APPEAL NO. 94094

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 20, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issue at the hearing was whether the appellant (claimant) sustained a low back injury on (date of injury), in the course and scope of his employment, or whether his complaints of back pain related to a pre-existing condition. The hearing officer determined that the claimant did not sustain a low back injury in the course and scope of his employment on (date of injury), but that his complaints were related to a pre-existing condition. The claimant appeals this decision urging that the hearing officer committed prejudicial error in not allowing the claimant to develop evidence to impeach the credibility of certain carrier witnesses and that the decision of the hearing officer has no reasonable evidentiary basis. The respondent (carrier) replies that the decision is supported by sufficient evidence and that the hearing officer only excluded redundant impeachment evidence.

DECISION

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

The parties presented competing versions of what happened to the claimant on (date of injury), and the attitude of the (employer) toward employees who file workers' compensation claims.

The claimant testified that he began working for the employer as an injection mold packer in September 1991. His duties included removing plastic pipe fittings from the molding machine, gauging them and then packing them in crates. A fully packed crate was estimated to weigh between 200 and 250 pounds. Once packed, the crates had to be moved from the packing areas. How they were moved was the subject of controversy at the hearing.

As background to his present claim of injury on (date of injury), the claimant related that on (date), while working for the same employer, he suffered a compensable slip and fall accident which resulted in lumbar strain. He was treated by (Dr. SA), an orthopedic surgeon, for this injury and released back to work in December 1992. After some dispute with the employer over the availability of work, which is discussed in greater detail below, the claimant stated he returned to work on January 20, 1993. His crew leader and immediate supervisor was (Mr. M); the department head was (Mr. K).

The claimant testified that he generally felt good until about April 19, 1993, when he started feeling general discomfort in his lower back and legs. Around this time he had started working 12-hour shifts. He stated that he had not been on any pain medication since the previous December. He also said that in mid-April he had complained about the need to have a forklift available for moving the loaded crates. According to the claimant, on (date of injury), he had to push a loaded crate across a cement floor about 100 feet to

get it to the other end of the plant so he could fill another empty crate. He estimated the crate to be about three and one-half feet square and top heavy, so he had to push it on the sides. When he pushed the crate about 1:30 or 2:00 p.m., he felt very sharp pains in his lower back but kept working until the end of his shift at 8:00 p.m. He stated that he immediately told Mr. M "exactly what happened and how I hurt myself." According to the claimant, two coworkers, (Ms. H) and (Mr. B), overheard his conversation with Mr. M, who reportedly told the claimant that he would report what the claimant said to Mr. K. Mr. K talked to the claimant at about 2:30 p.m. His reaction, as described by the claimant, was anger at the claimant for "even thinking that I was hurt or wanted to be hurt." The claimant said he was given permission to see a doctor the next day. He insisted in his testimony that this was a request to see his doctor for his injury, not a request for personal time off.

The claimant further stated that he told his wife, (Ms. B), that evening what had happened. The next day, (date), he went to see a (Dr. W) at the South Texas Medical Clinics (sic). This was the same doctor who first saw the claimant in an Emergency Room after his (date), accident. Dr. W diagnosed back strain and excused the claimant from work pending further treatment. His treatment notes for this visit do not mention a new injury on (date of injury), but mention that the claimant referred to "a back injury he had about a year ago." Dr. W's original treatment report records "5-17-92" as the date of injury, but this is, without explanation, crossed out and replaced with "4-19-93." A "corrected copy" of an "Initial Medical Report" (TWCC-61), signed on behalf of Dr. W lists "4-19-93 (approx.)" as the date of injury. In his testimony, the claimant was adamant that he told Dr. W that the injury occurred on (date of injury). On his visit to Dr. W, the claimant testified that the nurse entered his identifying data in the computer and the (date), incident appeared and this is probably why the new date was not reflected in Dr. W's records. He admitted he did not tell Dr. W that he began feeling pain on April 19, 1993.

On (date), the claimant injured his neck in a automobile accident. He sought treatment on May 1, 1993, for this injury at the Gulf Coast Medical Center emergency room where was diagnosed with a mild cervical strain. He never advised the attending physician of his earlier lower back injury because he considered the effects of the automobile accident separate and not impacting on his low back condition.

The claimant saw Dr. SA on May 7, 1993, in connection with his alleged (date of injury) lower back injury, according to his testimony, at the suggestion of (Ms. J), the head of personnel for his employer and (Ms. D), the adjuster who had worked with him on his workers' compensation claim for his (date), injury.[1] Dr. SA recorded the claimant as complaining of pain from an (date of injury), injury. He diagnosed lumbar strain and prescribed physical therapy and anti-inflammatory medication. The claimant admitted that he did not mention the automobile accident to Dr. SA because he considered it unrelated to his low back pain.

[1]The employer had changed workers' compensation insurance carriers by the time of the alleged (date of injury) accident.

The claimant testified that he went to a meeting with Mr. K, Mr. M, Ms. J and a (Mr. W) on May 4th or 5th. According to the claimant, the meeting was called to discuss his (date of injury) injury, but took on a belligerent tone toward him. He said that none of the supervisors wanted to hear anything about him getting hurt and tried to confuse or misrepresent his position that he hurt himself on (date of injury). At the meeting he gave a note to Ms. J which reiterated his claim of injury on (date of injury).[2]

Ms. B testified that the claimant's health was fine when he went back to work in January 1993, but it began to decline about April 19th. She recalled that the claimant complained of more pain of (date of injury), but does not recall if he mentioned to her any specific incident at work that caused the increased pain.

Ms. H testified that she did not see the injury on (date of injury), but heard the claimant complaining about his back hurting and overheard the claimant ask Mr. M on (date of injury) if he could see a doctor. She signed an employer originated Incident Investigation Report as a member of the investigation team in which it was stated that the team "couldn't find any reason for [claimant's] injury on (date of injury)," that the claimant did not report an on-the-job injury on that date and that to their knowledge he did not move any crates that day. In her testimony, she said she thought she was just saying that she saw the claimant injure his back.

(Mr. B), another coworker, testified that he too heard the claimant tell Mr. M that he hurt his back moving crates. In a written statement of September 30, 1993, Mr. B states that on (date of injury), the claimant told him he was having lower back pain and was going to see the doctor and that claimant reported this to Mr. M and Mr. K.

Ms. D testified that the claimant called her on (date) to say he re-injured himself. He said he needed to see a doctor and wanted to see Dr. W. She told him that he should see Dr. SA, his treating physician, but if it was "really necessary" she would approve a one-time visit with Dr. W. Two or three days later, the claimant called her to say that Dr. W had excused him from work. She advised him that he was no longer entitled to TIBS[3] from the May 1992 injury. They then discussed a new claim which she said would have to be reported to the employer if it was an aggravation of the old injury and not just a reoccurrence.

Mr. M testified that the claimant first came to him on (date of injury), about 1:00 p.m. to ask for the next day off because his medication was no longer strong enough and that his back was bothering him. According to Mr. M, the claimant never mentioned any incident as the cause of this pain. He stated that the claimant said he wanted a "personal" day off which would have to be approved by Mr. K. He only learned a couple days later from Mr.

---

[2]On September 29, 1993, Ms. J returned the note to the claimant with the annotation that the information from the note and from the supervisors "conflict."

[3]There is evidence in the file that the claimant reached maximum medical improvement in December 1992, and this was never challenged by the claimant.

K that the claimant was claiming an injury on (date of injury). Mr. M also testified that, although there was no formal policy, employees were not expected to push loaded crates to move them. He stated that sufficient crates were placed at each work station during the course of a work shift. The loaded crates were then moved as the forklift became available. He never saw the claimant push a crate, but thought it was "possible." He also testified that the claimant never complained about his back before. He did not recall the conversation on (date of injury) with the claimant as described by the claimant in his testimony. He conceded that the employer had expressed concern in the past about too many workers' compensation claims, but testified there were no meetings or memos on the subject.

Mr. K testified that on (date of injury), Mr. M called him to say the claimant was asking for the next day off to see a doctor. He asked the claimant what the problem was and the claimant told him he needed more medication. Mr. K asked the claimant if he hurt himself and claimant reportedly said "no, it was from a year ago." According to Mr. K, the claimant never mentioned any back pain to him. About a week later he learned through personnel channels that the claimant was claiming a back injury.[4] After this he had a meeting with the claimant to discuss why the claimant was making another workers' compensation claim. Present in addition to himself and the claimant were Ms. J and Mr. W. He testified the claimant never said there was a new injury or that he hurt his back pushing crates, but only that he needed more medication. He stated that to the extent that Ms. J suggested anything different in a memo she was wrong. In answer to the question was it true that the employer "just doesn't like people who file workers' compensation claims?", he answered "no." He also stated that in the past he observed packers move "small crates" by hand across the floor. He did not notice the claimant in pain on (date of injury), but does believe that Ms. H is a forthright and honest individual.

The pertinent findings of fact and conclusions of law of the hearing officer are:

FINDINGS OF FACT

6.The Claimant's complaints of back pain on (date of injury), are related to a pre-existing condition.

CONCLUSIONS OF LAW

2.On or about (date of injury), the Claimant did not sustain a low back injury in the course and scope of employment; rather, the Claimant's complaints of back pain are related to a pre-existing condition.

The claimant contends on appeal that these findings and conclusions have "no reasonable basis" and that the hearing officer abused her discretion in not allowing the

[4]The claimant's notice of injury (TWCC-41) was signed by the claimant on May 13, 1993, and by his attorney on May 25, 1993.

claimant to "properly develop his evidence of [employer's] bias, motive, Intent [sic], plan and scheme." We address the second contention first.

Recognizing that critical evidence in this case was in direct conflict and that the outcome hinged largely on the weight and credibility given the evidence by the hearing officer, the claimant throughout the hearing sought to impeach the credibility of Mr. M and Mr. K by painting a picture of employer hostility and retribution against workers' compensation claimants. The claimant opened his testimony with an account of how he attempted to return to work in December 1992, after he reached MMI from his May 1992 injury, but was told by a supervisor that there was no work for him. From discussions with coworkers, he said he found out that two new employees had just been hired and another one specifically to do his job. At this point in his testimony, the carrier's counsel objected that the line of questioning had nothing to do with the issue of an injury on (date of injury). The claimant's attorney responded to the hearing officer:

> What I'm simply trying to show . . . is that we have a hostile work environment at this point, that [claimant] had filed a workers' compensation claim, had been released to go back to work.
>
> * * * *
>
> It's . . . our contention that [claimant] was being intentionally excluded from the rehire process because he had filed a workers' compensation claim.
>
> * * * *
>
> . . . this testimony lends or cuts to the weight and credibility to be given to the testimony of the witnesses for the employer that will be here today.
>
> * * * *
>
> Therein lies the motive and the intent . . . for the statements that [Mr. M and Mr. K] have made.

The hearing officer addressed the objection by saying the information being presented "does not appear to be directly related to" the issue of injury in the course and scope of employment. She noted, however, that the evidence went to credibility, asked the claimant's attorney "to move on" and sustained the objection. The claimant then had admitted into evidence without objection a letter of January 7, 1993, from the claimant's previous attorney which threatened legal action if the claimant was not allowed to return to work (he returned on January 10, 1993) and a help wanted ad which appeared in a local newspaper on January 9, 1993, in which the employer advertised openings for jobs which the claimant described as being for the kind of work he was doing.

The credibility of a witness can always be made an issue in a contested case hearing and parties are entitled to introduce relevant evidence of bias or prejudice. In Texas Workers' Compensation Commission Appeal No. 931004, decided December 14, 1993, we observed that this is particularly true of the testimony of a party and reversed the hearing officer when the carrier was denied, with no clear reason, the opportunity to introduce rebuttal evidence going to the claimant's credibility. The logic of this case applies equally to critical testimony regardless of the source. Hearing officers should exercise caution in cutting off the presentation of evidence on a matter deemed by the parties to be important and should give the parties every reasonable opportunity to present their case as they deem best. The claimant was not denied all opportunity to impeach the credibility of Mr. M and Mr. K. The claimant was permitted to testify without objection that the employer's reputation in the community for firing people who filed workers' compensation claims was "real bad." In rebuttal to the testimony of Mr. M and Mr. K, the claimant opined from the witness stand that these management officials were "coached" and "knew what to do." The claimant further testified contrary to Mr. M and Mr. K that it was common to move the crates by hand and that the employees could not wait for the forklift to move the crates. He stated the May meeting with Mr. K and Mr. M was specifically called to discuss his injury; they knew what had happened and, according to the claimant, they lied about him needing more medication as the reason he asked for the time off on (date).

Ms. H, in rebuttal, testified that "very often" packers had to push crates and she herself had done so, but "only a few feet." Mr. B, also in rebuttal, said that employees had to move loaded crates every shift. He characterized his previous testimony about overhearing a conversation between the claimant and Mr. M as the truth and had no idea why Mr. M would consider Mr. B to be lying about this and contesting this claim.

From our review of the record, we do not find that the hearing officer committed reversible error in preventing the claimant from continuing his testimony about the employer's hostility towards workers' compensation claimants or that the claimant was unfairly hindered or restricted from pursuing this theory and presenting evidence on it. Under these circumstances, given the extensive matters in evidence on the question of credibility and bias of the witnesses, we are unwilling to conclude that the hearing officer's evidentiary rulings were an abuse of discretion or otherwise deprived the claimant of a fair hearing, or that they were reasonably calculated to cause or probably did cause the rendition of an improper decision. *See* Appeal No. 931004, *supra*, and cases cited therein.

The claimant also appeals the decision and order of the hearing officer on the grounds that "she abused her discretion by making an arbitrary and capricious decision without reasonable basis, on both findings of fact and a conclusion of law." In particular, he asserts that the hearing officer "improperly placed herself in the shoes of [Dr. SA] by opting to completely disregard information in both the medical records and in the deposition on written questions contained in the record."

The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury 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 sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company 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 reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986).

The existence of a compensable injury, whether a new injury or an aggravation of a pre-existing injury, is a question of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993; Texas Workers' Compensation Commission Appeal Nos. 92654 and 92655, decided January 22, 1993. As we have pointed out, an appellate body will overturn a finding of fact only if the finding is contrary to the overwhelming weight of the evidence. In reaching a finding of fact, the hearing officer must evaluate the entire record of a case hearing and determine what evidence is more worthy of belief. Thus, assuming that Dr. SA's medical report and deposition on written questions supports a conclusion that the claimant "in fact, received a new compensable injury on (date of injury)," as the claimant contends,[5] the hearing officer was not bound as a matter of law to make a finding in accordance with this interpretation of this evidence. In reviewing the entire record and judging the credibility of all the witnesses, the hearing officer could disregard this portion of Dr. SA's evidence or conclude that it did not support the finding of fact suggested by the claimant.

In this case, the hearing officer determined that the claimant suffered back pain on (date of injury), but that he did not sustain a low back injury in the course and scope of employment on that day. There were obvious conflicting accounts about the requirement to move the loaded crates that allegedly produced the claimant's injuries, just as there were conflicting accounts about when the claimant reported his injury to his supervisors and what he said to them. Where there are conflicts and contradictions in the testimony, it is the duty of the finder of fact, in this case the hearing officer, to consider those conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine

[5]Dr. SA, when asked if the (date of injury), incident aggravated a pre-existing condition, responded that he could not answer this question without another MRI to compare with an MRI evaluation done before the (date of injury), incident.

Insurance Company v. Escalera, 385 S.W.2d 477, (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). Having examined the evidence in this case, we find it sufficient to support the decision of the hearing officer that the claimant was not injured in the course and scope of his employment on (date of injury).

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge