Claimant stated that he had volunteered to work Saturday, although it was not a regularly scheduled day. (On Friday, he had been urged to take off the next day because he reported he felt unwell, but he determined to work anyway.) The claimant stated that he felt very bad on Saturday morning, and early that morning drove to meet the man with whom he was scheduled to work to state that he could not. Claimant said he called a chiropractor, (Dr. G), and saw him that Saturday. Claimant denied that it was Dr. G who suggested he had been injured at work; he stated he began to connect his back pain to work activities, rather than the flu, before he saw Dr. G. Dr. G diagnosed claimant as having a lumbar strain and treated him for three months, eventually releasing him and declaring he had reached maximum medical improvement on June 26, 1993. Claimant stated that he had

not been treated by him since that time. Claimant's testimony indicated that it was since that time that he began working for his brother-in-law's welding business 20 hours per week.

Claimant acknowledged he had a prior knee and back injury, and records indicate that this occurred (date). The case was resolved by settlement on September 20, 1991, by lump sum payment, with "open" medical treatment with (Dr. B) or a Dr E. Medical records show that the prior injury was a knee and ankle and low back pain, with objective findings of two mild bulging lumbar discs. Claimant maintained that this had entirely resolved.

A statement from the safety director at the location of injury said that according to his conversations with co-workers of claimant, the claimant had (prior to April 12th) complained only that he had a sore throat and cold. The safety director stated that claimant first reported an on-the-job injury on April 12th.

The hearing officer made no express findings as to the date of the compensable injury, but no issue was presented as to the date and the parties stipulated as to employment and coverage on (date of injury). Although the claimant could not recall a specific incident that injured his back, we may imply a finding that the hearing officer believed that claimant sustained an injury at some point, and that each lift thereafter aggravated the strain. This would fulfil the requirement of a time and date certain for a specific injury. *See* Hartford Accident and Indemnity Company v. Contreras 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st District] 1973, writ ref'd n.r.e.)

Claimant has also indicated why it did not immediately occur to him that his back pain developed from these activities: because he attributed it to overall pain from the flu. The trier of fact evidently believed this was a reasonable explanation for the fact that claimant did not immediately tell a co-worker on (date) or (date of injury) that he hurt his back at work, but stated instead he was coming down with the flu and felt unwell.

The hearing officer's finding of fact that claimant first began to experience back pain on (date) does not seem to be as strongly supported by the evidence as other dates where claimant attributed the pain, such as (date) or (date). We do note that the hearing officer found that claimant first began to experience "severe" back pain on that date, which is also consistent with claimant's testimony.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). A claimant's testimony alone is sufficient to establish that an injury has occurred. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

Although carrier argues that the evidence showed that it was Dr. G who suggested that claimant claim a work-related injury, this was a matter not as clear as carrier argues and it was a matter for the trier of fact to weigh. It is true that the claimant, in the transcript interview of April 15, 1993, answered a question regarding prior compensable injuries in the negative. The extent to which this would impeach his credibility was, again, a matter for the trier of fact.

Finally, there was no evidence disputing the claimant's contention that he was unable to work because of his back injury for the period of disability found by the hearing officer.

The hearing officer's determination that claimant sustained a compensable injury and had disability is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge