APPEAL NO. 94046

This appeal is brought 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 on November 29, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant's (claimant) current back problem (herniated disc) was a result of an injury in the course and scope of his employment on (date of injury), and whether claimant had good cause for failing to timely report the injury to the employer. The hearing officer concluded that the claimant sustained a back injury in the course and scope of employment on (date of injury); that he had good cause for failing to timely report the injury; and that his current back problem was the result of a new back injury sustained on (date), which neither arose out of and in the course and scope of employment, nor was the result of claimant's back injury of (date of injury). The claimant appeals the determination of the hearing officer that his current back problem is not the result of his earlier injury as contrary to the evidence. The respondent (carrier) replies that it is not contesting a finding of an injury in the course and scope of employment on (date of injury), or the existence of good cause for failure to timely report it, but that the remaining findings of fact and conclusions of law of the hearing officer are supported by sufficient evidence.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was 16 years of age at the time of the alleged initial injury, worked as a "cart attendant" at a (employer). His duties involved collecting carts and bringing them into the store in rows of 10 to 12 carts for distribution to the customers. He had this job on a part-time basis for about a year. According to this testimony, he was pushing a row of carts into the store when he felt a pull in his back that felt somewhat like a pinched nerve. He continued working the remainder of the day and went home and complained of his pain to his family. He took over-the-counter pain relievers and did not think the injury serious. He also stated that because his father worked for the same employer and helped get him this job, he did not want to reflect badly on his father by complaining of an injury.

Because the pain continued, he first reported the injury to (Mr. F), the general manager, on February 25, 1992, at his mother's urging. He was uncertain of the exact date of the injury when he reported it to Mr. F, but knew it was in mid December, so as a result of his conversation with Mr. F, he selected (date of injury), as the date of the injury. Since he believed the injury happened around noon, he concluded that it had to be on a weekend, but he is not sure of the exact day. He told no one else at the store about the incident leading to the injury and there were apparently no witnesses.

On the same day he reported the injury, his employer transported him to see (Dr. C) who took x-rays and diagnosed lumbosacral strain. He returned to work his normal part-time schedule as a cart attendant until he was laid off sometime in March 1992. He conceded he did not miss any work because of this injury.

Although he states that he continued to have back pain on and off, he did not receive any further medical care for his back until July 7 and 8, 1993, when he was treated by (Dr. V), a chiropractor in (city), (state). He had been visiting relatives there with his mother when, according to his testimony, he felt severe low back pain as he bent over in the shower to pick up a bar of soap. At his mother's urging, he saw Dr. V. Dr. V's report of treatment reflects that the pain began two years previously, was recently aggravated by the long drive from Texas and that the present onset of pain was related to participation in a volleyball game the night before. The claimant strongly denied that he played volleyball the night before and contends that Dr. V got this impression from his mother who did the majority of talking at the examination. When she said this, he spoke up to deny it and tried to correct any false impression about playing volleyball. Dr. V does not mention bending in the shower as a possible cause of the onset of pain.

The claimant's mother, though present throughout the hearing to assist the claimant, did not testify on the question of whether she or claimant attributed the back pain in July 1993 to playing volleyball. In a sworn statement admitted into evidence, the claimant's cousin, (Mr. C), says:

> It seems that [claimant's mother] mistakenly reported that [claimant] joined in on a pick-up volleyball game at the house while visiting. I specifically and vividly recall, however, that [claimant] was in too much pain already and did not want to risk hurting himself any further.

The claimant testified that he had actually picked up a volleyball himself, but that it was not an organized game and that he was not playing.

Upon his return to Texas from (city), he sought treatment from another chiropractor and then on July 27, 1993, from (Dr. G), an orthopedic surgeon. Dr. G noted a slight curvature of the spine, a half inch leg length discrepancy and an abnormal pelvic rotation that "could be related to muscle spasm." He also mentions that the claimant aggravated his back playing volleyball. According to the claimant, the reference to volleyball again came from the claimant's mother who was present for the examination. The claimant testified that at the time he again told Dr. G he was not playing volleyball. In a later letter of September 10, 1993, Dr. G clarifies that he feels the claimant injured his back pushing carts, though he "may have aggravated it by playing volleyball once, but the original injury was at work." A CT of the lumbar spine on July 29, 1993, was normal. An MRI of the lumbar spine on November 9, 1993, showed evidence of a "well localized herniation of disc at L4-5."

The claimant additionally testified that even though he sought no medical treatment between February 1992 and July 1993 for his back pain, he was taking over-the-counter pain medication during this period. He also testified that he played high school soccer in 1990 and 1991 and in his senior year was starting linebacker for his high school football team (though the year was not clarified) including the state championship competition. He seeks only medical benefits for his injury.

Based on this evidence, the hearing officer made the following determinations which are appealed by the claimant:

FINDING OF FACT

9.Claimant was neither examined nor treated by a health care provider from February 26, 1992, until July 7, 1993.

10.Claimant voluntarily participated in a volleyball game on (date).

11.Claimant had a back injury while voluntarily participating in a volleyball game during the evening hours of (date), while visiting relatives in the State of (state).

12.Claimant's voluntary participation on (date), in the volleyball game was a recreational, social and athletic activity not constituting part of the Claimant's work-related duties with Employer.

13.Claimant's voluntary participation in the volleyball game on (date), was an activity neither reasonably expected of Claimant or expressly or directly requested of Claimant by Employer.

14.Beginning (date), and continuing to the date of the Benefit Contested Case Hearing, Claimant's medical records established that Claimant's current back problem was directly and causally connected to Claimant's back injury Claimant had on (date), while voluntarily participating in a volleyball game.

CONCLUSIONS OF LAW

4.Beginning (date), and continuing to the date of the Benefit Contested Case Hearing, Claimant's current back problem was the result of a new back injury sustained by Claimant on (date), which neither arose out of and in the course and scope of employment with Employer nor the result of Claimant's back injury of (date of injury), while working with Employer.

5.Claimant's (date), back injury is the sole cause of Claimant's current back problem.

In his objection to Finding of Fact No. 9, claimant submits that he was under the care of a family physician between February 1992 and July 1993 for "other medical reasons" and that he was given "anti-inflamitory (sic) medication" during this time "that mask the pain in my back." At the hearing, the claimant gave no evidence of this treatment, nor did he mention use of masking anti-inflammatory drugs. We are limited in our review to the record developed at the contested case hearing and will not consider evidence presented

for the first time on appeal. Section 410.203; Texas Workers' Compensation Commission Appeal No. 93970, decided December 9, 1993.

A claimant has the burden of proving both that an injury occurred in the course and scope of employment and the extent of the injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, 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). As the trier of fact, the hearing officer 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). A claimant's testimony is that of an interested party and only raises an issue of fact for the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ).

Here the critical question was the credibility of the claimant's assertion and supporting evidence that he did not play volleyball the evening before he sought treatment from Dr. V and that the pain that precipitated this visit occurred while reaching for the soap in a shower. The claimant's own testimony on this point was not that he totally avoided the volleyball game, but that he at least was on the sidelines and handled the volleyball. Although it has been held that a doctor's recitation of the history of an injury can not support a finding that the injury occurred as recited in the history, *see* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex.Civ. App.-Texarkana 1977, no writ), we note here that reference to a volleyball game which appears in the reports of two treating doctors was attributed by the claimant to his mother who, though present at the hearing, did not elect to clarify her statement or assert that she was mistaken. This evidence, coupled with evidence of a lapse of some 18 months between reporting this injury and again receiving medical attention for it as well as the hearing officer's evaluation of the claimant's credibility is sufficient to support the hearing officer's decision that the cause of the claimant's current back condition (disc herniation) was his participation in a volleyball game. Only were we to determine, which we do not in this case, that the great weight and preponderance of the evidence was so against the decision of the hearing officer as to be clearly wrong and manifestly unjust would we reverse it. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

Finding sufficient evidence in the record to support it, we affirm the decision and order of the hearing officer.

Alan C. Ernst

Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge