APPEAL NO. 93819

This appeal arises under the Texas Worker's Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). On August 4, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues considered at the CCH were:

1. Whether the Claimant is entitled to the rights and remedies of the Texas Worker's Compensation Act;

2. Did the Claimant sustain an injury in the course and scope of his employment;

3. Did the Claimant report his injury to his Employer timely; and

4. Does the Claimant have disability as a result of his workers' compensation injury of (date of injury)?

The hearing officer determined that the claimant was entitled to the rights and remedies of the Texas Workers' Compensation Act, that claimant sustained a compensable back injury in the course and scope of his employment on (date of injury), that claimant timely reported his injury and that claimant had disability as a result of his compensable injury of (date of injury).

Appellant, carrier herein, contends that there is insufficient evidence to support certain of the hearing officer's determinations, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, 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 testified that he was attending a truck driving school in (driving school) and that (employer), employer herein, sent a representative, who claimant only knew by the name of (Mr S.), to the driving school to recruit truck drivers. Claimant testified that (Mr S.) told them about the employer, "their . . . operation out of (state) and (state) and all that," and what the benefits were. Claimant filled out an application that was provided and subsequently when he got out of school, called a toll-free telephone number the employer had provided. Apparently as a result of the telephone call, claimant, and two others, were given plane tickets and invited to (state), where claimant was required to fill out another application, take written and practical driving tests, take a physical and attend a three day orientation course. It is undisputed that claimant was hired on October 31, 1992, at the conclusion of the orientation course, to drive a truck out of (city) to all 48 states plus (C ). It is undisputed that claimant traveled outside of Texas about 27 days of the month and had about three days a month off in Texas where he resided. It was also unrefuted that claimant

on occasion (perhaps four or five times in the following five months) had trips to various locations in Texas. It is also undisputed that the employer is a nationwide motor carrier with major terminals in (states) and (state).

Claimant testified that (state) was his home base and that his immediate supervisor was (TC). TC, in his statement, states his title is "driver manager." Claimant testified on March 16, 1992, he had delivered a shipment to a customer in (state), and that the customer was to unload and clean the trailer. When claimant came back the next day, (date of injury), he found the customer had left 48 pallets and a stack of cardboard boxes in the trailer. Claimant stated that he had to unload the pallets, that weighed about 50 pounds each, and take the cardboard boxes to the "trash masher." Claimant stated that while unloading the pallets, he may have slipped on a cardboard box. Claimant testified it took two and a half or three hours to clean out the trailer and that afterward he called TC on the phone and said "I think I may have hurt my back. I need a routing home to check it out." Claimant testified it was "two weeks or so" before he got back to Texas where he could see a doctor. Claimant also stated he had reported the incident to (RC), who was TC's supervisor, on (date of injury). Claimant stated he had been using the Department of Veteran Affairs Hospital (VA hospital) in (city), Texas, since 1988 and he went back there for treatment. Claimant stated the doctors wanted to check him out for about three days and that he called TC to give him this information. According to claimant, TC told him to take the ". . . truck to the yard, clean it out and leave it there." Claimant said he did so and three days later ". . . when I told him (TC) I was out, I went to pick my truck back up. It was gone. They had assigned it to someone else." Claimant says he asked about it and TC said "[w]ell, we didn't know how long you was going to be in there." Claimant testified he was hospitalized from March 30, 1992, until April 2, 1992, at the VA hospital. Claimant stated he had to wait until April 10th for another truck.

Claimant states he continued to work until August 17, 1992, when he "had a falling out" with TC when he was routed to (city), for a customer who required "strictly hand unload for the truck drivers." Claimant said he told TC he couldn't unload the truck because he "had a bad back" and TC replied "it's not in your file." Claimant states he then called TC and told him that his (claimant's) son needed surgery on his heart and that claimant needed some time off. Claimant stated he "dropped the load off at the (city) yard . . . and just went from there." Claimant was subsequently terminated for abandoning his truck. Claimant testified his back continued to get worse until he could no longer stand up and he went back to the VA hospital on September 28, 1992.

The VA hospital progress note dated Mar. 30, 1992, records: "Back - 2½ wks ago - No lifting 'pain & pressure to my tail bone' pain going into both legs. . . . Poss HNP. Will admit for H.N.P." The diagnosis on the discharge note dated 4-2-92 was: 1) Low back pain; 2) Hypertension; and 3) Non-insulin dependent diabetes mellitus. A VA hospital progress note dated May 20, 1992, documented low back pain complaints. A progress note dated 9-28-92 notes "[b]ack problem . . . . Denies injury to aggravate back." On 10-5-92 a progress note records "A. Severe mechanical LBP (low back pain). B. No activity - complete rest - until 10-20-92." There are subsequent progress notes

dated 10-13-92, 1-22-93, 2-2-93 and what appears to be a neurosurgical consult of 4-8-93. An MRI of the lumbar spine dated March 1, 1993, states:

IMPRESSION:

1.L4-5 disc desiccation with focal posteriorly extruded disc fragment measuring 5 to 6 mm in size located at the expected location of the L5 nerve root.

2.L5-S1 disc desiccation.

Claimant stated he has been unable to work since August 17, 1992, has been under active medical care since September 28, 1992, and that he is unable to work at the present time because he is still undergoing medical treatment for his back.

The hearing officer's contested determinations are:

**FINDINGS OF FACT**

3.Claimant was hired by (employer) on October 31, 1991, and his job duties as a truck driver included picking up, delivering, and occasionally unloading the trailer on his routes traveling the 48 states and Canada.

4.On (date of injury), Claimant injured his back on a route in (state) when he cleaned his trailer out.

5.Claimant's immediate supervisor at the time of the injury was [TC], and on (date of injury), Claimant reported that he had hurt his back while unloading and cleaning out his trailer on the route through (state).

12.Claimant has had significant contact with this state as he was hired or recruited in this state and Claimant was injured not later than one year after his date of hire.

13.Claimant's inability to obtain or retain employment at wages equivalent to his preinjury wage is because of a compensable back injury.

**CONCLUSIONS OF LAW**

1.The Texas Workers' Compensation Commission has jurisdiction to determine the issues in this case and venue is properly placed in (city) Field Officer.

2.Claimant is entitled to the rights and remedies under the Texas Workers' Compensation Act.

3.On (date of injury), Claimant sustained a compensable back injury while in the

course and scope of his employment for this Employer.

4. Claimant timely reported his injury to his Employer as required by the Act.

5. Claimant has disability as a result of his workers' compensation injury of (date of injury), and such disability began to accrue as of March 30, 1992, until April 2, 1992. Then such disability began to accrue again as of September 28, 1992, and continues through the date of this hearing.

Carrier contends that the quoted determinations are supported by insufficient evidence or are so against the great weight and preponderance of the evidence to require reversal, principally contending that claimant did not have "significant contacts with the state of Texas to create jurisdiction." The relevant statute is Section 406.071 (formerly Articles 8308-3.14 and 3.15) which states:

Sec. 406.071. **EXTRATERRITORIAL COVERAGE.**

(a) An employee who is injured while working in another jurisdiction or the employee's legal beneficiary is entitled to all rights and remedies under this subtitle if:

(1) the injury would be compensable if it had occurred in this state; and
(2) the employee has significant contacts with this state or the employment is principally located in this state.

(b) An employee has significant contacts with this state if the employee was hired or recruited in this state and the employee:

(1) was injured not later than one year after the date of hire; or
(2) has worked in this state for at least 10 working days during the 12 months preceding the date of injury. (V.A.C.S. Arts. 8308-3.14, 8308-3.15.)

The key issue is whether claimant had such significant contact with Texas as to confer jurisdiction. Section 406.071(b), quoted above, specifies that significant contact occured "if the employee was hired or recruited . . . ." (Emphasis added.) It is not disputed that claimant was actually hired in (state) after he had completed an application, took a physical and attended an orientation course. It is also undisputed that the driving school was not owned or operated by the employer. We note that the statute states "hired or recruited" in the disjunctive. Carrier concedes that the employer sent ". . . a representative to inform the students about the company." While there is no specific evidence regarding exactly what was said by the employer representative, the claimant testified he gave a presentation telling the students about the employer's operation in two of its terminals and what the benefits were. The representative apparently also left application forms and a toll-free number to call after students completed the application. There are no cases, workers' compensation

or other, and no commentary in the various texts regarding what constitutes recruitment. Larson, Workmen's Compensation Law, Vol. 4 § 87.12 page 16-17 (Matthew Bender, 1992) cites the Texas statute and notes the hired or recruited provisions are in the disjunctive, stating: "Injuries sustained outside of Texas are covered if the contract was made in Texas, or if the worker was a Texas resident recruited in Texas, provided the injury occurred within a year after leaving Texas . . . ."

American States Insurance Co. v. Garza, 657 S.W.2d 522 (Tex. App. - Corpus Christi 1983, no writ), involved a Texas resident who was recruited in Texas to work in another state. The court held that the employee who "established conclusively that he was a Texas resident and that he was recruited here in Texas," was entitled to bring a claim for compensation as a Texas employee. The factual recitation of that case does not spell out what the recruitment consisted of. Garza does cite Southern Underwriters v. Gallagher, 135 Tex. 41, 136 S.W.2d 590 (1940), Texas Employer's Insurance Ass'n v. Dossey, 402 S.W.2d 153 (Tex. 1966) and Renner v. Liberty Mutual Insurance Co., 516 S.W.2d 239 (Tex. Civ. App. - Waco 1974, no writ), noting in Renner the Waco court applying a strict Gallagher - Dossey test, determined that the employee was not a Texas employee because he was employed to work only outside the state during the term of the contract in question. Garza went on to note that effective June 15, 1977, the compensation statute's extra-territorial provision was amended to provide coverage if an employee ". . . who has been hired or *if a Texas resident, recruited in this State*, sustain injury in the course of his employment . . . ." The court noted that no appellate court has been asked to construe this particular section. The 1989 Act provision is similar in this respect (except there is now no requirement of Texas residency) and insofar as we can determine an appellate court has still not spoken on this issue or defined what constituted recruitment. Garza speculates that this may be because the plain meaning of the words used in the amendment (and subsequently in the 1989 Act, less the requirement to prove Texas residence) indicates an intent on the part of the legislature to extend the protection of the act to all Texas residents hired or recruited in Texas even though case law denied that coverage prior to 1977 when an employee was injured outside the state. Carrier, in its appeal, downplays the significance of the employer representative's presentation to the driving school students and states "[t]here is no specific evidence about any communication between this representative and the claimant." However it is unrefuted that the representative's presentation, making application forms available and providing a toll-free number resulted in claimant making an application to the employer and the employer sending claimant an airline ticket to come to (state) for additional tests and a pre-employment physical. The hearing officer characterizes the employer representative coming to the driving school ". . . to recruit truck drivers" and this constituted "significant contact" in that claimant was recruited in Texas and was injured not later than one year after his date of hire. We are unwilling to hold, as a matter of law, under these circumstances, that employer's conduct does not constitute recruitment.

Carrier also cites Texas Workers' Compensation Commission Appeal No. 92724, decided February 16, 1993, as being exactly opposite to the facts in this case. As carrier points out, Appeal No. 92724, involved an employee who was living in (state) and who was recruited (interviewed) in (state) and the issue was whether he was hired in Texas. That

case is clearly distinguishable from the instant case where it is undisputed that claimant was actually hired in (state) and the issue was whether employer, by sending a representative to the Texas driving school "to recruit truck drivers" and subsequently sending an airline ticket to claimant, had brought itself under the provisions of Section 406.071(b). The hearing officer believed it did and we do not disagree.

Carrier also contends that there is insufficient evidence to support determinations that claimant sustained an injury in the course and scope of employment and that the injury was timely reported to the employer. We would note these are factual determinations which are within the province of the hearing officer to resolve. We have on a number of occasions held that just because the injured party is the only witness to an injury does not defeat an otherwise valid claim. Texas Workers' Compensation Commission Appeal No. 93512, decided August 2, 1993; Texas Workers' Compensation Commission Appeal No. 91013, decided September 12, 1991. Claimant's testimony may be believed by the trier of fact and the testimony of others may be rejected. Texas Employers Insurance v. Thompson, 610 S.W.2d 208 (Tex. Civ. App. - Houston 1981, no writ). When the claimant's testimony is that of an interested party, his 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 1978, no wit), and the trier of fact has the responsibility to judge the credibility of the claimant and the weight to be given his testimony in the light of the other testimony in the record. Section 410.165(a). Here the hearing officer obviously found claimant's testimony regarding the circumstances of the injury credible and believed the testimony regarding claimant's calls to TC. The circumstances surrounding claimant's statement that he needed time off for his son's heart surgery was explained by claimant as being an excuse so he would not have to hand unload the truck on August 17th. The hearing officer found this testimony credible and we will not disturb that decision unless it is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 93477, decided July 19, 1993. We do not so find.

Other factual issues and inconsistencies which carrier cites, such as claimant's denial that he aggravated his back injury in September 1992, the inconsistency in the original versus the amended date of injury and claimant's failure to see a doctor until September 28th while alleging disability after August 17th, are issues within the province of the hearing officer to resolve. The hearing officer, as the trier of fact, may accept some parts of a witness' testimony and reject other parts (Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App. - Fort Worth 1947, no writ) and resolve any conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. App. - Amarillo 1974, no writ). We find that the hearing officer's decision is supported by sufficient evidence.

In sum, finding no reversible error and sufficient evidence to support the hearing officer's determinations as set forth above, we will not disturb the findings and conclusions of the hearing officer that claimant had significant contact with the state of Texas as he was recruited in this state and was injured within one year of his date of hire,

that claimant sustained a compensable back injury which was timely reported to the employer, and that claimant has disability. The hearing officer's decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge