APPEAL NO. 93767

At a contested case hearing held in (city), Texas, on August 2, 1993, the hearing officer, (hearing officer), concluded that the respondent (claimant) had disability on or about January 26, 1993, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011 *et seq.* (1989 Act). The parties had stipulated that claimant sustained a compensable injury on (date of injury), while working for (employer). The respondent (carrier) contended that claimant's disability, if any, did not result from his compensable injury, and adduced evidence of a subsequent incident at home on January 25, 1993. The hearing officer further concluded that the carrier failed to meet its burden of proving that the sole cause of claimant's present condition was an intervening or subsequent injury. Carrier challenges the sufficiency of the evidence to support the hearing officer's adverse conclusions as well as certain of the findings of fact. The claimant's response urges affirmance.

DECISION

Finding the evidence sufficient to support the challenged legal conclusions and factual findings, we affirm.

Claimant testified he was injured on (date of injury), while working at a street paving project. He had climbed into the asphalt hopper of a street paving machine to adjust the extenders when a coworker inadvertently started the machine. The sides or flaps of the hopper, which had been in the open position, quickly arose to the closed position, claimant was struck across his back and shoulders by one of the closing sides, and his right leg was trapped by an extender. Coworker (Mr. C) testified that he saw the accident happen and that claimant was hit in the small of his back as he raised up. Claimant was extricated and went with his foreman to an occupational health center where he was examined, x-rayed, and, according to his testimony, later corroborated by employer's personnel and safety director, (Mr. E), released to light duty. The examining physician diagnosed "acute contusion back, [left] shoulder, [right] leg." He was seen at the center on November 24th for a follow-up visit and was released to regular duty. A record of that visit reflected that claimant said he "feels fine." According to a record of his hours, claimant worked the remainder of November, and also worked during the months of December and January 1993 except for substantial periods of time when there was no work due to wet weather. Claimant testified his pain during this period persisted and that his back got worse, but that he worked in pain and did not seek further treatment because he had a family to support. Mr. C testified that claimant appeared to be working in pain before transferring to another crew.

While at home on January 25, 1993, claimant said he went over to pick up his infant daughter from the floor and when he bent over felt severe pain and his back "locked up." He had been wearing a back brace which he had taken off. He went to a hospital emergency room (ER) the next day. The record of that visit reflects a history of claimant's bending from the waist and picking up a baby and experiencing a "sudden pop" and pain on the right side of his low back with a tingling sensation into his right leg. Midline right

paraspinous tenderness was noted and he was diagnosed with low back strain with radicular symptoms and medicated. Claimant said he thereafter commenced treatment with (Dr. M). Dr. M's record of January 29th referenced "worker's comp," claimant's having been "crunched in a machine," and his having some discomfort but seeming to do better until he picked up his child in a twisting motion after which he has had acute back spasm and difficulty straightening up. Claimant insisted he had only bent over to pick up the child when his back "locked up," and that he had not actually picked the child up. This record noted spasm in the right lower lumbar area.

He returned to the ER on February 5th complaining of pain in his low back, left hip, and right leg, and was treated. Claimant said this painful episode occurred when he reached to prevent a glass of water from spilling. X-rays of that date showed a normal lumbar spine. An MRI report of February 11th was essentially negative for his lumbar spine but did show a congenital narrowing in the L3 area which "would pre-dispose (sic) the patient to earlier symptomatology. . . ."

On February 15th, the carrier contested claimant's claim for the reasons that after his (date of injury) injury, claimant sought no further medical treatment until after January 25th "when his back `locked up' on him at home while reaching for his child," and that although claimant indicated his treatment and lost time after January 25th were related to his work injury, a signed statement of coworker (Mr. H) indicated claimant told him his back hurt from picking up his child. No statement or testimony from Mr. H was adduced at the hearing though Mr. E was extensively cross-examined on his investigation of the claim for employer. A statement accompanying carrier's Notice of Refused/Disputed Claim (TWCC-21) stated in part: "No compensable disability sustained by claimant since he rtw 11/17/92. Disability related to incident at home over 2 months later. . . . " The hearing officer advised the parties that while claimant had the burden of proving disability as defined in the 1989 Act (Section 401.011(16)), carrier would have the burden of proving a sole cause defense, that is, that claimant's disability resulted not from his compensable injury but rather from a subsequent, noncompensable injury such as the January 25th incident at home. The carrier acknowledged the hearing officer's statement without objection but did not appear to affirmatively commit the carrier to a sole cause defense. *See* Texas Workers' Compensation Commission Appeal No. 92018, decided March 5, 1992, and Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992, and Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992, for discussions of the sole cause defense. We have previously noted that the compensable injury need not be the sole cause of disability. *See* Texas Workers' Compensation Commission Appeal No. 93697, decided September 23, 1993.

An electromygraphy report of March 10th indicated acute right L5 radiculopathy. A letter from Dr. M dated March 23, 1993, stated that on January 29th when he first examined claimant, he related a history of having been injured at work eight weeks earlier, that his acute 5th lumbar radiculopathy is "a disabling condition," but that since he did not examine claimant after the (date of injury) injury he could not verify the mechanism or degree of injury

at that time. Claimant's unrefuted testimony was that Dr. M took him off work and has not released him to return to work.

On April 15, 1993, a Commission benefit review officer (BRO), who apparently conducted benefit review conferences in April and on June 7th, signed a Request for Medical Examination Order (TWCC-22) indicating it was a Commission request and asking (Dr. O) "to give a medical opinion of the causal relationship of the claimant's disability to his workers comp injury." An April 20th letter from this BRO to Dr. O stated that "[t]he purpose of this exam is to determine whether the current cause of his disability is due to his workers' compensation injury of (date of injury) or subsequent incidents of which it is questionable as to whether they caused additional injury and disability." Dr. O's May 11th report stated he did "not see any evidence of injury from his alleged mishap and every indication that this is functional and probably represents frank malingering."

Claimant went to the ER on May 31st after again experiencing severe pain while lying on his couch and shifting position. He was diagnosed with lumbar spasm and treated. Claimant was examined by (Dr. B) on July 14th upon referral from Dr. M. According to Dr. B, claimant had "a great deal of real muscle spasm in the paravertebral musculature" and he recommended a myelogram. Claimant stated that he underwent the myelogram four days before the hearing.

Both claimant and his wife, whose testimony essentially corroborated that of the claimant, testified that he had numerous similar bouts of severe spasm and pain at home when bending, reaching, or moving suddenly without guarding his back. They both testified to the discontinuance of claimant's former athletic lifestyle as well as his activities at home including playing with the children. Claimant said he could no longer perform his work duties which included shoveling asphalt as a member of a street paving crew.

The hearing officer found, among other things, that claimant's inability to obtain and retain employment at wages equivalent to his preinjury wages since January 26, 1992, was due to a compensable injury, and that the carrier failed to show that a subsequent injury was the sole cause of claimant's condition. Claimant's testimony was to the effect that his compensable back injury got progressively worse, and that he subsequently had a series of painful episodes at home, some of which drove him to the ER, but no new injury as such. We have observed that the testimony of a claimant alone may be sufficient to establish disability. *See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. The medical records show that on the day of his accident the x-rays were negative and contusions were observed by the doctor who treated him. Medical records after the January 25th incident noted paravertebral muscle spasm, lumbar strain, and L5 radiculopathy. However, no opinions were rendered that these findings resulted from either the (date of injury) accident or any of the later pain- causing incidents at home. In fact, Dr. O was specifically asked to address that question with a medical opinion and his response failed to do so.

We are satisfied the challenged factual findings as well as the corresponding legal conclusions are sufficiently supported by the evidence. Claimant aptly cited the hearing officer to our decision in Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1993. In that case, the claimant hurt his back on the job while driving a forklift on April 1st and worked in pain until April 30th when, at home, he bent over to tie a shoe, sneezed, and experienced unbearable pain causing him to go the ER. The Appeals Panel noted that the carrier's evidence did not address the question of whether the sneeze was the sole cause of the claimant's disability, and stated: "A sole cause defense may be based on a subsequent injury; appellant's problem is a paucity of evidence indicating that the subsequent sneeze was the sole cause."

While the evidence in this case could support a finding that claimant's bending over at home on January 25th was the sole cause of his disability, such a finding is not compelled by the evidence. That a fact finder might have arrived at different inferences and conclusions does not justify setting aside the facts deemed most reasonable by the fact finder. *See* Texas Workers' Compensation Commission Appeal No. 93422, decided July 12, 1993. The hearing officer is the sole judge of the weight and credibility to be given the evidence (Section 410.165(a)). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are some discrepancies. Taylor v. Lewis, 553 S.W. 2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). As the trier of fact, it was for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W. 2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge