APPEAL NO. 93938

Pursuant to 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*.), a contested case hearing was held in (city), Texas, on September 15, 1993, (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) did not injure his low back in an on-the-job accident of (date of injury). Claimant disagrees with several of the hearing officer's findings of fact, urges that the claimant met his burden of proof in establishing that his low back problems are related to an accident of (date of injury), and, newly on appeal, argues that the respondent (carrier) did not meet its burden of establishing that it had controverted the back injury within the 60 day required period. Carrier responds that the issue in the case was one of fact, that there is sufficient evidence to support the hearing officer's decision, and that no issue of timely controversion was ever raised (or waived by the carrier) and, further, that it cannot be raised for the first time on appeal.

DECISION

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

The facts of the case are fairly and adequately set out in the Decision and Order of the hearing officer and are adopted for purposes of this decision. Very briefly, the claimant was involved in a rear end collision in his truck while working for the employer on (date of injury). He continued working as a pipe draftsman, although he experienced progressively worse pain, until he was terminated on October 2, 1991, according to his testimony, because of his physical condition. In any event, he was subsequently diagnosed with two herniated discs in the cervical area, the compensability of which was not contested. A laminectomy was performed on the claimant on November 5, 1991 by a (Dr. R). Although the claimant testified that he had some "on and off" pain in his low back since November 1991, and that he mentioned it during the course of his lengthy medical treatment, nothing is recorded in any medical or physical therapy report concerning any pain or problem with the low back until January 1993, some 18 months after the accident. The MRI of his lower back in April 1993 showed a herniated disc and spondylosis at L5-S1. Dr. R related the low back condition to the (date of injury) incident thusly:

> When you asked whether or not I felt that your initial injury at the time of your automobile accident could have caused the low back pain, I answered by saying that if you have been having problems off and on since that time, it would be reasonable to assume that at least, if it was not the cause, it aggravated this.

(Dr. H) examined the claimant for the carrier on July 2, 1993. His report indicated that the claimant told him that he awoke with pain in his low back and left leg in January and that the pain had been almost continuous thereafter. Dr. H stated that the claimant did not begin having complaints related to the lower back or limb until seven months (it isn't clear if this should have actually reflected a year and seven months) after the motor vehicle accident

and "this lengthy interval removes any possible cause and effect relation."

The claimant testified that Dr. H's interview and exam were not thorough. He also testified that he has not returned to work since his termination, that he is not able to do various sporting activities as he could before, and that he had not sustained any other trauma to his lower back.

In discussing the evidence and her evaluation of the case, the hearing officer stated:

> The claimant did not prove by a preponderance of the evidence that his low back condition was causally connected to the (date of injury) accident. He engaged in strenuous lower body activities at work for more that three months after the accident, without experiencing any low back pain. After his laminectomy in November 1991, he walked two miles a day without experiencing any low back pain. All his physical therapy focused on his neck and arms. No medical report notes a complaint of low back pain until January 1993, more than 18 months after the accident. He argued that the pain medication he was taking masked his low back pain, but the evidence showed that the same medication failed to relieve his neck, shoulder, and arm pain. Finally, Dr. R's opinion on causal connection was conditioned on the existence of low back pain "off and on since" the accident.

The claimant disagrees with the findings of fact which limits the injury to the cervical spine and which states that he first mentioned the low back pain to his treating doctor in January 1993. Flowing from these findings, the claimant disagrees with the conclusion that his low back problems are not related to the compensable injury of (date of injury). As indicated above, our review of the evidence leads us to conclude that it is sufficient to support the hearing officer's findings and conclusion. It is apparent that the hearing officer did not give full credence to the claimant's testimony. A claimant's testimony as that of an interest witness only raises a factual question for the fact finder. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The fact finder can believe all, part, or none of the testimony of a given witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Under the 1989 Act, 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). We do not substitute our judgment for that of the fact finder even if the evidence would support a different result. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620, (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will not disturb such decision unless it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986): Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

Whether the claimant sustained a low back injury on (date of injury) when he sustained a neck and shoulder injury or whether there was any casual connection between

his low back condition and the (date of injury) incident was a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92617, decided January 12, 1993; *see also* Texas Workers' Compensation Commission Appeal No. 93672, decided September 16, 1993. We have previously affirmed hearing officer's decisions which questioned the causation of a particular injury which was not recorded by any doctor for an extended period of time. Texas Workers' Compensation Commission Appeal No. 92326, decided August 28, 1992; Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993. The hearing officer, with sufficient evidence supporting her findings and rationale, applied the law correctly.

As a general rule, issues not raised below will not be considered for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 93697, decided September 23, 1993; Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992; Texas Workers' Compensation Commission Appeal No. 91100 decided January 22, 1992. The claimant assert in his request for review that the carrier did not timely controvert the back injury within 60 days. Without deciding whether an issue of timely contesting the compensability of a low back injury could be reasonably presented under the particular facts of this case, we determine the issue is not properly before us not having been raised below. Appeal No. 93697, *supra*.

For the reason set forth above, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge