APPEAL NO. 93298

At a contested case hearing held in (city), Texas, on January 11 and March 23, 1993, the hearing officer considered two disputed issues, namely, whether appellant (claimant), a home health care aide, was injured in the course and scope of her employment with (Employer A) on (date of injury), and whether claimant's disability was solely caused by a preexisting or subsequently occurring condition. The hearing officer concluded that claimant sustained an occupational disease from her repetitious, physically traumatic activities; that her disability was not solely caused by a prior compensable injury of (previous DOI), sustained while working for (Employer B); that she was not in the employ of Employer A when her last injurious exposure occurred on March 8, 1992; and thus that respondent (carrier), the workers' compensation insurance carrier for Employer A, is not liable for benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-3.01(b) (Vernon Supp. 1993) (1989 Act). Claimant challenges the hearing officer's findings that she last worked for Employer A on February 21, 1992, and last worked for Employer B on March 8, 1992, as well as the conclusion that she was not in the employ of Employer A when last injuriously exposed to the hazards of the occupational disease on March 8, 1992. The carrier's timely response cites the sufficiency of the evidence to support the challenged findings and conclusions and urges our affirmance.

DECISION

Finding that the evidence sufficiently supports the challenged findings and conclusion, we affirm.

Claimant testified that after completing training she commenced work for three home health care agencies including Employers A and B, and that her duties consisted of assisting various clients of her three employers in their homes with the activities of daily living which varied from client to client. While not the case with the third employer, caring for clients of Employers A and B could include lifting or otherwise assisting them in getting from beds to wheelchairs and to commodes. Such assistance was referred to as "transferring" the clients. On (previous DOI), claimant injured her back in an unsuccessful attempt to transfer a heavy stroke patient, a client of Employer B, from a wheelchair to a commode. At the time, claimant felt extreme pressure in her back, and pain and weakness in her back and left knee down to her toes. She thought she had pulled a muscle. Later at home, claimant laid on the floor to attempt to exercise her back, felt excruciating pain, and could not get back up. The pain subsided shortly later. She said she did not experience further health problems until sometime in January 1992 when she began to feel increasingly fatigued. She stopped seeing multiple clients for the employers and reduced her schedule, caring for just one Employer A client, (Ms. M), for 40 hours during the week, and caring for some Employer B clients on the weekends. She continued to feel poorly, stopped caring for Ms. M after February 21st, and worked only a few hours on the weekends, and in early April 1992 said she experienced a sensation of "pins and needles" in her left buttocks and leg. Soon thereafter she experienced muscle spasms and some bladder incontinence problems. She went to an emergency room (ER) on April 7, 1992, and on April 10th was admitted to

the hospital. The admission notes stated claimant had complaints of low back pain for the past two months. Diagnostic tests revealed a left L5-S1 disc protrusion and some denervation changes in the L5-S1 distribution. Claimant underwent a discectomy on April 16, 1992.

Claimant filed a workers' compensation claim for her (previous DOI), injury which was disputed by Employer B's carrier. After a contested case hearing on that claim, the hearing officer determined that claimant was injured in the course and scope of her employment and the Texas Workers' Compensation Commission (Commission) Appeals Panel affirmed the decision. Texas Workers' Compensation Commission Appeal No. 93033 (unpublished), decided March 1, 1993. Claimant's theory for her claim in this case seemed to be that after her (previous DOI), injury (for which injury she successfully claimed workers' compensation benefits from Employer B's carrier), she continued to assist various clients of both Employers A and B in transfers to and from beds, wheelchairs, and commodes, and that such transfers were repetitious, physically traumatic activities which aggravated her September 30th injury culminating in her surgery on April 16, 1992. She contended that after the September 30th accident, which damaged her spine, "each time I lifted I had two free-floating bones in there that was (sic) cutting my nerves around my cord," and that such activities culminated in her back surgery on April 16, 1992. Claimant testified that doctors told her she had two bones cutting into nerves and muscles and she said she developed a lot of problems she became aware of in April 1992. At another point, claimant testified that during the January - April 1992 period, when she substantially reduced her caseload because she was not feeling well, she did not know which work activity in particular was causing her additional problems, that she always knew her problems were related to her work, and that she did not know she had a permanent injury until she went to the ER on April 7th and was told what was wrong with her. She said she told the doctors she was a home health care aide who had to transfer heavy patients. She also maintained that her condition was the result of her repetitive traumatic activities while working for both Employers A and B. Under the 1989 Act, repetitive trauma injuries are included within the term "occupational disease." Articles 8308-1.03(36) and (39). It was the carrier's theory that claimant's last injurious exposure to the occupational disease (repetitive trauma) occurred while caring for an Employer B client since claimant had last cared for an Employer A client on February 21, 1992. Article 8308-3.01(b) provides that "[i]f an injury is an occupational disease, the employer in whose employ the employee was last injuriously exposed to the hazards of the disease is considered to be the employer of the employee under this Act."

Claimant identified two of Employer A's clients, (Mr. S) and Ms. M, as requiring strenuous lifting or transferring after September 30th with which she had trouble. Claimant testified that she last cared for Ms. M on February 21, 1992, and that February 21st was the last day she cared for any client of Employer A. She also said that at some time when she was caring for Ms. M, her hip "popped" during a transfer of Ms. M and that she had pain in

her calf. In her sworn affidavit, Ms. M, who was recovering from hip surgery, said that when claimant began to care for her claimant said she could not do any heavy lifting due to her bad back. Ms. M further stated that she transferred herself from the bed to the bedside commode and only had claimant stand nearby to watch in case she lost her balance. She also stated she never fell. After last caring for Ms. M on February 21st, claimant said she reduced her work schedule to one and one-half hours on Saturdays and Sundays caring only for Employer B clients. The carrier produced records from Employer A which showed that claimant last assisted an Employer A client, Ms. M, on February 21, 1992. Claimant did not deny the accuracy of such records but maintained that on March 20, 1992, she attended some classroom training for Employer A. This was the apparent basis for her challenge to the hearing officer's finding that claimant last worked for Employer A on February 21, 1992. Employer A's accounting coordinator testified that the March 20th training was a two-hour classroom session on crime prevention which involved no bending nor lifting of patients. Claimant's testimony and Employer A's records established that claimant last cared for an Employer A client on February 21, 1992, but attended a training session on March 20th, presumably as an employee of Employer A. Thus, the finding is in error. However, such evidence also permits an implied finding that claimant last assisted a client of Employer A on February 21, 1992.

Claimant further testified that after (previous DOI), she also cared for (Ms. G), an Employer B client, who required assistance in transfers, that she transferred Ms. G many times, and that sometime in February 1992 while transferring Ms. G, claimant felt her back "pop" and had to get help to get Ms. G up off the floor. She said that even after that incident she continued to assist Ms. G with transfers. Claimant also testified she last worked for Employer B on March 8, 1992. That testimony sufficiently supports the challenged factual finding that claimant last worked for Employer B on March 8, 1992. Employer B's weekly payroll records appear to show that claimant cared for Ms. G for two hours each day not only on March 7 and 8, 1992, but also on March 14 and 15, 1992. However, claimant said she could not recall working the latter weekend but might have done so. Additionally, these records showed that after February 21st, claimant also cared for Employer B client (Ms. K) though there was no evidence of claimant's having transferred Ms. K.

The hearing officer found, without challenge on appeal from either party, that claimant sustained a work-related injury to her back ("a centrally herniated L5-S1 disc") on (previous DOI), while working for Employer B, and that from October 1, 1991, through February 21, 1992, she "repeatedly moved, lifted and transferred the patients" of Employers A and B. The hearing officer concluded that claimant has an occupational disease in the nature of a repetitive trauma injury, and that her disability was not solely caused by a preexisting condition, namely, her compensable injury of (previous DOI), sustained while working for Employer B. While neither party has appealed from such conclusion and we thus affirm the decision in view of the evidentiary support for the challenged findings, as modified, and conclusion, we do not here decide that claimant's accidental back injury of (previous DOI),

also constituted by the following April a repetitive trauma back injury. As already noted, claimant asserts error in the hearing officer's finding that she last worked for Employer A on February 21st and for Employer B on March 8th, and in the hearing officer's concluding that she was not in the employ of Employer A on March 8th when she was last injuriously exposed to the hazards of the occupational disease. As is frequently the case, there are discrepancies and inconsistencies in the evidence. However, we view the finding that claimant last worked for Employer B on March 8, 1992, and the implied finding that claimant last assisted a client of Employer A on February 21, 1992, as sufficiently supported by the evidence, and that the findings sufficiently support the challenged conclusion.

Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 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.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings, as modified, are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings, as modified, and conclusion of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

CONCUR IN THE RESULT:

Stark O. Sanders, Jr.
Chief Appeals Judge