APPEAL NO. 931177

On November 29, 1993, a contested case hearing was held in (city), Texas, with the record being closed on December 6, 1993. (hearing officer) presided as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. Section 410.001 *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) has disability as a result of his injury sustained on (date of injury); and (2) whether a pre-existing or subsequent injury or condition is the sole producing cause of the claimant's disability. The hearing officer determined that the claimant had sustained a compensable back injury on (date of injury); that the claimant had disability between May 21 and November 29, 1993, as a direct result of that injury; and that the appellant (carrier) failed to prove that the sole cause of the claimant's disability was a prior or subsequent injury or condition. The hearing officer decided that the claimant is entitled to temporary income benefits (TIBS) until his disability ends or he reaches maximum medical improvement (MMI). The carrier disagrees with the hearing officer's decision and requests that we reverse it and render a decision in its favor.

DECISION

We affirm the hearing officer's decision and order.

The claimant has worked for the employer, (employer), since 1984. In 1985 he had a car accident and missed time from work, but he said he did not injure his back in that accident. In November 1986 the claimant sustained a work-related back injury rolling an 1100 pound spool of wire. The claimant said he had a ruptured disc at the L5-S1 level for which a laminectomy operation was performed in November 1986 and a "redo" laminectomy operation was performed in February 1987. The claimant said he missed seven months of work in 1986 and 1987 as a result of the 1986 injury, but then returned to work in 1987. A medical report showed that in May 1987 the claimant was diagnosed as having "recurrent low back and left leg pain, probably secondary to small recurrent disc extrusion at L5-S1" and was given three lumbar epidural injections approximately two weeks apart. Other reports indicated that the claimant had physical therapy for two weeks in July 1989 for back pain. The claimant settled his workers' compensation claim for his 1986 injury and medical benefits expired in September 1991.

The claimant said that in 1990 his back started giving him problems again so he went to Dr. L who, according to the claimant, told him he had a choice between a fusion operation or epidural injections. The claimant said he chose the injections. The claimant was hospitalized between July and August 2, 1990, with a diagnosis of "lumbar disc displacement." An MRI scan of the claimant's lumbosacral spine done on August 1, 1990, revealed a large recurrent focal disc herniation centrally and to the left at the L5-S1 level where there was prior surgery. The claimant had a lumbar epidural block (LEB) in August 1990. Also in August 1990 (Dr. T) reported that according to the results of a "Job Simulation Evaluation," the claimant had the ability to perform in the "medium to heavy work category." The claimant had another LEB in September 1990. A December 1990 report from Dr. T's

office indicated that the claimant had called in to the office for pain medication due to having tripped and fallen on December 19, 1990.

Apparently, following the LEB in September 1990, the claimant had a lumbar epidural booster in March 1991 when he presented to Dr. T with complaints of low back pain and bilateral leg pain. A post procedure evaluation indicated that 70 percent of the claimant's pain was gone seven days after the injection, although by the 10th day after the injection he had some trouble sleeping due to back pain and leg discomfort. In an April 10, 1991, report, Dr. T reported that the claimant had recently "aggravated" his back at work when he had to move a transformer and that another LEB was given to the claimant on April 4, 1991. The claimant testified that he did not injure his back moving the transformer but said he had "muscle soreness" from that incident. Another report from Dr. T revealed that on May 17, 1991, the claimant's wife requested pain medication for the claimant because the claimant was experiencing back pain which kept him from sleeping. This report also noted that another LEB was scheduled for June 14, 1991. The claimant missed his appointment for his LEB on June 14th so it was rescheduled for July 19, 1991.

In regard to the claimed injury of (date of injury), the claimant testified that on that day he was working for the employer as an apprentice lineman helping to load a 40 foot wooden pole used for electric wires when the pole struck a tire and swung back around and hit him in the chest. The claimant said the force of the blow bent him backwards over the pole trailer "until my head was touching my feet and it snapped my lower back." The claimant said he immediately reported the injury to his employer and then his wife took him to a hospital emergency room. By written statements, two coworkers corroborated the claimant's testimony concerning being hit by the pole. One said the pole "slammed" into the claimant, and the other said the pole "kicked back smashing him [claimant]." A third coworker said in a written statement that while he did not see the accident, he came out of the shop and helped the claimant to his feet and that the claimant complained of back pain.

The emergency room report of (date of injury), noted the history of two prior back surgeries and that the claimant was being seen for back pain he experienced when he felt a "pop" when a 40 foot pole hit him in the chest bending him backwards. The emergency room doctor noted his or her impression as "low back pain - acute exacerbation." The claimant said that due to his injury of (date of injury), the LEB scheduled for July 19, 1991, was moved up and given to him on July 12, 1991. Dr. T noted in her report of July 12, 1991, a date of injury of November 7, 1986, and that the claimant had been getting LEBs periodically "for quite some time." However, Dr. T also noted that the claimant was given an LEB on July 12, 1991, and further noted that:

> He reinjured his back on Tuesday of this week, that was (date of injury). He was working at the time and was struck in the chest by a large pole causing him to fall backwards over a metal frame. When he did, he hyperextended his back and noticed the onset of extreme back pain.

Dr. T's records revealed that the claimant also received an LEB on September 23,

1991; January 27, 1992; September 11, 1992; January 8, 1993; and June 21, 1993. All of these records reflect a date of injury of (date of injury). However, the report for the January 8, 1993, LEB recited that the claimant "often exacerbates his pain with different work activities" and noted that the claimant lifted heavy things frequently, climbed poles, and went through rough terrain on his job. The claimant said that at the time of the January 8, 1993, report Dr. T was not aware that he had been working since early 1992 as a timberjack operator and not as a lineman.

The claimant missed work on (date) and 12, of 1991, and on seven other days during 1991 following his injury of (date of injury). The claimant also missed approximately 19 days of work in 1992 and 10 days of work in 1993 up to May 21, 1993. However, while the claimant testified that some of the days of work he missed in 1991, 1992, and 1993, were related to back pain, he could not say for certain how many were related to such pain. He said that about a week of the lost time in 1991 following his injury on (date of injury) was because he had to take care of a son who was involved in an accident. Several more days were taken off in 1991 due to the birth of a child. He also said that some of the lost time in 1992 was due to his house burning down and records reflected that several other sick days were taken for dental appointments. No account was given for a number of other days shown as sick days.

The claimant testified that both before and after the accident of (date of injury), he had worked with back pain. However, he testified that the level of his back pain increased after his (date of injury) accident and that the LEBs and pain medication which had given him some relief from pain before the accident failed to relieve his pain after the accident. He further said that after the (date of injury) accident he could not perform his lineman job like he could before the accident. He said that in early March 1992 he was assigned to work as a "timberjack operator" which he said only involved sitting down and pulling levers. The claimant testified that although the level of pain after the accident of (date of injury) increased, he continued to work because he did not believe in "lost time accidents" and because it would keep his coworkers from getting bonuses the employer gave for no "lost time accidents." The claimant also said that he had a good paying job which he did not want to give up. The claimant's supervisor, (DC), testified that he could not recall claimant complaining of back pain prior to (date of injury), and that after that date the claimant complained of pain several times and did not want to work overtime because he "didn't feel up to it."

On May 21, 1993, the claimant was working his timberjack operator job when he said he could no longer tolerate the pain which had radiated into both legs so he talked to DC, his supervisor, about his pain and DC told him that "this time you're going to get it fixed." DC testified that he told the claimant to "get it fixed where I could count on him." The claimant said he went to (Dr. F) and (Dr. D) who, he said, told him he needed a third laminectomy, but not a fusion as had been previously recommended by Dr. L in 1990. The claimant had his third laminectomy on October 21, 1993. The claimant has not worked since May 21, 1993. The claimant said that he had not injured his back since his (date of injury), back injury and had not filed any claim for any repetitive trauma injury occurring after

his accident of (date of injury). The claimant said the timberjack operator job he had after early 1992 rarely involved lifting and that he had a helper to do the hard work.

A May 21, 1993, report from Dr. T indicated that the claimant called Dr. T and told her that he had "reinjured" his back. There is no mention of how an injury occurred on May 21, 1993. At the bottom of the report Dr. T wrote "[t]his is not a new injury but an aggravation of a pre-existing problem." The report contained a date of injury of (date of injury), and described the nature of the injury as "knocked backward over metal frame," which is consistent with the description of the (date of injury), accident set forth in Dr. T's report of July 12, 1991. A June 2, 1993, report from Dr. F (stamped "corrected copy") gave a date of injury of (date of injury), at the top of the report; recited the claimant's two surgeries for his 1986 injury; did not mention the accident of (date of injury), in the body of the report; and noted that "[h]e [claimant] states his present exacerbation started about one month ago." Dr. F recommended an MRI of the lumbar spine which was done on June 3, 1993. The MRI report stated "[p]ersistent identification of a left paracentral disc herniation at the L5-S1 level effacing the lateral anterior thecal sac and impinging the left S1 nerve root. These findings were present on the previous examination of 8/1/90." In a June 28, 1993, report Dr. D stated that the claimant "remains totally disabled temporarily." Finally, in a report dated September 29, 1993, Dr. T stated that in his opinion the claimant sustained an "original injury" to his back in November 1986 and that that injury was aggravated by a second injury in (month year). Dr. T opined that "the (date of injury), incident is a contributing factor to his present medical condition."

The carrier disagrees with the hearing officer's findings that the claimant sustained a compensable back injury when he aggravated his pre-existing lower back condition while working for the employer on (date of injury); that the 1990 and 1993 MRIs do not establish that the claimant did not aggravate his pre-existing back condition; and that there is insufficient evidence to prove that an injury or condition prior or subsequent to (date of injury), was the sole cause of the claimant's inability to retain employment after May 21, 1993. The carrier also disagrees with the hearing officer's conclusions of law that the claimant proved that he had disability between May 21 and November 29, 1993, and that the carrier failed to prove that the sole cause of the claimant's disability was an injury or condition prior or subsequent to (date of injury).

The carrier has not complained of the hearing officer's finding that the claimant was unable to retain employment between May 21, 1993, and November 29, 1993, as a result of his compensable injury on (date of injury), nor has the carrier (or the claimant) complained of the finding that the claimant failed to prove what part of his lost time between (date of injury), and May 21, 1993, was a result of his injury on (date of injury).

The carrier contends that there is no evidence that the (year) "incident" caused new or separate physical harm or damage to the claimant's body which resulted in disability and further contends that the evidence establishes that the claimant's disability was not a result of the (date of injury), "injury," but that the "sole producing cause of his disability was the aggravation in May 1993 of the 1986 injury by work-related repetitive trauma." The

employer was insured by the carrier on (date of injury), but not in 1986 or in May 1993.

We first observe that there was no specific issue as to whether the claimant had been injured in the course and scope of his employment on (date of injury). In fact, the first issue appears to presuppose that the claimant was injured at work on (date of injury). Although the issues to be decided at the hearing related to disability, we note that 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's testimony that he injured his back at work on (date of injury), was corroborated by statements of coworkers, by the emergency room report, and by the opinion of Dr. T. We find that there is sufficient evidence to support the hearing officer's finding that the claimant was injured on (date of injury), when he aggravated his pre-existing back condition, and that the finding is not against the great weight and preponderance of the evidence.

The claimant has the burden to prove disability. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992. In this case, the claimant testified that the level of his back pain increased after his injury on (date of injury); that the injections and medications which relieved his pain prior to that injury failed to give him relief after the injury; and that by May 21, 1993, his pain had become unbearable and he went to his supervisor who told him to "get it fixed." The claimant has not worked since May 21, 1993. Also, Dr. D opined in June 1993 that the claimant was "disabled" and Dr. T opined in July 1993 that the claimant's injury of (date of injury), was a "contributing factor to his present medical condition." Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's finding and conclusion that the claimant had disability as a result of his (date of injury), injury between May 21, 1993, and November 29, 1993 (the date of the hearing), and we further conclude that the finding and conclusion on disability are not against the great weight and preponderance of the evidence.

In regard to the hearing officer's finding and conclusion that the claimant's inability to work after May 21, 1993, was not caused solely by an injury or condition that pre-existed or was subsequent to the injury of (date of injury), we observe that it has long been held that to defeat a claim for workers' compensation benefits because of a pre-existing injury, the carrier must show that the prior injury was the sole cause of the workers' present incapacity. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). It has also been held that a carrier is not liable for incapacity produced solely by a later injury. Liberty Mutual Insurance Company v. Peoples, 595 S.W.2d 135 (Tex. Civ. App.-San Antonio 1979, writ ref'd n.r.e.). Our decisions have placed the burden on the carrier to show that a pre-existing or subsequent injury or condition is the sole cause of a claimant's disability when the carrier asserts sole cause as a defense. Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992; Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). 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.). 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 hearing officer had evidence that the claimant had a herniated disc at L5-S1 both before and after his injury of (date of injury); that the claimant had back pain before and after his injury; and that the claimant took off time from work due to back pain both before and after his injury. However, the hearing officer also had evidence that the level of pain increased after the (date of injury) injury; that after that injury injections and pain medication which had helped before the injury failed to give the same relief; and that at least one doctor, Dr. T, opined that the claimant's accident on (date of injury), was a "contributing factor" to his present medical condition. While different inferences might reasonably be drawn from the evidence, this fact alone is not a sufficient basis to reverse the findings of the hearing officer, where, as here, the findings on the sole cause issue are supported by sufficient evidence and are not against the great weight and preponderance of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92515, decided November 5, 1992.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge