APPEAL NO. 931155

On November 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The issues at the hearing were: (1) whether the respondent (claimant) sustained an injury in the course and scope of his employment on (date of injury); (2) whether the claimant timely reported his injury to his employer; and (3) whether the claimant has disability as a result of his injury on (date of injury). The hearing officer determined that the claimant sustained a back injury in the course and scope of his employment on (date of injury); that the claimant gave timely notice of his injury to his employer; and that the claimant had disability from July 12, 1993 to at least November 9, 1993 (the date of the hearing) as a result of his injury of (date of injury). The hearing officer ordered the appellant (carrier) to pay income and medical benefits in accordance with his decision and the provisions of the 1989 Act. The carrier disagrees with the hearing officer's decision and requests that we reverse it and render a decision in its favor. No response was filed.

DECISION

We affirm the hearing officer's decision and order.

The claimant is a welder and has been employed by the employer, (employer), since 1984. The claimant repairs railroad cars.

On (date of injury), the claimant sustained a lumbar strain at work when he lifted a 200 pound "bonnet" off a railroad car. His treating doctor for that injury, (Dr. H), certified that the claimant reached maximum medical improvement on February 12, 1992, with a five percent impairment rating, and the carrier paid impairment income benefits based on the five percent impairment rating. The claimant was released to return to work without restrictions on February 18, 1992, and he resumed work on that date.

On August 20, 1992, the claimant injured his neck and back in a non-work related car accident and was off work until December 31, 1992.

In regard to the first issue concerning injury in the course and scope of employment on (date of injury), we note that 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 subtitle." Section 401.011(10). The claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). An injury includes the aggravation of a pre-existing condition. Gulf Insurance Company v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.-Houston [14th Dist.] 1976, writ ref'd n.r.e.).

The claimant testified that on (date of injury), he had to remove a bonnet from a railroad car in order to work on the bonnet and on another part of the car. He said that in

order to do the repair work he had to do more welding than he normally did and that the welding was done in a crouched position where he was continuously bent over. He further stated that after welding in the crouched and bent over position for "quite awhile" he got ready to stand up and felt pain in his back. The claimant said that although his back was "messing" with him, he continued to work and did not see a doctor until July 12, 1993, when he saw (Dr. W), a chiropractor who is the claimant's treating doctor for the claimed injury of (date of injury). Dr. W's initial medical report for the examination of July 12, 1993, contains a date of injury of (date of injury), and a diagnosis of lumbar sprain/strain and muscle spasm. Dr. W noted that the pain the claimant had was gradual and was similar to the pain the claimant had experienced from his 1991 injury. In a letter dated September 15, 1993, Dr. W stated that he has been treating the claimant for "thoraco-lumbar and lumbosacral pain related to on-the-job injury." Dr. W further stated that "[t]he injury that [claimant] currently suffers from is an aggrevation (sic) of/or re-injury to the lumbar region. It can not be held to be a continuation of the original (date) injury." Two coworkers whom the claimant identified as witnesses to his injury stated in written statements that they did not witness the incident described by the claimant, but said that the claimant told them in July 1993 that he had strained his back at work. The carrier contends that the hearing officer's findings of an aggravation of a pre-existing back condition and a new back injury on (date of injury), and his conclusion that the claimant sustained a back injury in the course and scope of his employment on (date of injury), are against the great weight and preponderance of the evidence.

In regard to the issue of timely notice of injury, we observe that Section 409.001(a) provides that for injuries other than occupational diseases, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs. Notice of injury may be given to the employer or to an employee of the employer who holds a supervisory or management position. Section 409.001(b). The claimant has the burden to show timelynotice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). In order to constitute notice of injury, the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980).

The claimant testified that on (date of injury), he told his foreman, (NC), that he hurt his back at work welding and that he showed NC what he was working on when he hurt his back. NC testified that the last week of (month year) the claimant told him he was having back problems and would probably see a doctor but that the claimant did not report a new injury to him. Another supervisor and the employer's safety coordinator also denied receiving notice of a new injury. The carrier contends that the hearing officer's finding that the claimant reported his injury to his employer within 30 days of (date of injury), and his conclusion that the claimant gave notice of injury to his employer within 30 days of (date of injury), are against the great weight and preponderance of the evidence.

In regard to the third issue at the hearing, "disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury

wage. Section 401.011(16). The claimant testified that since July 12, 1993, he has not worked, that he has not been physically able to work, and that he is unable to work "because of my back." Dr. W's initial medical report of July 23, 1993, indicated that the claimant would be off work for three weeks and would then be reassessed as to work status. In a report dated August 25, 1993, Dr. W stated that the claimant would be "disabled from work" until October 15, 1993. And, in a report dated October 13, 1993, Dr. W anticipated that the claimant would not be able to return to work until November 15, 1993. The carrier contends that the hearing officer's finding that the claimant was unable to obtain and retain employment between July 12, 1993, and November 9, 1993, (the hearing date) as a direct result of his injury on (date of injury), the finding that the claimant's prior injuries were not the sole cause of his current disability, and the conclusion that the claimant had disability between July 12, 1993, and November 9, 1993,are against the great weight and preponderance of the evidence.

On appeal, the carrier points to inconsistencies in the claimant's testimony and conflicts between the claimant's testimony and the testimony of its witnesses in urging us to find that the claimant was not credible and that the determinations of injury, notice, and disability are against the great weight of the evidence. Under Section 410.165(a), the hearing officer is the sole judge of the weight and credibility to be given to the evidence. The hearing officer may believe all, part, or none of the testimony of any witness, and may believe one witness and disbelieve others. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1987). While there were conflicts and contradictions in the testimony, it was the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts had been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Having reviewed the record, we conclude that the complained of findings of fact and conclusions of law are sufficiently supported by the evidence and are not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

After the hearing officer concluded that the claimant notified his employer of his injury within 30 days, the hearing officer concluded, in the alternative, that the claimant established "good cause" that would excuse the claimant's failure to give timely notice of injury to his employer. The carrier contends that the alternative "good cause" conclusion is not supported by the evidence. Since the hearing officer's finding that the claimant reported his injury to his employer within 30 days of the injury and his conclusion that notice of injury was given to the employer within 30 days of the injury are supported by sufficient evidence and are not against the great weight and preponderance of the evidence, the alternative "good cause" conclusion may be disregarded as being unnecessary to the determination of the issue of timely notice of injury and it presents no basis for reversal of the hearing officer's decision. *See* Texas Indemnity Ins. Co. v.Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge