APPEAL NO. 94157

On December 20, 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 issues at the hearing were: (1) whether the current medical condition of the appellant (claimant) is a result of the compensable injury sustained on (date of injury); and (2) whether the claimant has had disability as a result of the injury of (date of injury), and if so, for what period. The hearing officer decided that "[c]laimant's current medical condition is not related to the (date of injury), injury. Claimant had disability from April 12, 1992 to April 13, 1992 to the date of this hearing. Claimant's claim for benefits for his current medical condition/herniated disc is denied." The hearing officer ordered the respondent (carrier) to pay medical and income benefits in accordance with his decision and the provisions of the 1989 Act. The claimant contends that certain findings of fact and conclusions of law are against the great weight and preponderance of the evidence and requests that we reverse the hearing officer's decision and render a decision in his favor. The carrier responds that the evidence supports the hearing officer's findings of fact, conclusions of law, and decision, and the carrier requests that we affirm the hearing officer's decision.

DECISION

The hearing officer's decision and order are affirmed.

On (date of injury), the claimant was working for the employer, (employer), as an owner/operator of a furniture moving truck when he fell off the ramp of the truck while loading furniture and fell four feet to a concrete floor. The claimant said he hit his back when he fell and that he felt a "hot spot" in his back and limped. He immediately reported the injury to the employer's safety department. The claimant rested the next day and the following day was referred by the employer to a medical clinic. The doctor at the clinic had x-rays of the lumbar spine taken and diagnosed the claimant as having a low back strain and a back contusion. The following day, April 14, 1992, the doctor released the claimant to return to regular work and indicated on a medical report that the claimant did not have any "permanent disability" resulting from the injury. The carrier paid for the medical treatment at the clinic.

The claimant said he returned to work on April 14, 1992, and continued to work at his regular driving job until January 15, 1993. The claimant said he wanted to avoid a "claim" and didn't want to give his employer the impression that he could not work so he didn't take off work during that period. However, he said he continued to have back pain "off and on" during this period, that he never got better from his injury, that his back pain got worse during this period, that he could only drive the truck for four to six hours at a time before having to rest for one or two hours, and that he had to hire an additional helper or two to help with the loading and unloading of the truck. The claimant said that before his injury he had one helper, but that after the injury he hired an additional helper or two in order to limit the amount

of lifting of objects on his part. The claimant also testified that before his injury he would be able to drive 12 to 14 hours at a time.

Between April 14, 1992, and January 15, 1993, when the claimant stopped working, the claimant said he made only one visit to a doctor which was on June 9, 1992. The claimant said that he went to a doctor at that time because he had an ear infection and because his back was bothering him. He testified that he would not have gone to the doctor if he had not had an ear infection. The claimant said that the doctor recommended that he have an MRI scan which he did not have done at that time because he said he did not want to lose time from work. The claimant testified that he believed that if he complained of back pain his employer would not give him work. The only document in evidence relating to the June 1992 visit to the doctor is a note apparently signed by a doctor (the name is illegible) which is difficult to read and which appears to state "needs to be evaluated for possible disc disease."

The claimant testified that on January 15, 1993, his back was bothering him so he decided to go home and rest. He said he planned to get medical treatment, recover, and go back to work. However, he also said that he usually takes off work for two or three months at that time of the year. He said that if he had not had back pain he would have returned to work in February or March 1993. The claimant has not returned to work. However, later in the hearing when the claimant was asked why, if he took off work on January 15, 1993, to get medical treatment, he waited until February 26, 1993, to seek medical treatment, the claimant denied taking off work to get medical treatment and said he took off work on January 15th because of "downtime" and to rest. He also said that his pain was "off and on" during the period of January 15 to February 26, 1993, and that if he rested a few hours the pain would go away.

The claimant further testified that on February 20, 1993, he had severe back pain and could not get out of bed so he went to (Dr. S), a chiropractor, on February 26, 1993. However, later in the hearing when the claimant was asked why he paid Dr. S himself instead of having the carrier pay for the initial treatments by Dr. S, the claimant said he did not know that his pain was severe, thought it was a minor matter, and did not want to put it on the "claim." There was evidence that at some point in time the carrier also paid for treatment by Dr. S. The claimant denied being involved in any incident in February 1993 which caused back pain. He said he had back pain off and on from (date of injury). He testified that in March 1993 he was stacking some pads in the back of the truck when he felt a "little cracking" in his back, but denied having any "new injury" at that time.

No medical report for the February 26, 1993, visit to Dr. S was in evidence. However, several billing documents from Dr. S were in evidence which showed that x-rays were taken on February 27th, and that between March 2nd and March 15th the claimant was treated by Dr. S nine times. The claimant said that Dr. S took x-rays, told him he had "subluxation," performed "adjustments," and sent him for therapy. The claimant said that Dr. S told him he needed six months of treatment, but after 15 days when the treatment was not helping, the claimant asked the carrier for authorization to see (Dr. A), which

authorization was eventually given. A "personal history" form revealed that the claimant reported to Dr. S that he had "this injury" on (date of injury).

The claimant said he first saw Dr. A on April 8, 1993. Dr. A recommended an MRI scan of the lumbar spine which was done on April 27, 1993, and which revealed a right paracentral small contained herniated nucleus pulposus of a degenerative disc at L4-5, a bulging degenerative disc at L5-S1, and multiple levels of osteoarthritis of lumbar facet joints. In addition, an EMG and nerve conduction studies done on May 4, 1993, revealed right L5 radiculopathy.

Dr. A noted in his report for the April 8, 1993, visit that the claimant told him that he injured his back on (date of injury), when he fell off the truck and that he has had chronic back pain. Dr. A diagnosed a low back injury, lumbosacral radiculopathy, and a herniated intervertebral disc. Dr. A placed the claimant on physical therapy. Dr. A reported that the claimant was to be off work as of April 8, 1993, and he has not released the claimant to return to work. The claimant testified that driving causes him to have back pain and that he can not work. In a report dated June 14, 1993, Dr. A noted that he had offered the claimant a referral for a neurosurgical consultation but the offer was declined because the claimant wanted to return to Dr. S so Dr. A referred the claimant back to Dr. S for treatment. In a report dated September 2, 1993, which referenced a date of visit of August 26, 1993, Dr. A noted that the claimant had advised him that he now wanted a neurological consultation so Dr. A referred the claimant to (Dr. SV). Dr. A also noted that he believed that the claimant would require surgery for his herniated disc. The claimant said that he has not seen Dr. SV due to the carrier's refusal to pay for the consultation. The claimant also said that he has not seen Dr. S since August 26, 1993, because the carrier stopped paying Dr. S and he does not have money to see Dr. S. The claimant said he wants to have surgery.

In a medical report dated June 21, 1993, Dr. S noted that he had seen the claimant earlier that year and that the claimant had told him that he injured his back when he fell from a truck. Dr. S diagnosed "anomaly spine," disc displacement with sciatica, lateral canal stenosis, muscle spasms, and restriction of motion. Other reports of Dr. S indicated that he had taken the claimant off work in February 1993, and released him to limited work on July 7, 1993. Billing documents from Dr. S's office showed that the claimant received treatment from Dr. S on 21 dates between June 4 and July 9, 1993.

The claimant testified that on June 8, 1993, he was arrested for transporting about 192 pounds of marijuana in a truck, that he pled guilty to charges, and that he received probation for the offense. The carrier said it offered this evidence to show that the claimant was capable of driving a truck. A letter from the employer to the U.S. Customs Service stated that the claimant had been out of work on a workers' compensation claim since January of 1993.

In his appeal, the claimant contends that the following findings of fact and conclusions of law are against the great weight and preponderance of the evidence:

FINDINGS OF FACT

5.Claimant recovered from his (month year) injury with no permanent impairment.

6.On April 14, 1992, claimant returned to his regular job duties as a truck driver and continued working without any medical problems to his lower back.

8.Claimant's current medical condition is not related to the injury of (date of injury).

9.Claimant was unable to obtain and retain employment at pre-injury wages due to a compensable injury from April 12, 1992 to April 13, 1992 to the date of this hearing.

CONCLUSIONS OF LAW

2.Claimant's current medical condition is not related to the (date of injury), injury.

3.Claimant did not have disability for more than eight days as a result of the injury of (date of injury).

The hearing officer decided that "[c]laimant's current medical condition is not related to the (date of injury), injury. Claimant had disability from April 12, 1992 to April 13, 1992 to the date of this hearing. Claimant's claim for benefits for his current medical condition/herniated disc is denied."

In Traders & General Insurance Co. v. Stubbs, 91 S.W.2d 407 (Tex. Civ. App.-Texarkana 1936, writ ref'd), the court stated the "well-settled proposition of law . . . that the burden of proof is on the compensation claimant to prove his case in all its parts by a preponderance of the evidence." The claimant has the burden to prove that his or her inability to obtain and retain employment at wages equivalent to the pre-injury wage was because of a compensable injury. *See* Texas Workers' Compensation Commission Appeal No. 92641, decided January 4, 1993. Of course, the immediate effects of an original injury are not fully determinative of the nature and extent of the compensable injury. Texas Employers' Insurance Association v. Thorn, 611 S.W.2d 140 (Tex. Civ. App.-Waco 1980, no writ). It has also been held that a trier of fact is not required to accept a claimant's testimony at face value, even if the testimony is not specifically contradicted by other evidence. Bullard v. Universal Underwriters Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). In addition, it has been held that a trier of fact is not required to believe a claimant's explanation that he worked in spite of pain. Texas Insurance Employers Association v. Poe, 152 Tex. 18, 253 S.W.2d 645 (Tex. 1952). The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). 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 decision is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). That the evidence may give rise to equally supportable inferences is not a sound basis to disturb a fact finder's determinations. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

To the extent that Finding of Fact No. 5 may be construed as a finding on maximum medical improvement (MMI) and impairment, it is disregarded as not being necessary to the decision because MMI and impairment were not issues before the hearing officer. It has been held that unwarranted findings may be disregarded and judgment rendered on valid findings. *See* Texas Indemnity Insurance Company v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (Tex. Comm'n App. 1940, opinion adopted).

Finding of Fact No. 6 that on April 14, 1992, the claimant returned to work and continued working without any medical problems, is not against the great weight and preponderance of the evidence inasmuch as the claimant was returned to regular work on April 14, 1992, and did continue to work for about nine months until January 15, 1993. As previously mentioned, the hearing officer was not required to believe the claimant's testimony that he worked in pain. Poe, *supra*.

Finding of Fact No. 8 that the claimant's current medical condition is not related to the injury of (date of injury), was a factual finding made by the hearing officer after considering the conflicts and contradictions in the evidence. The hearing officer was not required to believe the claimant's testimony and in considering the credibility of the claimant the hearing officer could consider the various inconsistencies in the claimant's testimony such as the reason or reasons he took off work on January 15, 1993. The determination of whether the claimant sustained a herniated disc in his back on (date of injury), or perhaps aggravated a pre-existing herniated disc, was in large part dependent on whether the claimant could convince the hearing officer that there was a logical, traceable connection between the (date of injury), injury and the herniated disc. The hearing officer apparently did not believe that a preponderance of the evidence established the connection and, although different inferences might be reached on review, that is not a sound basis for disturbing the hearing officer's determination where, as here, we conclude that the determination is not against the great weight and preponderance of the evidence.

Finding of Fact No. 9 might be read to mean that the claimant had disability from April 12, 1992, to the date of the hearing. However, such a reading of that finding would not be consistent with the hearing officer's conclusion that the claimant did not have disability for more than eight days as a result of the injury of (date of injury), and his denial of the claimant's claim for benefits for the claimant's current medical condition. Therefore, we read Finding of Fact No. 9 the same way as the claimant does in his appeal and the carrier does in its response, that is, to the date of the hearing, December 20, 1993, the only period during which the claimant was unable to obtain and retain employment at pre-injury wages

due to his compensable injury of (date of injury), was from April 12 to April 13, 1992. We also interpret that part of the hearing officer's decision and order which recites that the "claimant had disability from April 12, 1992 to April 13, 1992 to the date of the hearing" to mean that the claimant had disability only on April 12 and 13, 1992. Having reviewed the record, we conclude that Finding of Fact No. 9, as interpreted to mean that the claimant had disability only on April 12 and 13, 1992, is not against the great weight and preponderance of the evidence.

We further conclude that the Findings of Fact Nos. 6, 8, and 9 support Conclusion of Law No. 2 that the claimant's current medical condition is not related to the injury of (date of injury), and Conclusion of Law No. 3 that the claimant did not have disability for more than eight days as a result of the injury of (date of injury), and we also conclude that the hearing officer's conclusions are not against the great weight and preponderance of the evidence.

The claimant contends in his appeal that the "carrier must put on proper evidence to establish that some other injury or condition is the `sole cause' of the claimant's disability," *citing* Texas Employers Insurance Association v. Page, 553 S.W.2d 98,100 (Tex. 1977). In Page, *supra*, the court stated "[t]o defeat Page's claim for compensation because of the pre-existing injury, Texas Employers must show that the prior injury is the sole cause of Page's present incapacity." In its appeal, the claimant acknowledges that the carrier did not attempt to defeat his claim of disability based on a sole cause defense. In Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993, we held that the hearing officer had improperly shifted to the carrier a burden of proof that was the claimant's where the carrier had not raised a sole cause defense. Thus, under our holding in Appeal No. 93143, *supra*, we conclude that the hearing officer in this case did not err in placing the burden of proof on the claimant under the particular facts of this case. In order for a claimant to prove disability, he or she must establish by a preponderance of the evidence that a compensable injury was the cause of his or her inability to obtain or retain employment at wages equivalent to the pre-injury wage. Appeal No. 93143, *supra*.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge