APPEAL NO. 94144

At a contested case hearing held in (city), Texas, on January 10, 1994, the hearing officer, (hearing officer), heard evidence on the sole disputed issue, namely, whether the respondent (claimant) sustained an injury in the course and scope of his employment on (date of injury). Determining that the resolution of the disputed issue was ultimately reduced to an estimation of claimant's credibility, the hearing officer found that claimant injured his lower back on (date of injury), while lifting a heavy package to check a baggage tag as part of his duties for (employer), and concluded that claimant sustained a compensable injury to his back on that date. The appellant (carrier) asserts on appeal a number of conflicts in the evidence and asks that the case be either remanded for further evidence or that a new decision be rendered for the carrier.

DECISION

Affirmed.

Claimant testified that on (date of injury), while working as a baggage handler for employer, he lifted a heavy object, either a tool box or a crate, to see the baggage tag underneath and felt "a hot sting with a sharp pain" in his back. Claimant said he mentioned to coworker (Mr. B) before the shift ended that he had hurt his back but did not report it to his supervisor, (Mr. V), because he thought it was a minor strain which would resolve. He said he did office work the next two days and had mild pain. On the third day, his pain was so severe he could not get out of bed. Claimant said no other incident had occurred that week which would account for his back pain. He then commenced a previously scheduled two week vacation which, he said, was completely disrupted by his being virtually bedridden with back pain. According to claimant, he obtained an appointment with (Dr. M) for July 23, 1993, and after Dr. M later reviewed certain imaging tests, claimant underwent spinal surgery by Dr. M on August 2nd. The medical records indicate claimant was admitted to the hospital on July 28th, on that date underwent a microlumbar diskectomy at the L2-3, L3-4, and L4-5 levels with excision of herniated nucleous pulposus (HNP), and was discharged on August 3, 1993.

Claimant had previously undergone lumbar disc surgery by Dr. M in September 1982 and was thereafter followed by Dr. M. On March 16, 1983, Dr. M advised claimant he could return to work on March 21st with a lifting limitation of 45 pounds for three weeks and then resume his regular work activities. On March 30, 1993, claimant returned to Dr. M complaining of back and right hip and leg pain, "fairly severe at times," which was relieved by claimant's limiting his activity. Dr. M then noted that claimant should not be doing any lifting, bending or twisting. A CT scan of July 21, 1993, revealed that claimant had no change in his acquired severe spinal stenosis at L3-4 and L4-5 upon comparison with an August 1992 exam, but did have a new central, primarily left posterolateral herniated nucleus pulposus (HNP) at L5-S1 with left S1 nerve root impingement. A myelogram of the same date revealed that claimant had impingement on the right L3 nerve root and a left posterolateral HNP at L5-S1 with impingement on the left S1 nerve root. According to Dr.

M, claimant's left HNP at L5-S1 was, however, completely asymptomatic and his primary problem was severe stenosis and evidence of nerve root compression on the right.

Claimant said he told Dr. M on the first visit about the incident at work on (date of injury). Dr. M's records of the July 23rd visit failed to mention such but to the contrary stated that claimant had not done any lifting. However, in Dr. M's letter of November 16, 1993, he stated that when claimant was seen on July 23rd, claimant related "an exacerbation of back pain with radiation down into his right leg," and "indicated to me that this had occurred over the past two weeks while he was working." Dr. M went on to say that he, Dr. M, was "uncertain of one particular event." Though his reporting of his injury was not untimely, claimant maintained that it was not until his x-rays were reviewed and surgery scheduled that he realized he had a serious injury and focused on its relationship to the (date of injury) lifting incident. Claimant acknowledged that although he advised both Mr. V and employer's "lost time analyst," KP, of his back problem just prior to his surgery, he did not tell them that his back problem was related to an on-the-job injury nor did they ask.

While in the hospital recovering from his surgery, claimant said he spoke with both Mr. V and with (Ms. C), an employer "lost time analyst," and informed them both that he had sustained an injury at work on (date of injury). There was no disputed issue at the hearing concerning the timeliness of claimant's reporting to employer of his injury as being job related. *See* Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 409.001 (1989 Act). The thrust of the carrier's contentions in this regard was that claimant's admitted failure to report a job-related injury to his employer for approximately 26 days reflected on his credibility concerning whether the (date of injury) incident happened as claimant testified. Both Ms. C and Mr. V testified that claimant told them during telephone conversations on or about August 2nd that he had injured his back at work on (date of injury). Ms. C stated that claimant told her he did not report the injury earlier as he did not want "any hassles" over his surgery. As for claimant's credibility, a matter explored with Mr. V by both claimant and the carrier, Mr. V described claimant as "a perfect employee" and said that when he and claimant spoke about the injury as being job related, he had no reason to believe claimant was not being truthful.

The carrier's appeal emphasizes its view of claimant's testimony as not being credible given the inconsistencies and conflicts in the evidence. As the Appeals Panel has often observed, the occurrence of an injury in the course and scope of employment is a fact question which can be established by the testimony of the claimant alone. However, claimant's testimony in this case found some corroboration in the brief statement of coworker Mr. B to the effect that on (date of injury), claimant mentioned he had hurt his back and hoped it would not disrupt his vacation plans, as well as in Dr. M's November 16th letter. Further, claimant's immediate supervisor's testimony was quite relevant on claimant's credibility.

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of

the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses and the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. An appellate 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.) Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660, 661 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge