APPEAL NO. 93229

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. ART. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On February 16, 1993, a contested case hearing (CCH) was held in (city), Texas, with(hearing officer)., presiding as hearing officer. The record in the case was held open until February 23, 1993. The sole issue was: "Did the Claimant sustain an injury in the course and scope of her employment with the Employer, on or about (date of injury)?" The hearing officer determined that the respondent, claimant herein, sustained a repetitive trauma injury in the course and scope of her employment on (date of injury). Appellant, carrier herein, contends that certain findings of fact and conclusions of law are "insufficiently supported by the evidence and law" and requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant was an assembly line worker doing "trimming" and/or "cementing" on boots at employer's factory. It is undisputed that claimant had a prior work-related back injury in 1988 which kept her off work for about three weeks. Claimant testified that her symptoms had resolved and that she had worked regularly since that time. Approximately two weeks before the incident in question, claimant began working as a "cementer" at the boot factory. Claimant states her normal job as a "trimmer" required trimming of boots, while as a "cementer" it required gluing portions of the boot together. Both claimant and employer's witness testified that although both jobs required some repetitive lifting of plastic tubs weighing approximately 20 to 25 pounds each, cementing required more lifting than did trimming. Claimant testified that on or about (date of injury), her back began hurting. The circumstances are unclear because of the contradictory testimony from the claimant. (The hearing officer notes in his discussion that "the Claimant appears to have been less than truthful regarding the injury . . ."). We would note parenthetically that there were also inconsistencies in carrier's evidence. Claimant's testimony at the CCH was at some variance with accounts she gave the employer, a prepared statement she had typed, and an interview she gave to carrier's adjuster. Depending on which version is used, claimant states she either had been having pain for two or three weeks before (date) and it then got worse, or she felt a sharp pain while lifting one of the tubs on (date). In any event, claimant testified she reported the pain to her supervisor, (Mr. S), on (date). Claimant also complained of the pain to several coworkers including (Ms. B), no relation, who testified supporting claimant's allegations. Claimant's testimony, confirmed in part by Mr. S, was that Mr. S did not inquire about the nature of her injury but agreed claimant should see (Ms. A), employer's health and safety coordinator. Claimant states that Ms. A wasn't available on (date) and that claimant left early that day. It is undisputed that claimant missed work the next day, Wednesday, October 14th. Claimant states she worked, although in pain, on October 15th and Friday, October 16th. Claimant's regular shift on Friday, October 16th,

was only a half day and claimant said she thought she could work the half day. The following Monday, October 19th, claimant testified she went to the emergency room (ER) of the local hospital for treatment of her back pain. Claimant testified she contacted Ms. A about her back on October 19th. Exactly what was said, including any discussion regarding insurance coverage, is in dispute.

The hospital medical record shows claimant was seen at 12:45 p.m. on "10-19-92" with complaints of "Back pain ↑ in last 2-3 wks, numbness R leg, hip and R arm, mostly in mornings." The medical record goes on to mention claimant's prior back injury "2 yrs ago" and that claimant "has not had any new accidents or injuries, does not remember doing anything different or unusual 3 wks ago." The treating doctor, (Dr. B), on an Initial Medical Report (TWCC-61) dated 10-29-92, records claimant's history thusly: "I was lifting cartons of boots. I strained my neck and lower back." Dr. B finds spasm and tenderness of the paravertebral muscles of the lumbosacral spine. An MRI report dated 11-14-92 shows a disc bulge at C4-5 and "a 6-7 mm central to left parasagittal disc herniation . . ." at C5-6. A Specific and Subsequent Medical Report (TWCC-64) refers to the" . . . CT scan of the cervical and lumbar spine. Herniated disc present at L4-L5, and C5-C6." Dr. B recommended conservative management.

Carrier's witnesses also had inconsistencies in their testimony and may have suffered from a credibility problem. Claimant testified that on October 19th, she called Ms. A, as noted previously, and told Ms. A she had injured her back because "it had never hurt like that." Claimant further testified Ms. A said she would call the insurance carrier. Ms. A apparently did not do so and after another call on October 19th claimant stated, Ms. A suggested claimant turn the claim in under claimant's personal medical insurance. Claimant testified she called Ms. A on October 20th, again telling Ms. A of her back pain. Claimant's testimony is that Ms. A then advised her to get in touch with the insurance carrier for her 1988 injury. Claimant then called the Texas Workers' Compensation Commission (Commission) and got the name of the prior carrier. Claimant states she then called the prior carrier and was told that carrier didn't have a claim file for the 1992 injury. Eventually the information got to the correct carrier, which then called Ms. A. Ms. A then called claimant, and, according to claimant, insisted on a specific date of injury. As a result, claimant states she picked (date) as the date of injury. Mr. S's and Ms. A's testimony is at times inconsistent. Ms. A states that when becoming aware of claimant's claim on October 22nd she spoke with Mr. S who, according to Ms. A, knew nothing about the claim. Yet Mr. S does not dispute that he referred claimant to Ms. A when claimant first reported her back pain on (date). Similarly, Mr. S stated Ms. A was in charge of both workers' compensation and group health insurance while Ms. A said she only did workers' compensation. Ms. A, in her notes, makes references to dates and information, allegedly given to her by claimant, but later Ms. A conceded that such was not the case. Claimant's Notice of Injury (TWCC-41) dated 10-29-92 alleges injury in the alternative, "as the result of repetitious, physically traumatic activities that occurred over time. . . ."

The hearing officer's challenged findings of fact and conclusions of law are:

FINDINGS OF FACT

4.On the above date [(date of injury)], Claimant injured her back as a result of the repetitive lifting she had to do as part of her job.

5.The pain, if any, the Claimant experienced on (date) was a manifestation of the repetitive trauma injury mentioned above.

CONCLUSIONS OF LAW

2.Claimant was injured in the course and scope of employment on or about (date of injury).

Carrier's basic argument is that the challenged findings and conclusions are insufficiently supported by the evidence and/or are contrary to the great weight of the evidence. Carrier bases its allegations principally on inconsistencies in claimant's testimony and prior statements made by claimant. Carrier points out claimant denied any new accidents, injuries or unusual activities in giving a history of her back pain at the hospital ER. Claimant explains this by saying she thought they (the hospital personnel) meant some specific event. Carrier emphasizes that claimant, at various times, claimed a gradual onset of pain and at other times a specific, very sharp pain at a specific time on (date).

We do not disagree with carrier's assertion that "claimant has the burden of proof with regard to injury in the course and scope of employment" citing Texas Workers' Compensation Commission Appeal No. 92543, decided November 23, 1992. We have on occasion (Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992) cited Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.) for the proposition that an employee seeking workers' compensation benefits for a work-related injury has the burden of proving that the injury occurred in the course and scope of employment. That burden can be met by the claimant's testimony. Even though the claimant is an interested party, the claimant's testimony raises an issue of fact for the trier of fact, Escamilla v. Liberty Mutual Insurance Co., 499 S.W. 2d 758 (Tex. Civ. App.-Amarillo 1973, no writ) and the trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given her testimony in the light of the other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). In this case, although there are some inconsistencies, claimant testified she had been having back pain for two or three weeks and this is supported by the medical record. According to claimant, the pain became

more severe on (date), as supported by complaints to Ms. B. Claimant reported the pain to her supervisor, Mr. S, who does not deny claimant's allegations. When presented with conflicting evidence, the trier of fact, the hearing officer, in this case, may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The hearing officer did so by finding a repetitive trauma injury arising out of the repetitive lifting of 25 pound tubs.

Carrier, both in closing argument and on appeal, cites Texas Workers' Compensation Commission Appeal No. 92050, decided March 27, 1992, as authority that mere pain, without damage or harm to the physical structure of the body, is not compensable. We do not disagree with that proposition. However, in the instant case there is testimony of severe pain on (date), with subsequent objective medical evidence of a herniated lumbar disc, which constitutes more than "mere pain." We would note that it is claimant's unrefuted testimony that her May 1988 back injury had resolved and that claimant had worked steadily without losing time until October 1992. The fact situation in Appeal No. 92050 is dissimilar and we affirmed the hearing officer who had found the injury not compensable. In that case, and in the current case, as announced by the hearing officer, the hearing officer is the sole judge of the relevance, materiality, weight and credibility of the evidence presented at the hearing. Article 8308-6.34(e). The hearing officer's decision should not be set aside provided that his decision is supported by sufficient evidence of probative value and is not against the great weight and preponderance of the evidence. Appeal No. 92050, *supra*.

Carrier alleges an inconsistency between claimant's testimony as to the onset of claimant's back pain as recorded on the hospital ER record. We would note even that record contains inconsistencies in that under "Assessment" it states claimant "c/o 3 month hx [history] of back pain . . ." and in a different handwriting in the next paragraph it states "Back pain ↑ in last 2-3 wks, numbness R leg. . . ." As noted previously, it is the responsibility of the hearing officer to resolve these inconsistencies. The hearing officer may believe all, part or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). In this case the hearing officer believed that claimant had a gradual onset of pain caused by repetitive lifting of plastic tubs weighing 25 pounds each.

Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb his decision. Only if we were to determine, which we do not in this case, that the decision of the hearing officer was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would we be warranted in setting aside the hearing officer's decision. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Applying these

standards of review, we affirm.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge