APPEAL NO. 94071

On December 14, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). The issue at the hearing was whether the respondent (claimant) sustained a compensable injury on or about (date of injury). The hearing officer determined that the claimant sustained a compensable injury on or about (date of injury), and ordered the appellant (carrier) to pay medical and income benefits in accordance with her decision and the provisions of the 1989 Act. The carrier disagrees with the hearing officer's decision and requests that it be reversed and a decision rendered in its favor. The claimant responds that the decision is supported by the evidence and requests affirmance.

DECISION

The hearing officer's decision and order are affirmed.

The 39-year-old claimant immigrated to the United States from an Eastern European country sometime after completing high school. Although the claimant speaks English, it is obvious that he has some difficulty communicating in English.

The claimant began working as a welder for the employer, (employer), in 1984. In (date) he sustained a skull fracture when a coworker hit him in the head with a hammer. Surgery was performed on his head the same month. In August 1989, while he was still being treated for his head injury, the claimant began experiencing low back pain, was diagnosed with myofascitis and a lumbar strain, and undertook physical therapy for his back pain. Medical reports at the end of August 1989 noted that the claimant had normal range of motion of the back. Another medical report noted that in September 1989 the claimant's low back was doing much better and he was released to return to work that month. The claimant testified that he has had intermittent back pain since his 1989 head injury, but attributed that pain to his normal "heavy" work. The claimant said that since late 1989 or early 1990 he had not sought medical treatment for his back because he had been able to "work out" his intermittent pain with exercises he learned in physical therapy.

On Friday, (date of injury), the claimant said he needed to move a 300 to 400 pound "welding machine" slightly closer to where he was welding so he lifted the front end of the machine and slid it sideways. He said that when he moved the machine he felt as if he had "stretched" his back. He said he felt no "pop" or "sharp" pain at the time. On Sunday, (date), the claimant said he began experiencing severe back and left leg pain when he attempted to do "light" yard work at home. The type of yard work he was doing was not developed in the evidence. His wife took him to a hospital emergency room. A hospital report dated (date), recited that the claimant had had intermittent back pain for two years, that he was "very painful" on that day, and that the claimant had been doing "heavy lifting," but did not state where the lifting had been done. The emergency room doctor diagnosed low back strain and referred the claimant to the claimant's family doctor.

The claimant went to his family doctor, (Dr. Mc), on April 5, 1993, and had an MRI scan done on April 6th which revealed herniations at the L3-4 and L4-5 levels and a large disc extrusion at the L5-S1 level which affected the left S1 nerve root. Dr. Mc noted that the claimant had stated that he had had low back pain for 10 days, but noted a date of injury of (date).

The claimant was next seen by (Dr. L) on April 12, 1993. Dr. L reported that he was evaluating the claimant for a back injury which occurred four years earlier, but then noted that the claimant had been working "uneventfully" until the onset of left leg pain on (date of injury). In a report dated May 3, 1993, Dr. L reported that the claimant told him he was injured on (date of injury), when he was doing a lot of bending and lifting at work. The report also indicated that the claimant told Dr. L that prior to (date of injury) he had had some problems with his back from time to time, but nothing that would last more than a day or two. However, after (date of injury), the claimant reported that his pain had gotten worse and would not stop. In a July 13, 1993, report, Dr. L stated "I really believe this man's injury occurred in 1993. . . ." In May 1993, Dr. L recommended that the claimant have a laminectomy which the claimant testified had been performed. The claimant also saw (Dr. C) for a second opinion, and Dr. C stated that "I definitely feel that his current back problems and symptoms are the result of his injury in (date)."

The claimant's foreman testified that welders were not required to move the welding machine, which he agreed weighed between 300 and 400 pounds, and that the claimant made no report of an injury on (date of injury). He also stated that at some unspecified date after (date of injury), the claimant told him that he had to move the welding machine and that he "might" have hurt his back at that time. The employer's controller said that on April 7, 1993, the claimant's wife called work and asked about procedures to file a workers' compensation claim. Timely notice of injury was not an issue at the hearing.

The carrier introduced into evidence two transcribed recorded statements of the claimant which contain some inconsistencies between statements given to the carrier's adjuster and the claimant's testimony at the hearing. However, in several places in the transcriptions the claimant's answers are recorded as "inaudible" and in more than one instance the claimant's answer was cut short by the adjuster's next question. Also, it is obvious that the claimant was having some difficulty in understanding certain questions asked by the adjuster and in formulating clear answers to certain questions due to his difficulties with the English language.

The hearing officer determined that on or about (date of injury), the claimant suffered a back injury while working for the employer. She also found that the claimant's 1989 injury is not the sole cause of the claimant's "current condition."

The claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the judge of the weight and

credibility to be given to the evidence. Section 410.165(a). The hearing officer may believe all, part, or none of the testimony of any witness, and may believe one witness and disbelieve others. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer's decision should not be set aside merely because different inferences may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Having reviewed the record, we conclude that the hearing officer's findings, conclusions, and decision are supported by sufficient evidence and are not against the great weight of the evidence.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge