APPEAL NO. 931169

On November 30, 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 appellant (claimant) sustained an injury in the course and scope of his employment on (date of injury); and (2) whether the claimant has had disability. The hearing officer determined that the claimant was not injured in the course and scope of his employment on (date of injury), and further determined that the claimant has not had disability. The hearing officer decided that the claimant is not entitled to workers' compensation benefits. The claimant disagrees with the hearing officer's decision and requests that we reverse it and render a decision in his favor. The respondent (carrier) responds that the decision is supported by the evidence.

DECISION

We affirm the hearing officer's decision and order.

The claimant is employed as a machine operator by the employer, (employer). On (date of injury), the claimant fell at work and hit his back on an oven door. He was treated by (Dr. T) who diagnosed lumbar strain with spasms, thoracic strain, lumbar contusion, and left leg radiculitis. An MRI of the claimant's lumbar spine done on February 24, 1993, was reported to be "essentially normal for age." The claimant said that he did not lose any time from work due to his injury of (date of injury), but he was placed on light duty work by Dr. T until March 22, 1993, when Dr. T certified that the claimant reached maximum medical improvement (MMI) with a two percent impairment rating and released the claimant to regular work without restrictions. Dr. T's diagnosis when he certified MMI was lumbar strain with spasm.

The claimant testified that on March 10, 1993, he sustained a non-work related injury to his back when he slipped and fell in a restaurant. For this injury he was treated by (Dr. C) and (Mc) who diagnosed cervical, thoracic, and lumbar sprain/strain; right ankle strain/sprain; and right shoulder strain/sprain. X-rays of the claimant's spine, right ankle, and right shoulder were reported as normal. Although Dr. Mc's report of March 12th indicates that the claimant missed two days of work following this accident, the claimant said he did not miss any work due to the injury at the restaurant. At Dr. Mc's recommendation, the claimant underwent physical therapy from March 17 to sometime in May 1993. The physical therapist reported on May 12th that the claimant had progressed to a point where he was ready for discharge from physical therapy, and that he would be discharged following one more visit. The claimant said he didn't tell Drs. C and Mc about his injury of (date of injury) because he wasn't asked about it. The claimant said a lawsuit against the restaurant resulted in a settlement.

The claimant further testified that on (date of injury), he injured his back at work when

he lifted a bucket of parts from a table. He said the bucket weighed 60 to 70 pounds; other witnesses said in written statements that the bucket weighed 20 to 25 pounds. The claimant said he told his supervisor that his back was hurting and he was sent to a clinic that day. Notice of injury was not an issue at the hearing. The claimant said he chose to go to (Dr. M) for this injury. Medical reports indicate that the claimant first saw Dr. M on June 7th and that he told Dr. M that on (date of injury), he felt pain in his lower back when he lifted a parts bucket at work. The reports also indicate that he told Dr. M about his January 1993 injury but not about his March 1993 injury. The claimant said he didn't tell Dr. M about his March 1993 injury because he wasn't asked about it. Dr. M reported that x-rays, an EMG, and an MRI were normal and he diagnosed acute lumbosacral strain with myofascitis. Dr. M recommended physical therapy which the claimant has been attending and took the claimant off work as of June 7th. The claimant has continued to see Dr. M on a weekly basis and has not returned to work since (date of injury). Physical therapy notes indicate that the claimant has complained about lower back pain from June 7, 1993 through September 1993.

While medical reports show that the claimant went to Dr. M on June 7th for his claimed injury of (date of injury), another medical report shows that on June 8th the claimant was examined by Dr. Mc, one of the doctor's the claimant was seeing for his injury of March 10th. Dr. Mc's report of the June 8th examination does not make any mention of the claimed injury of (date of injury); it simply indicates a "date of accident" of March 10, 1993. The claimant said that he could not remember if he saw Dr. Mc after (date of injury) and thus could not remember if he told him about the (date of injury) injury. Dr. Mc billed the attorney who represented the claimant in the restaurant lawsuit for the office visit of June 8th. Dr. Mc's report for the June 8th examination states as follows:

> It is my pleasure to see this 35-year old gentleman in a follow-up examination who states that he feels much better following his physical therapy. He was released from physical therapy 2-3 weeks ago and has been doing well. He does complain of some lumbar spinal stiffness, but states that it is much better.
>
> Physical examination today reveals negative straight leg raising bilaterally with minimal point tenderness and paramuscle spasms in the lumbar region.
>
> I feel that it would be appropriate to release [claimant] at maximum medical improvement at this point with the understanding that should he experience any problems in the future, that he should seek medical attention immediately.

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 hearing officer is the judge of the weight and credibility to be given the evidence. Section 410.165(a). A claimant's testimony is that of an interested party and it only raises a fact issue for the finder of fact to determine. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). 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 Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have 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.).

It has been held that a fact finder is not bound by the testimony of a doctor when the credibility of the doctor's testimony is manifestly dependent upon the credibility of the information imparted to the doctor by the claimant. Rowland v. Standard Fire Insurance Company, 489 S.W.2d 151 (Tex. Civ. App.-Houston [14th Dist.] 1973, writ ref'd n.r.e.). The hearing officer judges the weight and credibility to be given to the expert medical testimony and resolves conflicts and contradictions in the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

In the instant case, the claimant's testimony and the medical reports of Dr. M indicate that the claimant was less than forthright in giving Dr. M his history of recent injuries. The claimant had just completed in May 1993 a program of physical therapy for, among other things, a lumbar sprain or strain incurred in March 1993 but failed to relate that injury and treatment to Dr. M who saw the claimant on June 7th and diagnosed a lumbar sprain. Dr. Mc's report indicates that on June 8th, just four days after the claimed injury of (date of injury), he examined the claimant for the injury of March 1993 and found that the claimant only had some spinal stiffness and minimal point tenderness and muscle spasm in the lumbar region. Dr. Mc released the claimant from further treatment with the understanding that if he should experience any problems in the future, he should seek further medical attention. There is no mention in Dr. Mc's report of any back injury occurring on (date of injury). In weighing the evidence, the hearing officer noted in his decision the fact that Dr. M's reports failed to reflect an accurate history of the claimant's back problems and that there was no mention of the claimed injury of (date of injury) in Dr. Mc's report of June 8th. Having reviewed the record, we conclude that the hearing officer's finding that the claimant did not injure his back on (date of injury), while lifting a parts bucket at work is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. That finding supports the hearing officer's conclusion that the claimant was not injured in the course and scope of his employment. Without an injury in the course and scope of employment, the claimant would not have disability as defined by Section 401.011(16).

The claimant attached to his appeal a letter from a (Dr. W) dated December 15, 1993, which was not made a part of the hearing record. The claimant contends Dr. W's letter

establishes that he sustained an injury in the course and scope of his employment on (date of injury). We have previously held that under Section 410.203(a) (formerly Article 8308-6.42(a)) we consider on appeal only the record developed at the contested case hearing. Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992. The claimant contends that Dr. W is a designated doctor chosen by the Texas Workers' Compensation Commission (Commission) and that the letter is newly discovered evidence as Dr. W did not examine the claimant until seven days after the hearing. It has been held that in order to constitute newly discovered evidence it must be shown that the evidence came to the party's knowledge since the trial, that it was not owing to the want of due diligence that knowledge of the evidence did not come sooner, that it is not cumulative, and that it is so material that it would probably produce a different result if a new trial were granted. Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983).

First, it is not clear that Dr. W is a designated doctor selected by the Commission because in the letter Dr. W states that he examined the claimant at the request of the carrier and that he performed an "independent medical evaluation" of the claimant." However, even if Dr. W is a designated doctor chosen by the Commission, his opinion regarding whether an injury occurred in the course and scope of employment would not carry presumptive weight because we have previously held that the question of injury in the course and scope of employment is to be resolved by the hearing officer as the finder of fact and that a designated doctor's opinion is only entitled to presumptive weight in regard to MMI and impairment rating, and not as to injury. Texas Workers' Compensation Commission Appeal No. 93290, decided June 1, 1993.

Second, while persuasive argument could be made that Dr. W's letter meets the first three tests in Jackson, *supra*, in our opinion, under the circumstances presented in this case, it fails as to the fourth test, that is, it would probably not produce a different result. Dr. W diagnosed "lumbar syndrome" and concluded that the claimant had an on-the-job injury on (date of injury), "after essentially recovering from initial injury to his back in January of this year" and further concluded that the claimant has not reached MMI. In reciting the history of the injury as reported to him by the claimant, Dr. W stated:

> History reveals that the examinee has had two injuries to his back on the job within the past year. The first was in January of 1993 at which time he fell and struck his back. His symptoms cleared and he continued to work and essentially was asymptomatic at the time of his second injury in June 1993.

As is readily apparent from the history recited in Dr. W's report, the claimant failed to advise Dr. W, as he had Dr. M, that he had had a recent back injury in March of 1993 for which he underwent physical therapy until sometime in May of 1993. He further failed to advise Dr. W that just four days after his claimed injury of (date of injury) he was examined by Dr. Mc and found to have reached MMI with minimal subjective complaints. In fact, Dr. W's report makes no mention of medical treatment by Drs. C and Mc whom the claimant treated with for several months following his March 1993 back injury. The hearing officer made it clear in his decision that the claimant's failure to tell Dr. M about his March 1993 back injury and

course of treatment for that injury affected the weight he gave to Dr. M's report concerning a back injury in June 1993. Since Dr. W's report also fails to recite an accurate history of the claimant's recent back problems and treatment in determining that a back injury occurred on (date of injury), we have no reason to believe that the hearing officer would give it any more weight than he gave to the report of Dr. M.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge