APPEAL NO. 93855

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. art 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on August 27, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant's (claimant) current back condition did not arise out of a compensable injury he sustained on (date of injury), that he had disability from the (date of injury), injury until August 10, 1992, that he reached maximum medical improvement (MMI) on August 1, 1992, with a 10% impairment rating (IR) and that he did not timely dispute his certification of MMI and IR rendered by his treating doctor. Claimant appeals urging that the respondent (carrier) did not prove that his current back condition is different from the (date of injury), injury to his back, that the impairment rating is not a good impairment rating and, that he did not understand the 90 days he had to dispute the rating and now wishes he had. The carrier urges that there is sufficient evidence to support the hearing officer's determinations and asks that the decision be affirmed.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

The hearing officer fairly and adequately set forth the evidence in this case in his Decision And Order, and it is adopted. Very briefly, the evidence established that the claimant suffered a back injury sometime in early November 1991 while moving a refrigerator. He subsequently injured his back on (date of injury), while lifting a lawn mower. His treating doctor was (Dr. G) who performed a hemilaminectomy on the claimant on June 11, 1992. Dr. G filed a Report of Medical Evaluation (TWCC-69) which certified that the claimant reached MMI effective August 1, 1992, with a 10% IR. He also returned the claimant to full work status effective August 1, 1992, (subsequently extended to August 10th) and the claimant worked until terminated in December 1992. The claimant was advised of the certification of MMI and the IR sometime around the 13th of August 1992 in a letter from the carrier's representative which fully advised him of the certification and rating and the impact, that he could dispute these matters, that he had 90 days to do so, and who to contact (including the Commission) if he had any questions. According to the claimant's testimony and other evidence, he did not indicate a dispute of the certification or rating until sometime after he was terminated in December 1992. The medical records indicated that he was experiencing some back pain between the time he was returned to duty and when he was terminated in December 1992. The evidence also indicates that he did not have any doctors' appointments from December 7,1992, until (date). He later secured employment elsewhere and was working with that employer on (date). On that date, while at home and while bending over to tie his shoe, he sneezed or coughed and felt the same type of pain in his back that he felt after he was injured on (date of injury). He saw Dr. G who subsequently performed a second surgery on his back. The claimant seeks medical benefits and temporary income benefits from (date), his position being that he did not sustain a new injury on April 14th, rather it related to his (date of injury), injury. A June 14, 1993, letter from Dr. G states:

It is my opinion that (claimant's) present condition is a reaggravation of his original injury of (date of injury). According to the history that this patient gave me, his present episode of pain began with a simple bending over to tie his shoe and coughing which created a recurrence of the same type pain that he had had with his original disc herniation in 1992. Radiographic evaluation confirmed that his problem was at the same level as his previous disc herniation and therefore, in my opinion, constitutes a reaggravation of the pre-existing condition and does not constitute a new injury.

A statement from a (Dr. B) who had rendered a second opinion regarding the second surgery indicated:

Without some definite documentation, it would be almost impossible to determine whether or not the initial injury which the patient states is the causal injury for the surgery was influenced by the subsequent insult. Either, both or a combination of the two could have been responsible for the patient's ultimate symptomatology and subsequent surgical treatment.

The evidence is clearly sufficient to support the hearing officer's determination that the claimant had been certified by his treating doctor as having reached MMI on August 1, 1992, with a 10% IR resulting from his compensable injury of (date of injury). The evidence is also sufficient to establish that the claimant failed to dispute this first certification by his treating doctor of MMI or IR within 90 days as required by Tex. W. C. Comm'n, 28 TEX. ADMIN CODE § 130.5(c) (TWCC Rule 130.5(e)). The crux of the case concerns the evidentiary sufficiency and support for the hearing officer's determination that the claimant reinjured himself on (date), and that such reinjury was unrelated for workers' compensation purposes to his compensable injury of (date of injury), the claimant thereby not qualifying for benefits under the 1989 Act. These were factual matters for the decision of the fact finder (*See* Texas Workers' Compensation Commission Appeal No. 93577, decided August 18, 1993) and, if there was sufficient evidence to support his determinations, they are upheld even if different inferences and conclusions could reasonable be drawn from the evidence before him. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ.App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 93422, decided July 12, 1993. In evaluating the evidence, he resolves conflicts and inconsistencies, including any conflict in medical evidence. *See* Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.- Houston [14th Dist] 1984, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). Although Dr. G's letter of June 14, 1993, supported the causal relationship between the injuries, Dr. B's statement cast doubt on the possibility of definitively connecting the two. And, the other evidence before the hearing officer supports the substance of his findings and conclusions that the claimant's current back condition is the result of a lower back injury unconnected for workers' compensation purposes with his compensable injury of (date of injury). In this regard, and although not itself

controlling, there was a lengthy period of time between the two injuries--some 11 months. During that period of time, the claimant was able to return to work, had been certified as having reached MMI, obtained another job after being terminated in December, did not have any doctor appointments from December 7, 1992, until after the second, shoe tying, injury on (date), and indicated that he was having no problems and that he was "doing fine" prior to the shoe tying incident. This evidence was sufficient for the hearing officer's determination that the claimant reinjured himself on (date), and that such reinjury was unrelated to his compensable injury of (date of injury). *See* Texas Workers' Compensation Commission Appeal No. 93632, decided September 9, 1993; Texas Workers' Compensation Commission Appeal No. 92322, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 93767, decided October 8, 1993; Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1992. While there was some evidence that the claimant did continue to have some pain after returning to work in August 1992, we have held that some lingering pain may be anticipated even after MMI is reached but that such does not mean that MMI has not been reached. Texas Workers' Compensation Commission Appeal No. 92695, decided January 22, 1993. Considering the record as a whole, there is sufficient evidence to support the decision of the hearing officer. The decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge