APPEAL NO. 94172

This action arises under the Texas Workers' Compensation Act TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas on January 20, 1994, (hearing officer) presiding. The claimant in his appeal states that he is not satisfied with the hearing officer's decision. The carrier responds that the claimant's appeal is insufficiently specific, but presuming that the claimant is appealing the hearing officer's determination that he did not have disability as the result of his compensable injury, the carrier argues that the evidence supports the hearing officer's determination. The carrier, also cross-appellant, appeals the hearing officer's determination that the claimant was injured in the course and scope of his employment on (date of injury), and that he gave timely notice to his employer of such injury; the carrier contends that the hearing officer's decision on these issues is against the overwhelming weight of the evidence. Neither party appealed the hearing officer's determination that claimant was not an independent contractor.

DECISION

We affirm the decision and order of the hearing officer, as reformed.

Because the facts of this case are thoroughly set out in the hearing officer's decision, they will only be briefly summarized herein. The claimant, who had been deaf since birth and had a speaking impairment, was assisted at the hearing by a sign language interpreter.

The claimant resided in an apartment complex managed by (employer). The claimant knew (Mr. B), employer's maintenance supervisor, who had hired him to do odd jobs around the complex. In March of 1993 (all dates are 1993 unless otherwise indicated) claimant began working regularly as part of a 20-man crew which was taking down and rebuilding fences at the complex. While he originally was paid $6.00 an hour, Mr. B raised his pay to $8.00 an hour because that was what the other crew members were making and claimant was a good worker. Part of this project involved breaking up the concrete around fence posts, for which claimant used an air hammer.

The claimant testified that he hurt his back on (date of injury) as he was using the air hammer and that he told "a boy" and (Mr. A), who he characterized as his supervisor, that he was hurt; he later stated that his back first hurt on (date of injury) and that he told Mr. B he was hurt and needed to go to the hospital and Mr. B told him to "go on." He said he went to a hospital on that date but the line was long so he returned home and rested. He said he continued to work after (date of injury) because he needed the money. When he experienced the back pain again, on (date of injury), claimant said he told Mr. A because Mr. B was out of town. (Mr. B's written statement said that Mr. A was "in charge" when he wasn't there, and he testified that claimant could easily have considered Mr. A his boss because he gave claimant orders.) Claimant said he also told "M" (Ms. M), who worked in the office, that he needed to go to the doctor in either May or June.

Mr. B testified that he did not recall claimant's having spoken to him about an injury on (date of injury), and that he was out of town on (date of injury). He said he knew nothing about claimant's having sustained an injury until he returned from a trip in June and was told by his wife. He said he communicated well with claimant, via lip reading and gestures, and that he believed claimant could have communicated to him that he was hurt. He said claimant had not worked for him since the fence job ended in May, and that he knew of claimant doing work for other people, including a painting contractor used by employer, (Mr. W). He identified photographs he said he took in late August showing claimant carrying boxes; he said he had been removing items from a vacated apartment and claimant offered to help him. Mr. B said the boxes were heavy and that when the job was finished he gave claimant "cigarette money." (On rebuttal claimant stated that Mr. B asked claimant to come and help him and then took the pictures; he also said the boxes in question were not heavy.) Mr. B also said he believed claimant limped only when others were around to observe him.

Mr. B's wife, (Mrs. B), who was employer's apartment manager at that complex, said she saw claimant frequently, that claimant worked at the apartment complex until near the end of June, that he did not always work a regular 40-hour week, and that he did not tell her he had been hurt. (She also stated that claimant had come into the office "a couple of times" to say his leg hurt, but that he did not explain why.) She said claimant spoke to Ms. M, her assistant, on (date of injury) to say his leg hurt and that he was going to the doctor; she said Ms. M was hired on June 3rd and had not worked there in May. When the doctor's office called Mrs. B later that day ((date of injury)) she said she was aware for the first time that claimant was claiming a work-related injury. She said she had seen claimant doing work for other people, and she had also observed him limping at times.

The claimant testified that he did painting work for two weeks in July but had to quit because of the pain and has not worked since. In a signed, transcribed statement Mr. W, the painting contractor, said claimant had worked for him off and on for about three years, and that he last worked for him painting fences in July, a job that required stooping, bending, and heavy lifting. Claimant was paid $5.00 an hour and worked an average of 40 hours a week. Mr. W said claimant did not complain of a physical problem and he was unaware that claimant had suffered a job related injury earlier.

Medical records in evidence show claimant was seen by (Dr. A) on (date of injury) for pain at the left L4-5 and S1 joints that radiated down to the left foot. Dr. A's report also said that "the severe symptoms have onset within last month" and gave an approximate date of onset as (date of injury). The doctor arranged for daily chiropractic treatment and took claimant off work until July 9th. On October 12th Dr. A noted claimant's continued pain, stated claimant had "total disability," and recommended an MRI. On Dr. A's referral claimant saw (Dr. T), a neurologist, on December 8th. Dr. T noted claimant's complaints of weakness and numbness in his left leg and the fact that he walked with a limp, and stated his impression of possible lumbar herniated disk and lumbar radiculopathy. He also wanted to obtain an MRI report as well as an EMG of the left leg, and said he needed information on claimant's medication and physical therapy before deciding on a course of treatment.

The claimant did not return to Dr. T, apparently because he was awaiting a letter from that doctor telling him what to do next.

In its appeal, the carrier challenges the following findings of fact and conclusions of law:

FINDINGS OF FACT

8.In [Mr. B's] absence, the work crew members were supervised by [Mr. A].

10.On (date of injury), the claimant injured his lower back while using the air hammer to break up a concrete base; he reported his injury to [Mr. A] and another employee, and left work early to go to the hospital for treatment; he attempted to tell [Mr. B] on the same date.

11.Prior to (date of injury), the claimant mentioned to [Mr. A] on several occasions that he was having difficulty working due to this work-related injury.

12.The claimant had to leave work early one work day during the week preceding (date of injury), due to pain in his left leg caused by this injury.

13.On (date of injury), the claimant aggravated the pre-existing condition in his lower back while using the air hammer again; he left early again after informing [Ms. M, Mrs. B's assistant] that he had hurt himself and was going to the doctor.

CONCLUSIONS OF LAW

2.The claimant was injured in the course and scope of his employment with [employer] on (date of injury).

4.The claimant gave timely notice of his injury to the employer.

The carrier contends that the evidence demonstrates that the claimant was injured on (date of injury), that he did not inform anyone in a supervisory capacity for 43 days, and that even if he had given notice to Mr. A or Ms. M, those persons were merely co-workers and not supervisors. The carrier contends that the hearing officer's determination of the issues of injury in course and scope of employment and timely notice are so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, and cites evidence in support of its argument, as well as conflicting and contradictory statements of the claimant.

It is true, as carrier alleges, that the claimant's testimony was confusing and seemingly conflicting at times. As the record makes clear, this was exacerbated by communication problems on direct and cross-examination due to claimant's deafness and

the difficulty with interpretation. However, the 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). As fact finder, the hearing officer may believe all, part, or none of the testimony of a witness; judge credibility; assign weight; and resolve any conflicts and inconsistencies. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). Especially under the unusual circumstances of this case, the hearing officer was entitled to sort through the testimony of claimant and reconcile any inconsistencies as to the causation and notification of an injury. Moreover, as the hearing officer stated, the claimant's testimony was consistent in maintaining he was injured as a result of using an air hammer as part of a project that began sometime in March. Upon our review of the record, we do not find that the hearing officer's determination of the issue of injury in course and scope was so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer found that claimant had first suffered an injury on (date of injury), which injury was aggravated on (date of injury). While the evidence supports a finding of injury on (date of injury), we find the date of (date of injury) unsupported by the record as a date of injury or aggravation, although medical records show claimant first saw Dr. A on that date. However, this panel will affirm a hearing officer's decision on any reasonable basis which finds support in the record which, in this case, supports a finding that claimant's injury occurred on (date of injury). *See* Burnett v. Motyka, 610 S.W.2d 735 (Tex. 1980). ("The judgment of the trial court must be affirmed if it can be sustained on any reasonable theory supported by the evidence authorized by law.") We therefore reform the hearing officer's decision and order to reflect this date of injury.

The 1989 Act requires that an injury must be reported to the employer within thirty days of the date on which the injury occurs. Section 409.001(a). The Act also requires that such notice be given to someone who holds a supervisory or management position with employer, Section 409.001(b). The hearing officer found claimant had given notice to Mr. A and "another man" on (date of injury); he also found that claimant notified Ms. M that he was hurt on (date of injury). Carrier argues, however, that Mr. A and Ms. M are not supervisory employees. We note that the hearing officer also made a finding, based upon the statement Mr. B gave to carrier's representative, that Mr. A was left in charge when Mr. B was not present. Because we have reformed the hearing officer's decision to reflect a (date of injury) date of injury, the question remaining is whether the claimant gave timely notice of such injury within 30 days. The Appeals Panel has held that findings to support a hearing officer's decision may be implied where sufficient evidence exists to support them. Texas Workers' Compensation Commission Appeal No. 93452, decided July 21, 1993. The evidence in this case, including both claimant's testimony and that of Mr. B, supports an implied finding that claimant notified Mr. A of an injury within 30 days of (date of injury), at a time in which Mr. A was working in a supervisory capacity. (In addition, the claimant testified that he informed Mr. B of his injury on (date of injury), although Mr. B stated he did not recall this occurring.)

The hearing officer also found claimant did not have disability as a result of his compensable injury. As stated in his discussion, he based this determination upon the fact that the claimant, after being taken off work by Dr. A, returned to the full time, strenuous job of painting for Mr. W. The hearing officer also stated that the claimant engaged in other activity "which was unlikely for a person claiming to be unable to work due to his infirmity," and that the question of disability was further complicated by the claimant's failure to follow up on scheduled testing which was to be done by Dr. T after his December examination.

This panel has held that while a release to return to work is normally probative evidence that disability has ceased, under the 1989 Act all relevant evidence including the testimony of the claimant can be considered in determining this issue. Texas Workers' Compensation Commission Appeal No. 93961, decided December 9, 1993. While we would have concern if the hearing officer's determination of no disability was based solely upon the claimant's painting job (due to the discrepancy between the wages for that job and his preinjury wages), it is clear that his decision was based upon the cumulative effect of many factors, such as the claimant's performing strenuous work with no apparent difficulty very shortly after injuring himself, and the lack of evidence that any doctor had taken him off work past July 9th. As with the issues of injury and timely notice, while a different fact finder could have reached a different result based upon the evidence in the case, that alone is insufficient basis for reversal by this panel. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992.

The decision and order of the hearing officer, as reformed to reflect a (date of injury), date of injury, are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge