APPEAL NO. 931166

At a contested case hearing held in (city), Texas, on November 22, 1993, the hearing officer, (hearing officer), took evidence on the sole disputed issue, namely, whether claimant sustained a back injury in the course and scope of his employment on (date of injury). The hearing officer found that claimant had suffered from chronic back problems since 1963 which were exacerbated by work-related back injuries in 1977, 1979, and 1984, that he did not establish a specific work-related event or activity which caused him to experience back and leg pain on (date of injury), and that he did not establish that his work duties involved repetitious traumatic activities. Based on these factual findings, the hearing officer concluded that claimant failed to prove he sustained the compensable back injury he alleged. In his request for review the appellant (claimant) challenges the sufficiency of the evidence to support the salient findings. The respondent (carrier), in its response, asserts that the evidence is sufficient and urges affirmance.

DECISION

We affirm.

Claimant testified that he had been employed by (employer) at its (City) installation for 40 years, that his job on (date of injury), the date of his claimed back injury, was a multicraft leader and job planner, that he had previously done pipefitting, that he had a history of back problems commencing in 1963 which included workers' compensation claims for back injuries in 1977, 1979, and 1984, and that the 1984 injury involving a herniated lumbar disc was his most serious injury and resulted in his being off work for six months. He said that since that time he had often worked in pain, going to work "twisted" and coming home "twisted," but was not under treatment immediately prior to (date of injury). Claimant conceded that he missed a few days of work in 1992 after having experienced the onset of pain at home and that he "turned it in" as a workers' compensation claim but it was denied. Claimant further testified that his duties on (date of injury), and for some time prior thereto, involved looking over jobs to determine the types of crafts required, crawling around equipment, climbing ladders and stairs, and sitting at a desk using a computer. He further testified that before going to work on (date of injury), he felt tired and not well, that while at work that day, he performed his usual tasks (as recited above) and, in so doing, his back pain increased to the extent that he felt he needed medical attention. He said he went to employer's dispensary where he saw a nurse, and that later that day he saw (Dr. W), an orthopedic surgeon. Claimant stated that there was no specific incident or particular activity at work that day that caused the onset of his pain; rather, the performance of his usual duties that day resulted in more severe pain than he normally experienced and prompted him to seek medical attention. He said he could not pinpoint any particular time during the day that he hurt himself but said his pain and weakness increased as he went about his normal duties. He also indicated he had back surgery in June 1993.

After claimant testified that his prior back problems were limited to his disc at the L4-5 level, the carrier introduced an x-ray report of September 7, 1984, stating the following impression: "1. Marked L4-5 degenerative disc disease. 2. L2-L3, L5-S1 moderate

degenerative disc disease. 3. L5-S1 posterior joint sclerosis."

A record of employer's health services signed by nurses reflected that claimant, then age 64, visited the dispensary at 12:30 p.m. on (date of injury) and provided a history of "back hurting - doing routine work, got worse while he was working." This record further stated that claimant had a history of back problems since 1984, that his "back did not feel good before coming to work but worse now," and that "no specific incident caused it to get worse." The assessment was "chronic low back pain - acute exacerbation," and claimant was referred to Dr. W.

Dr. W's Initial Medical Report reflected claimant's visit on (date of injury), stated a diagnosis of "herniated nucleus pulposus, lumbar strain," and recited the following history: "The patient developed the onset of pain on (date of injury) while at work. He has had previous episodes of recurrence stemming from a previous on the job injury to his back." In a letter dated June 28, 1993, Dr. W stated that claimant had been intermittently treated on a conservative basis for a herniated disc at the L4-5 level incurred several years earlier at work, that he had had several episodes of back discomfort which he self-treated, that he had an exacerbation of back pain in 1992 for which he was treated by (Dr. C), and that at that time Dr. C, having been asked whether claimant had a new injury or was suffering from his 1963 injury, indicated it would be difficult to determine how much of each injury played a part in his 1992 problem. Dr. W then stated: "Similarly, although there was no acute exacerbation or injury in (month) of (year) that produced [claimant's] problem for which he is currently being treated, I believe that the same situation exists." Dr. W went on to state that claimant's most recent exacerbation of his prior herniated disc injury, following which he continued to have intermittent problems, has produced similar conditions but that they have been more severe and unresponsive to treatment.

The records show that claimant requested a second opinion concerning his back on April 8, 1993, and was referred to (Dr. P), a neurologist. In Dr. P's report of June 24, 1993, he stated that on May 18, 1993, he performed left L3-4 and left L4-5 partial hemilaminectomies, decompressive foramenotomies, and an L3-4 disc excision. With regard to claimant's history on (date of injury), Dr. P stated that a review of his notes indicated that claimant reported that on that date, while at work, he began experiencing left buttock and ultimately left leg pain down to the calf, and that he did not report having sustained an injury nor refer to a specific injury.

In Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992, the claimant, who was noted to have a long history of prior back complaints and treatment, testified he slipped and fell while washing a car for his employer on the date of his alleged injury. The Appeals Panel affirmed the hearing officer's determination that the claimant did not prove that he incurred the claimed injury. The decision noted that, unlike the case we here consider, the evidence of the accident (slip and fall) at work was strong but the medical evidence indicated that the claimant's subjective symptoms were not substantiated by objective medical findings. Pertinent to the case we here consider, the decision stated that an insurance carrier's liability for compensation under the 1989 Act is

for an "injury" that arises out of the course and scope of employment and that the 1989 Act's definition of "injury" is "damage or harm to the physical structure of the body . . . . " (Section 401.011(26)). The Appeals Panel went on to observe that the aggravation of a pre-existing injury can itself constitute a compensable injury and the fact that the claimant may have had previous injuries or workers' compensation claims "is irrelevant to liability" for benefits "if the evidence establishes that a work-related accident causes an injury . . . ." Also pertinent to this case, the decision in Appeal No. 92058 stated: "However, an accident does not necessarily equate to an 'injury.' [Citation omitted.] And, mere pain is not compensable under the workers' compensation statute. [Citation omitted.]"

In Texas Workers' Compensation Commission Appeal No. 92502, decided November 2, 1992, the Appeals Panel affirmed the decision of the hearing officer in a case where the claimant contended that the irregularity of her work hours together with mandated overtime resulted in circadian desynchronization or arrhythmia which caused her collapse at work. The hearing officer had determined, in effect, that "the claimant did not specify the physical injury that she claims to have sustained, and there was no evidence to show that she sustained an injury, or an occupational injury, in the course and scope of her employment on the above date." The decision noted the definition of "injury" cited above; further noted the definition of a "compensable injury" as one arising out of the course and scope of employment [Section 401.011(10)]; and stated that "a compensable injury thus is either the result of an accident or of conditions existing over a period of time." The decision also stated the following:

> We agree with the hearing officer that the evidence does not support a claim of accidental injury from a particular work-related event. An accidental injury is defined as an undesigned, untoward event traceable to a definite time, place, and cause. [Citation omitted.] By claimant's own testimony, no single, sudden external event or occurrence triggered her collapse. Rather, claimant's position is that it was the result of cumulative conditions of the work place, i.e., her hours of employment.

The Appeals Panel concluded that the claimant in that case failed to prove that her injury resulted from either an accidental injury arising out of and in the course and scope of her employment which was traceable to a definite time, place, or cause, or from repetitious physical trauma occurring in the workplace over time.

In our view, the law in these cases is dispositive of the claimant's appeal in this case. The evidence sufficiently supports the finding that "[c]laimant did not establish a specific event or work activity that caused him to experience back and leg pain on (date of injury)." Further, we find the evidence supportive of the finding that "[c]laimant did not establish that his work duties involved repetitively traumatic activities." Claimant's testimony was simply to the effect that during the course of a normal work day, he walked, climbed steps and ladders, moved around equipment, and sat down to use a computer, and none of the medical reports in evidence connected up his normal workday activities to a repetitious trauma injury. In Davis v. Employers Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-

Houston [14th Dist.] 1985, writ ref'd, n.r.e.), a flight attendant contended she developed an occupational disease (back problems) caused by the repetitious physical traumatic activities required by her job. She had had prior back injuries and surgery. The court held that to recover for an occupational disease of this type, a claimant must prove not only that repetitious, physical traumatic activities occurred on the job, but must also prove a causal link existed between such activities and the claimant's incapacity.

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he or she sustained a compensable injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The question whether an injury occurred in the course and scope of employment is one of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). As we observed in Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991, "[i]n reviewing a case, the Appeals Panel should not set aside the decision of a hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deem[s] most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences. (Citation Omitted.) Where sufficiency of the evidence is being tested on review, a case should be reversed only if the finding and decision is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. [Citation Omitted.]"

We do not find the hearing officer's determinations to be so against the great weight and preponderance of the evidence as to be manifestly wrong or 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). Consequently there is no sound basis on which to disturb the hearing officer's decision.

The evidence being sufficient to support the hearing officer's findings and conclusions, the decision and order are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Alan C. Ernst
Appeals Judge