APPEAL NO. 93838

On September 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. Article 8308-1.01 *et seq*.). The issues at the hearing were: 1) whether the appellant's (claimant's) current back problems are related to his (date of injury), "incident," or are they related to his previous injuries; 2) whether the claimant has had disability related to the (date of injury), "incident;" and 3) whether the claimant is due temporary income benefits (TIBS). The hearing officer determined that the claimant's current back problems are not related to the "back slap incident" of (date of injury); that the claimant has not had disability related to the "incident" of (date of injury); and that the claimant is not due TIBS. The claimant disagrees with the hearing officer's decision and requests that it be reversed and a decision rendered in his favor. The respondent (employer), a self-insured political subdivision of this State, responds that the hearing officer's decision is supported by the evidence and requests that it be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant has worked as a school teacher for the employer for about 20 years. He teaches wood and metal shop and drafting. The claimant testified that on (date of injury), his back was injured when a student hit him in the back at school. The student was running down a ramp behind the claimant when he hit the claimant with his outstretched hand. The claimant indicated that the student may have been trying to stop his forward momentum at the time of the incident as the ramp was steep. The claimant said that on the day of the incident he reported it to his employer. He further stated that he worked the remainder of the school term without missing work. He testified that he was unable to work during the summer months of 1992, but returned to work at the end of August 1992, and taught school the entire school year without missing work due to his claimed injury. The claimant indicated that he was not scheduled to teach during the summer months, but had his own businesses such as painting and constructing wooden sheds and metal items which he said he was unable to do because of his (date of injury), back injury. The claimant further testified that he had been paid workers' compensation benefits during the summer months of 1991 for one or more of his previous back injuries. He said he was not paid TIBS during the summer months of 1992.

According to the claimant, prior to the incident of (date of injury), he had sustained several work-related back injuries. In March 1989, he injured his back breaking up a fight at school. In May 1989, he injured his back when he fell in a hole in the schoolyard. In April 1991, he injured his back loading a welder into a truck. In (date), he injured his back picking up an object in the school work shop. In October 1991, he injured his back when a student jumped on his back. As to the October 1991 injury, the claimant wrote in a letter to the carrier that since that injury "I have had pain that will not go away," and that this was the "straw that broke the camel's back." In addition to the work-related back injuries, a medical report indicates that in November 1991, the claimant injured his back trying to get a bicycle through

a locked door at a department store.

The claimant testified that he first consulted a doctor about his injury of (date of injury), on June 4, 1992, after the end of the school term. In a medical report dated June 4, 1992, (Dr. P) noted that the claimant consulted him in regard to "Injury to Back (date of injury)," reviewed the claimant's history of prior back injuries, and noted that the claimant's back pain started in 1989 when he attempted to break up a fight at school. Dr. P said he reviewed a CAT scan dated January 10, 1992, and the scan showed "L5-S1 disc degeneration, bilateral mild L5-S1 foraminal stenosis unchanged since 1988, and small left foraminal L3-4 disc herniation unchanged since 1988." Dr. P said there was no evidence of nerve root impingement. Dr. P stated that the claimant asked him for a release from work for bed rest for the entire summer, that he, Dr. P, could not do that and gave him a release from work until June 10th. Dr. P added that the claimant could then resume work "with the previous pre-existing restrictions." In a letter dated September 1, 1992, Dr. P stated that on June 4, 1992, he diagnosed the claimant as having chronic low back pain secondary to degenerative disc disease. Dr. P said that the claimant's back pain is related to degenerative disc problems and that there is no medication or surgical treatment which will cure the claimant, and that he recommended that the claimant try to lead as active a life as possible in spite of continued back discomfort.

The claimant said he saw (Dr. S) on June 10, 1992. In a medical report dated June 24, 1992, Dr. S indicated that he saw the claimant on June 10, 1992, and indicated that the date of injury was sometime in November 1991. Dr. S diagnosed "right lumbar radiculopathy," and stated "probably disabled at least 2 months." In a letter dated September 11, 1992, which indicated a date of injury of (date of injury), Dr. S noted that in addition to seeing the claimant on June 10, 1992, he also saw the claimant on June 24 and July 15, 1992. The claimant testified that on June 24th Dr. S prescribed "bed rest" until September 1, 1992. In the letter of September 11th Dr. S stated "I do not feel that I can fully understand how such a slap could explain the present condition and in that sense I am inclined to think it is not a major contributing factor." In a report dated August 13, 1993, Dr. S wrote "At this point, I see no clear cut evidence to suggest that the patient's [claimant's] claim of injury as described in April was indeed, the straw that broke the camel's back, so to speak, and that his disability relates to that date."

In a medical report dated July 7, 1992, (Dr. B), a neurosurgeon, noted the claimant's previous back injuries and that his last injury was on "4/4/92" (sic) when a student hit the claimant in the back and the claimant had increased symptoms of low back and right leg pain. Dr. B further noted that the claimant told him that he, the claimant, was "totally paralyzed" for one day following his "initial 1989 injury." Dr. B also examined the claimant's CAT scan of January 1992 and reached the same conclusions as Dr. P. Dr. B added that there was no evidence of "surgical lesion or disk herniation" in the L5-S1 area, and diagnosed a lumbosacral strain. Dr. B further stated that the claimant was "unhappy that no one wants to operate on him, but I reassured him that he has seen a number of competent surgeons and that any of us would be most happy to operate on him if he had a surgical lesion present." Dr. B said that the claimant does not require surgery at this time. In response to a letter from

the company administering the employer's workers' compensation insurance, Dr. B indicated that he treated the claimant on July 7, 1992; that the claimant's diagnosis was lumbosacral strain; that the incident of (date of injury), did not result in the present diagnosis; and that the claimant's present condition is the result of the claimant's previous accidents or injuries.

In a medical report dated August 12, 1992, (Dr. C), a neurosurgeon, noted that he had treated the claimant in 1988; that in early 1989 the claimant developed "constant low back pain;" that in May 1989 the claimant aggravated his back condition when he fell in a hole; that the back pain increased when the claimant lifted a heavy object at school in March 1991 and that since that time the pain had "not really stopped." Dr. B said that the claimant presented for re-evaluation on August 12, 1992. After examination, Dr. C diagnosed the claimant as having "symptoms of a degenerative lumbar disk syndrome." Dr. C added that "[t]o my way of thinking, there are no indications for surgery at this time. He [claimant] has gone through all the known conservative methods without relief and at this point and time it is felt that he simply has to live around it." Dr. C does not mention the incident of (date of injury), in his report.

In a report dated August 27, 1992, (Dr. T) noted that he had treated the claimant in 1990 and 1991, and that he last saw the claimant on April 3, 1992, which was just several days before the incident on (date of injury). Dr. T said that on April 3, 1992, he diagnosed the claimant as having "mechanical back pain, probably secondary to degenerative L5-S1 disc, foraminal stenosis of L5-S1 and small HNP of L3-4." Dr. T stated that he had no knowledge of the "alleged injury of (date of injury)" and added that "[i]t sounds as if he were having substantial difficulty prior to that time." The claimant said that he did not recall seeing Dr. T on April 3, 1992.

SW, who is the risk manager for the employer, testified that the claimant is presently a full time substitute teacher because there are not enough students taking vocational courses to have a regular full time teacher position in the vocational area.

As previously noted, the hearing officer concluded that the claimant's current back problems are not related to the "back slap incident" of (date of injury); that the claimant has not had disability related to the incident of (date of injury); and that the claimant is not due TIBS.

Having reviewed the record, we conclude that the hearing officer's findings, conclusions, and decision are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951). The medical opinions provide ample support to conclude that the claimant's back problems and any inability to obtain and retain employment do not stem from the (date of injury), incident as alleged by the claimant. *See* Director, State Employees Workers' Compensation Division v. Wade, 788 S.W.2d 131 (Tex. App.-Beaumont 1990, writ denied); Evans v. Casualty Reciprocal Exchange, 579 S.W.2d 353 (Tex. Civ. App.-Amarillo 1979, writ ref'd n.r.e.); Ledesma v. Texas Employers Insurance Association, 795 S.W.2d 337 (Tex. App.-Beaumont 1990, no writ); and

Texas Workers' Compensation Commission Appeal No. 91085A, decided January 3, 1992. Pursuant to Section 410.165, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. As an interested witness, the claimant's testimony only raises an issue of fact for the hearing officer and the hearing officer is not required to accept the claimant's testimony at face value. Bullard v. Universal Underwriters Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). The hearing officer resolves conflicts and inconsistencies in the evidence, including the expert medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

In his appeal, the claimant appears to assert that the hearing officer erred in not allowing in evidence a medical report of a (Dr. D). From our review of the record, we find that no report of Dr. D was ever offered by either party and that all exhibits tendered by the claimant were admitted into evidence. Thus, we find no merit in this contention.

The claimant also contends on appeal that the employer failed to comply with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) relating to notice of refused or disputed claim. We find no merit in the claimant's contention because there was no disputed issue at the benefit review conference or at the contested case hearing concerning failure to comply with the requirements regarding giving notice of a refused or disputed claim, thus, such issue will not be determined for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991; and Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge