APPEAL NO. 93909

This appeal arises under 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*.). On July 19, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer). presiding as hearing officer. The record was closed on August 13, 1993. The issues announced and agreed upon at the CCH were:

1.Was the Claimant injured in the course and scope of his employment with (employer), the Employer, on (date of injury)?

2.Was the stroke the Claimant had on (date of injury), related to the injury, if any, he sustained on (date of injury)?

3.Did the Claimant give the Employer timely notice of any (date of injury), injury?

4.If the Claimant failed to give timely notice to the employer, was there good cause for his failing to do so, or, alternatively, did the Employer have actual knowledge of any such injury within the required time period?

5.What period of disability, if any, has the Claimant had as a result of any injury sustained on (date of injury)?

The hearing officer determined that the claimant sustained an injury in the course and scope of his employment on (date of injury), that this injury caused a stroke on (date of injury), that claimant gave timely notice to the employer and regardless had good cause for failing to give such notice until February 2, 1993, and that the claimant has had disability since (date of injury). Appellant, carrier herein, alleges eight "points of error" on the part of the hearing officer, which can generally be broken down as insufficiency of the evidence that an accident occurred on (date of injury), that even if an injury had occurred on (date of injury) it did not cause claimant's stroke, that the employer had not received timely notice, that the claimant did not have good cause for failing to give timely notice. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds to each of the carrier's allegations of error and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

At the outset, we note this case revolves entirely around the credibility of the witnesses (some ten in number testified at the CCH) and which version of the events one chooses to believe. The hearing officer obviously gave the matter considerable thought in that he has over three pages of Statement of Evidence and another page and a half of discussion. We find the recitation of the evidence to be a fair and accurate statement and adopt it for purposes of this decision.

Briefly by way of background, claimant was a millwright/iron worker for (employer)., the employer which was apparently a subcontractor engaged in a "shut down" of a portion of a large refinery. Claimant testified sometime in the early morning hours (claimant worked a night shift 7:00 p.m. to 7:00 a.m.) of (date of injury) (all dates are for (month year) and the months following unless otherwise noted) while attempting to "hot bolt" a flange on a pipe, the pipe broke free (because two other bolts had been removed unbeknown to the claimant), fell two or three feet and struck claimant on the left side of his neck. Claimant testified that the pipe weighed between 150 to 200 pounds and that two other employees were working on the pipe close by. The two coworkers were identified as (RM) and (BB). Claimant testified both RM and BB came over and asked if he was alright. Claimant also testified he told (CC), the lead man, to report the accident in case it was necessary for claimant to miss work. Claimant testified that a short time later (DP), the night foreman, also inquired about the accident. Claimant testified that he did not believe himself seriously injured and said he was O.K. No one believed the accident to be serious and, according to claimant's theory, the accident was not reported because of the employer's recent policy of discouraging reporting of minor injuries. Claimant testified that he worked the next day even though he didn't feel well. Claimant also testified that he again went to work the following day and while working the early morning hours of (date), he became dizzy, hot and his "right leg and arm was gone." Claimant testified that (SR), another coworker, was close by when this happened. An ambulance was called, claimant was taken to a local hospital where tests were run and it was determined claimant had suffered a stroke. Claimant was then transferred to (H Hospital) where he remained until his discharge on December 23rd to rest up for surgery. It was claimant's testimony that it was not until (Dr. KL), the operating surgeon at the (VA Hospital), asked claimant about a history of trauma to the left side of his neck after a January 27th, angiogram that claimant recalled the pipe incident. On January 29th, surgery was performed at the VA Hospital to remove a blood clot from claimant's left carotid artery. Claimant testified both (Dr. L) at H Hospital and Dr. KL had asked him if he had sustained trauma to his neck suggesting there might be some relationship between the pipe incident and the stroke.

Carrier strenuously denies the pipe incident of (date of injury) ever occurred and cites that three of claimant's alleged witnesses (coworkers RM and BB as well as lead man CC) have submitted sworn affidavits denying knowledge of the incident. Those affidavits, plus the affidavit of DP, the foreman all state identically:

> Mr. Lovett's statements are untrue because I am not aware of a pipe ever striking any part of Mr. L's body at any time, and <u>did not</u> witness him being struck on the neck with a pipe on (date of injury).

The affidavits all had virtually identical handwritten notes attached which stated:

I _____ was not aware of any piece of pipe striking NL in the Neck.

Claimant questioned the identical wording of the affidavits and the hearing officer commented regarding "the employer's assistance to the carrier in `organizing' evidence . . .

." Claimant's coworker BB, the lead man CC, and the foreman DP, all testified at the CCH and denied any knowledge of the pipe incident. CC denied he had been asked to report the incident. Claimant countered this evidence by a note from (TL) who was RM's roommate, stating RM had told him, TL, about claimant's being hit by the pipe. (CG), a former coworker, also testified that both BB and RM had discussed the accident. CG further testified that RM had told him that minor injuries were not to be reported because the employer "was over our limit." (MC) testified that he had seen BB at a concert and that BB had mentioned claimant's accident. BB conceded he saw MC at the concert but denies saying anything about claimant's accident. Carrier introduced testimony from (JWC), employer's site safety director, and (BD), employer's corporate safety director, adamantly denying there was a policy that accidents were not to be reported. DP, the foreman, CC, the lead man and BB, claimant's coworker, all steadfastly deny having been coerced or otherwise told to testify untruthfully. There was other contradictory, disputed or inconsistent evidence regarding the time sheet for the night in question, JWC, the safety director's conversation with claimant's wife, whether claimant had complained of chest pains prior to his stroke, whether claimant smoked only a half or one and a half packs of cigarettes a day and various other details.

The medical evidence from the local hospital was "mild right-sided weakness and significant expressive aphasia." Tests revealed a "left carotid occlusion" but the radiologist was unable to determine whether it was "internal or external carotid." Claimant was transferred to H Hospital where his admitting diagnosis recited the occlusion of either the left internal or external carotid artery. There was an impression of "left cerebral dysfunction" with "etiology is likely embolic." An MRI was performed on December 16th, and an aortagram/angiogram on December 17th, and it was determined that claimant had "99% occlusion of origin of the left internal carotid artery with `string sign.'" Claimant was stabilized and discharged on December 23rd to rest up for required surgery. On January 24th claimant was admitted to the (in Houston). Dr. KL, a neurosurgeon performed a left carotid endarterectomy on January 29th and he was discharged on January 31st. Dr. KL, in a March 8th letter, stated that "Angiographic evaluation at the VA in January revealed a severe stenosis in the carotid artery. As this was the only vascular abnormality seen I asked the patient about a history of trauma to the left neck." Claimant continued out-patient therapy at the VA Hospital due to brain damage from the stroke, including speech deficit and reduced cognitive ability. At a benefit review conference on April 6th, the benefit review officer determined that the claimant should be examined by an agency (Texas Workers' Compensation Commission (Commission)) appointed doctor to determine causation. Claimant was subsequently examined by (Dr. B), a neurosurgeon on May 3rd. Dr. B rendered two reports, both dated May 3rd, one of which was apparently done before the doctor had an opportunity to review all the medical records. In the first May 3rd report Dr. B states, "[a]t this time, I cannot say if indeed the alleged accident had any etiological factor relative to his stroke, however, it appears that it probably was not related but I really must review his records and studies before I do so." In the second report Dr. B states:

In short, were this gentleman to have had a significant injury to the left carotid artery at the bifurcation at the time that he alleged the incident to have happened, I

would have thought that more than likely he would have had a dissection. Dissections seem to be more frequent with blunt trauma than with occlusive diseases on an arteriosclerotic basis.

Though not certain, the statistical evidence is that this patient's stroke occurred independent of the alleged injury though I can't be one hundred percent sure.

Claimant apparently sought out his own expert medical witness, a (Dr. F) who purported to be a board certified vascular surgeon and Assistant Professor of Surgery at (college) in (City). Dr. F, in a brief report dated May 14th, reviewed claimant's course of treatment based on the records. Dr. F concluded:

Internal carotid artery occlusion and stroke secondary to blunt cervical trauma has been well described. It is my opinion that the stroke sustained by [claimant] was a direct result of the blunt cervical trauma which he sustained. Of course, he does have an elevated serum cholesterol and is a tobacco user. These risk factors along with maleness contribute to the formation of atherosclerosis, which is evident on the arteriogram which you provided. Although this complicates the picture somewhat, there is no evidence of hemodynamically significant stenosis of any other extra cranial vessel visualized on either the carotid arteriogram or the arch aortagram. Therefore, I believe that the most likely clinical scenario is that this patient sustained blunt trauma to the internal carotid artery which resulted in left hemispheric stroke.

Carrier objects to Dr. F's report on the basis there was "no proof . . . that (Dr. F) really exists" and that Dr. F's letter ". . . while obviously hearsay, never unequivocally states that the stroke was a direct result of the injury . . . ." We would note in passing that Dr. F, on the face of his report, states he is board certified and an assistant professor of surgery at Cornell. Carrier has failed to challenge these assertions with any probative evidence.

The hearing officer carefully reviewed the evidence as set forth in his discussion, and specifically found that claimant had been hit in the neck by a pipe, that DP, the foreman, was informed of the injury, that the injury caused a 99% occlusion of claimant's left carotid artery which in turn caused the stroke on (date), that claimant was unaware of the correlation between the pipe injury and his stroke until Dr. KL discussed the results of the angiograms with claimant on January 27th, and that claimant notified the employer's safety director that the pipe accident had caused the stroke on February 2nd, two days after claimant was released from the hospital.

Carrier assigns as error each finding and conclusion with which it disagrees. The allegations of error can generally be consolidated into four contentions: 1) Carrier contests that the pipe incident of (date of injury) ever occurred, citing testimony and affidavits contrary to claimant's contention; 2) that the medical evidence is insufficient to establish causation between the alleged injury and the stroke and therefore the hearing officer's decision on this point is against the great weight and preponderance of the evidence; 3) that claimant

failed to give notice of "an injury" to someone in a supervisory or management position in that by claimant's own testimony he stated he was "O.K." and not injured; and 4) that claimant knew or should have known that the alleged trauma to his neck, if it existed, was related to the stroke when Dr. L, at H Hospital, asked about trauma to the neck on (date). Carrier contends this "conclusively establishes that claimant was informed by (Dr. L) of a possible relationship between his stroke and injury to his neck and the untimely notice of injury was not filed until February 15th.

All of carrier's contentions revolve around the believability of various testimony. As claimant points out in his response brief, the hearing officer is the sole judge of the relevancy and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a) (formerly Article 8308-6.34(e)). The hearing officer, in this case, had the advantage of seeing the witnesses, observing their demeanor and listening to their testimony. Some ten witnesses testified, including the claimant and some key witnesses for the carrier, such as DP, the foreman, CC, the lead man and BB, one of the coworkers who allegedly witnessed the accident.

Regarding carrier's first contention that the accident of (date of injury) did not happen, carrier cites that claimant listed four witnesses to the accident but those witnesses have denied the accident occurred. Three of the witnesses, RM, a coworker, BB, another coworker and CC, the lead man, "all stated under oath (either by affidavit or live testimony) that they were not aware of a pipe striking (claimant)." Carrier cites testimony that there were "no 3" pipes," of the type claimant said he was working on, in the area, as additional evidence claimant was not injured as he testified. Claimant countered by pointing out that witnesses no longer employed by the employer, and who presumably have no stake in the outcome, those witnesses being CG, a former coworker with claimant on (date of injury), as well as SR and MC, testified that BB and RM had discussed claimant's accident with various individuals shortly after it occurred. Further, CG testified that it was employer's admonition not to report minor work related injuries because the employer was "over the limit." Claimant also stresses the fact that all of the carrier's affidavits were prepared by carrier's attorney and were identical. The hearing officer discusses this evidence in some detail in the discussion portion of the decision by stating:

> Had the Claimant to depend only on the testimony of clearly interested persons (i.e., his wife and himself) regarding an injury on (date of injury), it is unlikely he could sustain his burden. However, in this case one must consider not only that evidence and the Carrier's evidence to the contrary, but also the additional evidence from the Claimant that there were at least four other employees to whom one or more of the Carrier's witnesses mentioned that the Claimant had hurt his neck when and where he said he did. Since none of the documentary evidence has been given a great deal of weight . . ., the credibility of witnesses is determinative. And while no particular weight has been given the Employer's assistance to the Carrier in "organizing" evidence by having [RM], [CC], [BB] and [DP] give handwritten statements and subsequent affidavits, the lack of detail and the circumstances regarding

[RM's] participation in that effort compromise the probative value of his statement and affidavit.

Clearly the hearing officer considered and weighed all the evidence presented. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Corroboration of an injury is not required, and may be found, based upon a claimant's testimony alone. Gee v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). However, to this end, the hearing officer has the responsibility to resolve conflicts and inconsistencies in the testimony. Garza v. Commercial Insurance Company 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 any witness. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer's determinations on this point are supported by sufficient evidence.

Carrier's second contention is that there is insufficient evidence to conclude that the stroke was related to the (date of injury) injury, if any. Carrier relies almost exclusively on the two reports of Dr. B, who carrier emphasizes was appointed by the Commission to examine claimant. Carrier dismisses Dr. F's report, apparently primarily, because he is from out-of-state. Claimant counters by testimony that Dr. B's examination was cursory and "unfair," that Dr. B's report was made to the carrier rather than the Commission, and that Dr. B's report was based on statistics. The hearing officer apparently finds the causal connection "less troublesome," relies heavily on Dr. F's report and notes that "[Dr. B], quite candidly, admitted he wasn't sure (about the causal connection)." We further note that although neither Dr. L or Dr. KL gave a specific opinion on causation they both intimated there might be a connection with a blunt trauma injury, particularly as noted by Dr. KL, that the severe stenosis of the left carotid artery "was the only vascular abnormality seen . . . ." Again the hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer's finding on this point is supported by sufficient evidence in the form of Dr. F's and Dr. KL's reports.

Carrier's third contention of error based on finding timely notice and/or actual knowledge by the foreman, DP. Carrier emphasizes the testimony of DP denying any report or knowledge of the pipe injury. Carrier alleges even if DP had known of the accident, claimant by his own admission denied at the time, that he had been injured. Carrier again cites the testimony of CC, the lead man and BB. Carrier also cites Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992, for the proposition that "It is not enough that an employer witness even a dramatic incident on the job" but that the employer must receive notice of the injury. We disagree that Appeal No. 92037 stands for that proposition and distinguish Appeal No. 92037 from this case. Appeal No. 92037 involved trivialization after one employee fell on another and the Appeals Panel discussed DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The hearing officer in Appeal No. 92037 made a finding that the employer had no knowledge of

a claimed injury and based on the hearing officer's statements and decision ". . . we conclude that the hearing officer made an implied finding that the employer did not have actual knowledge of the alleged injury. Burnett v. Motyka, 610 S.W.2d 735 (Tex. 1980) . . . ." The claimant, in the instant case, concedes DP denied knowledge of the accident but characterizes DP as "a biased witness." Claimant in his response emphasizes his testimony that he asked DP (or perhaps CC the lead man), to report the incident to the safety man in the event claimant could not make it to work the following day. The hearing officer in his discussion concludes:

> . . . that while the Claimant did not report the injury within the required 30 days (since [CC's] authority is undetermined), his foreman had actual knowledge of the injury on the 10th and, regardless, Claimant had good cause for failing to notify the Employer since it was not until his conversation with [Dr. KL] after his January 27th angiograms that he could have been aware of the relationship between the accident and the stroke.

As previously noted the hearing officer is the sole judge of the credibility and weight to be given the evidence and may believe all, part or none of the testimony of any witness. *See also* Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, no writ). The hearing officer here apparently believed claimant had reported the accident to CC, as claimant alleged, but because of CC's authority was undetermined, claimant also had good cause for not reporting the accident until after he got out of the hospital after his surgery.

Lastly, carrier alleges that claimant knew or should have known the pipe incident was related to the stroke when Dr. L, at H Hospital asked him about a trauma on (date), the day of admission. Carrier argues the evidence ". . . conclusively establishes that claimant was informed by (Dr. L) of a possible relationship between his stroke and an injury to his neck in (month year)." Claimant responds that at the time of admission to H Hospital he had just suffered a stroke, was unable to communicate clearly and ". . . did not understand the term `trauma' at that time." Claimant's position was that he did not understand that there was a relationship between the pipe incident and the stroke until Dr. KL sat down with him on January 27th, ". . . and explained to him that a blunt trauma . . . could cause a stroke . . . ." The hearing officer does not specifically discuss this point but does make a finding that claimant ". . . was unaware of the correlation between his injury of (date of injury), and his stroke of (date of injury), until after (Dr. KL) discussed with him the results of angiograms done on January 27, 1993." There is sufficient evidence to support that determination based on claimant's testimony.

When reviewing a hearing officer's decision based on sufficiency of the evidence, we will reverse such a decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). Having reviewed the evidence, we believe there was sufficient credible evidence to support the hearing officer's decision and accordingly the decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge