APPEAL NO. 93941

At a contested case hearing held in (city), Texas, on September 16, 1993, the hearing officer, (hearing officer), took evidence on disputed issues concerning whether the appellant (claimant) injured his back through repetitious physical trauma and, if so, the date of injury; whether claimant timely reported a repetitious physical trauma injury to (employer); whether claimant has or had disability as a result of repetitious trauma to his back; and the amount of his average weekly wage (AWW). Since the hearing was consolidated with that on another claim of claimant's for a knee injury (Docket No.), evidence was taken on that claim as well. The hearing officer made certain factual findings and concluded that while claimant did timely report his alleged work-related back injury to employer, he did not sustain a work-related back injury in 1992 or 1993 while working for the employer, and did not have disability (defined in the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011(16) (1989 Act) (formerly V.A.C.S., Article 8308-1.03(16)). The parties agreed on claimant's AWW. The claimant's request for review challenges the sufficiency of the evidence to support three findings of fact and the adverse conclusions of law concerning the work-related injury and disability. In its response, the respondent (carrier) asserts the sufficiency of the evidence to support the challenged findings and conclusions and seeks affirmance of the hearing officer's decision.

DECISION

The evidence being sufficient to support the challenged findings and conclusions, we affirm.

Although the claimant resided in (city), Texas, at the time of the injury, the parties waived any objection based on venue and agreed to the hearing being held in (city) for the claimant's convenience.

The Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), signed by claimant and his attorney on "(date of injury)," described the nature of claimant's injury as "extreme pain in neck and back - muscle spasms," stated the date of injury as "late June 1992," and described the accident as follows: "Twisted back when stepped off ladder. Extended working overhead and off balance on ladder." Claimant did not appeal from Finding of Fact No. 5 that "[t]he Claimant stated on a TWCC-41 that he had a repetitious trauma injury to his back in late June of 1992."

Claimant, who conceded that his recall of dates was poor, testified that in January 1992 he commenced working for employer who operated a number of mobile home parks. His duties consisted, for the most part, of sandblasting the exterior and painting the exterior and interior of mobile homes as a part of their refurbishment. He said that when he painted the interiors he had to stand on the rung of a ladder and reach above his head to paint the ceilings, some of which were vaulted. It was his contention that he did a great deal of such overhead work throughout 1992 and that this particular work resulted in his sustaining a repetitious trauma injury to his back which he described as intermittent pain and muscle tightness from "the bottom of my feet to the top of my head." Despite the reference to a

specific accident in his TWCC-41, which, incidentally, claimant said at one point he did not understand, claimant's theory was that he sustained a repetitious trauma injury to his back from all the overhead painting while standing on a ladder. He said he was aware that painters commonly experienced "aches and pains" at the end of a day's work but maintained that as the year progressed, his back pain became progressively worse and that by sometime just before 1993 or in early to mid-January 1993, his back condition had become so bad he realized he had an injury, as distinguished from the usual aches and pains, and that he could not work.

Claimant testified, variously, that the overhead work consisted of about "90%" of his work, that he supervised (Mr. U) whom he had do most of the overhead work, and that he still had to stand on the ladder and reach out with his arms extended to paint. Claimant also testified to having sustained a knee injury in early August 1992 when he stepped off a ladder and into a hole. He said he was off work for some time in September for personal matters and that he had knee surgery in October. He agreed he was off work for his knee problem from October 1 through November 30, 1992, that he returned to work in December, and that sometime in January 1993 he was off work again for some time for knee treatment. He stated that his employment was terminated on February 16, 1993, for reasons unrelated to his claimed injuries, and that he has not since worked because his condition prevents his working.

Claimant indicated that in June or July 1992 he told his brother, (Mr. W), who was the supervisor of the employer's maintenance department, of his back problems. He testified that he also told (Mr. S), employer's chief operating officer, and, employer's general manager, in that same period, as well as in January 1993, but that his complaints fell on deaf ears. Mr. W testified that claimant began to have problems with his back in June or July 1992 "from all the overhead work" and that such problems continued to the time of claimant's termination. Mr. W also said that at about that same time (June or July 1992) he mentioned claimant's back problem to Mr. S but that Mr. S did not want to hear about it. He said he mentioned it to Mr. S and to Ms. T several times. Mr. S testified that the first he knew of claimant's having a back injury was in January 1993 when he was called by Ms. T, and that there had been no prior discussions of such an injury with either claimant or Mr. W. Ms. T testified that claimant never did tell her he had a back injury, that she was unaware of any back problem until some time in January 1993 when claimant returned to the doctor for knee treatment and the doctor's report indicated claimant had back muscle spasm. Claimant was then authorized treatment for that condition as well. The claimant, curiously, challenged Finding of Fact No. 6 which stated that "[t]he Claimant advised his brother [Mr. W] that he was having work-related back problems in July of 1992." This finding was clearly favorable to claimant on the disputed issue of timely notice of injury and was sufficiently supported by the evidence. Further, the hearing officer concluded in Conclusion of Law No. 3 that "[t]he Claimant timely reported his alleged work-related injury to his Employer." Accordingly, the asserted error concerning Finding of Fact No. 6 is without merit.

An Initial Medical Report (TWCC-61) of (Dr. H), dated January 27, 1993, stated a diagnosis of "post surgery - right knee," as well as "muscle strain and spasm - neck & upper

back" for which claimant was treated with muscle stretching exercises and an anti-inflammatory medication. The history portion of the TWCC-61 referenced claimant's having stepped off a ladder into a hole on July 22, 1992, twisting his knee. The report also stated that claimant said he also twisted his back and that his "back has hurt off and on." Dr. H also stated that claimant could resume painting on January 28th for four hours per day and that if his symptoms did not recur after two or three days he could increase his painting to eight hour days. On February 2, 1993, Dr. H recommended against "overhead work" since claimant had felt good the previous day but complained of his neck and back tightening up again that day after overhead painting, and he took claimant off work until February 8th. On February 10, 1992, Dr. H stated he could not understand the severity of claimant's back pain and recommended an orthopedic consultation. Claimant's x-ray report of February 10th indicated that he was 45 years of age and had mild degenerative changes in his lumbar spine and questioned spondylosis and disc narrowing at C5-6. According to his records, claimant moved from (city) to (city) in March 1993.

A report from (Dr. H), dated (date of injury), stated that claimant re-injured an old injury to his right knee on August 5, 1992, when he stepped off a ladder at work and that "[h]e injured his neck and lower back when this incident occurred." This report also stated that cervical and lumbar x-rays showed cervical spine straightening due to muscle spasms, lumbar scoliosis not related to this injury, and early ankylosing spondylitis of both sacroiliac joints, "possibly due to (or aggravated by) the `fall' in August of 1992." Among the hearing officer's factual findings was Finding of Fact No. 3 that "[t]he Claimant did not injure his back while working for the Employer when he stepped off a ladder in June, July, or August of 1992." Claimant did not challenge this finding on appeal and, as previously noted, asserted throughout the hearing that his back injury was a repetitious trauma injury which occurred over a period of time.

The other factual findings and legal conclusions specifically challenged by claimant are as follows:

FINDINGS OF FACT

4.The Claimant did not injure his back by the repetitious trauma involved in working overhead for the Employer at any time in 1992 or 1993.

7.The Claimant's back problems have not caused him to be unable to obtain and retain employment at wages equivalent to his preinjury wages.

CONCLUSIONS OF LAW

2.The Claimant did not sustain a work-related back injury in 1992 or 1993 while working for the Employer.

4.The claimant has not had disability based on his alleged work-related back injury.

Section 410.165(a) provides that the hearing officer, the trier of fact at the contested

case hearing, is the sole judge of the relevance and materiality of the evidence offered as well as of the weight and credibility it is to be given. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. 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 a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers Compensation Commission Appeal No. 91083, decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ).

The evidence on both the sustaining of a repetitious trauma back injury at work and claimant's having disability was in conflict. The hearing officer could consider that claimant said that at some point when his back began hurting he had Mr. U perform most of the overhead painting, as well as the evidence that claimant did not work for a portion of September nor in October and November 1992. We do not view the conflicting evidence as constituting the great weight of the evidence against either of these challenged findings. Further, with regard to the disability issue, we have previously stated that "a finding of a compensable injury is a threshold issue and a prerequisite to consideration of the issue of income benefits and disability." Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992.

We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

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

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge