APPEAL NO. 93951

This appeal arises under 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 September 23, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues to be determined at the CCH were:

1. Whether the Claimant, AJ, sustained a compensable injury on or about (date of injury).

2. Whether the Claimant, AJ, had disability from February 5, 1993, to present.

3. Did the Carrier timely dispute the claim of compensation for an injury of (date of injury)?

The hearing officer determined that claimant sustained a compensable injury to his neck, by virtue of aggravating a pre-existing neck condition, in the course and scope of employment on (date of injury), that claimant had disability beginning February 5, 1993, ". . . and has not ended as of the date of this hearing . . ." and that carrier had timely contested compensability.

Appellant, carrier herein, disputes the hearing officer's decision as being erroneous principally on the basis of sufficiency of the evidence, and requests that we reverse the hearing officer's decision. Respondent, claimant herein, did not file a response.

DECISION

The decision of the hearing officer is affirmed.

Claimant was employed as a heavy equipment operator by (employer), the employer, and had been so employed for several years. Claimant testified that on (date of injury), shortly before lunch, while operating a D-10 bulldozer, pushing boulders, he was pushing and backing when "the track fell in a hole about two or three foot and fell to the right and popped my neck." Claimant testified that he almost "blacked out" but after resting a few minutes he continued to work until lunch time. Claimant testified that a coworker "seen it when it happened." At lunch time, claimant said that he told his supervisor, (Mr. H), about the incident and that the right side of his neck was hurting. Both claimant and Mr. H agree that Mr. H then called the safety manager, (Mr. G), who came to the job site and asked claimant what happened. Claimant testified that he declined to go to the hospital, continued working that day and the next day, a Friday. Claimant testified his neck continued to bother him. On the following Wednesday claimant said he told his employer "that my neck was hurt" and that he could not do heavy construction work on rough terrain. There is a difference of opinion whether claimant requested, or the employer offered, to terminate claimant's employment on a reduction in force basis so he could draw unemployment benefits. This procedure had been followed in October 1992, when claimant needed to see a doctor about the left side of his neck and had been off work several weeks. Documentation indicates claimant did in fact apply for and receive unemployment benefits

for a period of time.

Claimant apparently first sought medical care with the local Veteran's Affairs (VA) hospital on January 19, 1993 (all dates are 1993 unless otherwise noted). Claimant had subsequent follow-up visits on February 5th, when claimant was taken off work, February 23rd, and March 10th. (Dr. G), at the VA, by progress note dated September 22, 1993, stated: "In my view the cervical spondylosis may have predisposed him to a cervical nerve root compression which was triggered by the trauma, i.e., aggravated a pre-existing non-symptomatic condition."

Claimant was first seen by (Dr. H), on October 12, 1992, for pain on the left side of his neck. (Dr. H had treated claimant previously for a left neck injury). Claimant saw Dr. H again in May 1993. In one report dated May 19th, Dr. H outlines some of claimant's previous medical problems and opines:

> I personally feel that this gentleman has degenerative disc disease. I medically feel that this gentleman has had this degenerative disc disease for a long period of time, as most of our population has this type of problem. With the increasing age, increasing deconditioning and a very strenuous way of life (operating heavy equipment), he has aggravated an already existing condition. Prior to 1991, I would feel very comfortable calling this a work-related problem. However, since the new law of 1991, I really do not feel confident to make such a diagnosis.
>
> In my medical opinion, [claimant] probably will never return to his previous occupation.

In another report, also dated May 19th, Dr. H states to the carrier:

> Reviewing the electronic studies that accompanied the patient, there is a problem at C5, C6, C7 and C8. This is an old problem that has been there for quite some time; however, it is due to growing older and not due to any particular injury. His next procedure is a cervical hypertonic saline injection. This will be a hospitalization where he will be in on Monday and out on Wednesday.

Dr. H released claimant to full duty on June 26th.

Claimant testified that since his release to work he has sought employment but has been unable to find a job because of his limited neck movement. At the CCH, claimant stated it was his position that "there was disability from February the 5th of '93 through June the 25th of '93." However, when the issues were announced at the beginning of the CCH in response to the second issue, quoted at the beginning of the decision, claimant stated "Yes, till now."

Carrier contends, both at the CCH and on appeal, that claimant had a long history of

problems with his neck, that even if claimant drove over a rock as he alleges that he did not suffer any injury at that time, that the incident as described by claimant had not occurred, and that because claimant applied for unemployment benefits he admitted he did not have any disability.

The hearing officer found in pertinent part:

FINDINGS OF FACT

3.Claimant suffers from degenerative disc disease in the cervical spine and has received prior medical treatment for neck pain.

4.Claimant aggravated a pre-existing neck problem on (date of injury), when the D-10 Bulldozer he was operating fell three feet as the right track slipped off of a rock.

5.Claimant advised his supervisor on (date of injury), that he had hurt his neck while driving the D-10 Bulldozer but did not need medical treatment and continued to do his regular work.

6.Claimant worked the following two days after his (date of injury), injury incident with the D-10 Bulldozer.

7.On January 13, 1993, after several days off work because of bad weather, Claimant advised the Employer that he could not work because of his neck problem and he requested a "pink slip" so he could apply for unemployment compensation while he sought medical treatment and less strenuous employment.

8.Claimant sought medical treatment on February 5, 1993, and was advised not to work pending medical treatment.

9.Claimant sought medical treatment from [Dr. H] in May of 1993, who diagnosed Claimant with degenerative disc disease that was aggravated by his operation of heavy equipment.

10.Claimant was released to return to work by [Dr. H] on June 26, 1993, but [Dr. H] had previously advised Claimant that he would never be able to return to his previous occupation of a heavy equipment operator.

11.After being released by [Dr. H], Claimant has sought employment at what the Claimant considered to be light duty vehicle operator positions but has not found employment as of the date of this hearing.

CONCLUSIONS OF LAW

2.Claimant aggravated his pre-existing neck condition in the course and scope of his employment on (date of injury).

3.Claimant sustained a compensable injury to his neck on (date of injury).

4.Claimant has disability which began on February 5, 1993, and has not ended as of the date of this hearing.

Carrier contests the above Findings of Fact Nos. 4, 9, 10 and 11, as well as Conclusions of Law Nos. 2, 3 and 4, on the basis "that there is no evidence to support those findings."

At the outset, we would point out that while the claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury, Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ), Section 410.165 of the 1989 Act provides that the CCH hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility to be given the evidence. In reviewing a no evidence point, an appeals body should consider only the evidence and reasonable inferences therefrom which support the finder of fact and reject all evidence and inferences to the contrary. *See* Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987); Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. We have held that in applying this standard of review, we should uphold the finding of the hearing officer if any evidence of probative force supports it. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. A claimant's testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Company, 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992.

Addressing carrier's specific allegations that claimant has not established an aggravation of a pre-existing injury, carrier points out that there are "numerous" inconsistencies in claimant's testimony and cites as an example that claimant (on cross-examination) stated he was going forward when the track fell off the rock, whereas a witness states that claimant was in reverse when claimant's injury supposedly occurred. We would note these are details which might go to the weight of the evidence but do little to establish that the accident did not occur. In fact, the witness who stated claimant was in reverse supports that the accident occurred. Claimant's testimony of how the accident happened is supported by this eyewitness. As noted above, the hearing officer is the sole judge of the weight and credibility of the evidence, and as the trier of fact resolves conflicts and inconsistencies in the evidence. 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 (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.). Carrier also argues that claimant ". . . was not doing anything unusual that day.

. . ." We note claimant's testimony to be that he said there was nothing unusual about the job that day ". . . until I fell in the hole, and that was unusual." (Page 110 of the transcript). Carrier further argues that claimant ". . . had a longstanding degenerative problem with his neck which was known to numerous employees. . . ." The hearing officer agrees with that proposition and made his Finding of Fact No. 3 on that basis. We believe that finding to be supported by sufficient evidence, however, as we have stated on a number of occasions an aggravation of a pre-existing condition may be an injury in its own right. INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.-Houston [1st Dist.] 1988, no writ). A strain or a rupture on the job is compensable notwithstanding that predisposing factors may have contributed to incapacity. Mountain States Mutual Casualty Co. v. Redd, 397 S.W.2d 321 (Tex. Civ. App.-Amarillo 1965, writ ref'd n.r.e.). A carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving such. Texas Employer's Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992. In fact, two of carrier's witnesses who were familiar with the D-10 bulldozer testified if it fell three feet it would cause quite a jolt which would be sufficient to further injure claimant's neck. Carrier has not met its burden of showing the sole cause of claimant's present incapacity was caused by the claimant's pre-existing condition.

Turning next to carrier's argument that claimant has not had disability, we note that disability is defined in Section 401.011(16) as ". .. the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." Carrier argues that because claimant applied for and received unemployment benefits he does not have disability in that claimant certified he was able to work and looking for work. We note, however, that in October 1992, when claimant needed time off, the employer had knowledge of, and at the very least acquiesced in, the procedure that claimant would draw unemployment benefits while receiving medical care. Once this procedure had been established claimant apparently believed this was a repeat of the October 1992 situation. The employer was well aware of why claimant wanted the "pink slip" and did not object to giving it to the claimant. Furthermore, under prior law, the fact that an applicant for unemployment compensation benefits certifies a willingness to seek work did not preclude a finding of incapacity for purposes of workers' compensation. Aetna Casualty & Surety Co. v. Moore, 386 S.W.2d 639 (Tex. Civ. App.-Beaumont 1964, writ ref'd n.r.e.).

Carrier argues that claimant was released for work on June 26th, and that the release to work ended disability. It is undisputed Dr. H released claimant to work on June 26th. We have held, however, that even an unconditional release to work does not, in and of itself, end disability. *See* Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991; Texas Workers' Compensation Commission Appeal No. 93731, decided October 4, 1993. If an employee cannot obtain and retain employment because of a compensable injury, disability continues. Where there is an unconditional release to work, however, the employee has the burden of showing that disability is continuing. It was claimant's unrefuted testimony that he was unable to obtain employment because of his neck injury. Carrier's only response is that by applying for unemployment benefits claimant was saying he was able to work. As stated before, we do not consider

that sufficient, in these circumstances, as a matter of law, to say that claimant does not have disability.

Carrier's last point is that claimant, and the ombudsman, stated in two places on the record that claimant's position is that he has had disability from February 5th through June 25th. However, we noted above, in the recitation, that when the issues were announced, the claimant, as opposed to the ombudsman, agreed the issue was disability to the present. We note that maximum medical improvement (MMI) is not an issue in this case. The hearing officer could consider claimant's testimony regarding his ability or inability to work, what claimant could or could not do and draw reasonable inferences and deductions from this evidence. Harrison v. Harrison, 597 S.W.2d 477, 485 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). Whether a particular claimant has disability is a factual determination for the trier of fact. The hearing officer could, as he apparently did here, disregard claimant's statement that he was not claiming disability after June 25th. We find the hearing officer's determination on this point supported by sufficient evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). We do not so find and consequently the decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Gary L. Kilgore
Appeals Judge