APPEAL NO. 94246

At a contested case hearing held in (city), Texas, on January 20, 1994, with the record closing on February 3, 1994, the hearing officer, (hearing officer), made a number of factual findings and concluded that the appellant (claimant) failed to prove he sustained a repetitive trauma injury. The hearing officer concluded further that the claimant failed to prove the correct date of his claimed injury and also failed to prove that he gave his employer timely notice of such injury or that he had good cause which would excuse his untimely notice. In essence, claimant's appeal posits that the evidence established that he did sustain the repetitive trauma injury for which he submitted a claim and that he provided his employer with timely notice of that injury. The response filed by the respondent (carrier) urges the sufficiency of the evidence to support the hearing officer's factual findings and legal conclusions. The carrier also timely filed a "conditional" appeal objecting to the hearing officer's admission into evidence, after the hearing was adjourned but before the record closed, of a letter from one of claimant's doctors.

DECISION

Affirmed.

Claimant testified that he had worked for (employer) for approximately 20 years in the permanent molds department; that his work involved the use of a crane to lift and lower heavy cast iron molds weighing 300 to 400 pounds; that he was required to push, turn and flip the molds, once hoisted, which required physical exertion; that in 1988 he sustained a compensable low back injury requiring disc surgery at the L4-5 level; that at the time of the hearing he was still receiving weekly workers' compensation benefit checks for that injury; that he was given a lifting restriction of 25 to 50 pounds by (Dr. W) who treated his original back injury; and that the pain of the first injury, for which he received heat treatments and medication until sometime in 1990, ultimately resolved. Claimant's claim for his original back injury, signed on "date)," stated: "I injured my back and body generally on the job flipping molds." Claimant further testified that when he returned to work after his original injury, his employer ignored the lifting restrictions and had him pushing, turning and flipping the molds approximately twice a day, as he had been before his injury. He said such work had him supporting the entire weight of the molds. However, claimant's immediate supervisor, (Mr. B), testified that the hoist did the lifting and that claimant's duties did not have him lifting more than 25 to 50 pounds, although he acknowledged it took some pressure to turn and push on the molds once hoisted. In a November 17, 1989, deposition, Dr. W stated that claimant's 25 to 50 pounds lifting and repetitive bending restrictions should be permanent and that claimant was more likely because of the surgery to re-injure his lower back. Dr. W also said that at the time of claimant's visit on March 9, 1989, claimant's pain was a mechanical back pain, basically a "wear and tear" type pain which was tolerable and usually not disabling.

Claimant said that on or about (date), he had the onset of pain across his hips and up his back which was not like his regular pain, and he stated "there wasn't no doubt in my mind" that this pain was caused by his lifting. It was claimant's theory that subsequent to

his prior low back injury, he sustained a repetitive trauma injury to his low back as a result of his repeated pushing, turning and flipping of the molds. Repetitive trauma injury is defined in the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011(36). He contended that his first injury required surgery at the L4-5 level and left him with a "mild" bulge at the L3-4 level; and that as a result of the subsequent repetitive trauma, he sustained a new injury manifested by the aggravation of the disc bulge at the L3-4 level which had progressed from "mild" to "slight to moderate."

Claimant testified that when he had the new pain on or about (date), he told Mr. B "he had pain and needed help with the molds" and that "the work was hurting it." In response, according to claimant, "they started helping me with the molds." Claimant's theory was that this statement to Mr. B constituted timely notice (Section 409.001) to the employer of his new repetitive trauma injury. The purpose of the notice requirement is to allow an insurer an opportunity to immediately investigate the facts. The employer needs to know only the general nature of the injury and that it is job related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). Mr. B testified that he knew from the time he began to supervise claimant in September 1992 that claimant had back pain because claimant had told him about it and said he was learning to live with it. He assumed claimant had chronic back pain from the surgery. According to a letter from Dr. W to employer's doctor dated October 10, 1990, claimant was seen for pain in his left hip region and Dr. W felt the symptoms were "related to degeneration in the lower part of his back." Mr. B said he never noticed claimant having any particular difficulty doing his job nor did he recall claimant asking for help due to back pain. He stated that it was standard shop practice for the employees to help one another with tasks such as turning molds. A December 16, 1993, statement from coworker (Mr. JS) stated that claimant was having back pain in (date), that claimant had trouble turning the molds over due to his back pain, that he helped claimant all he could, and that by the end of June 1993 claimant's condition was much worse and he was unable to work. A December 16, 1993, statement of coworker MB contained similar information.

Claimant testified that on June 29, 1993, the plant closed for a week for vacation and that he went on a vacation and never returned to work because his back "finally went out on [him]" and he sought medical care. At the hearing, after some discussion about the date of injury for an occupational disease being "the date on which the employee knew or should have known that the disease may be related to the employment" (Section 408.007), claimant amended his Employee's Notice of Injury or Occupational Disease and Claim for Compensation form (TWCC-41) to change the date of injury from "06-29-93" to "on/about 03-01-93." The supervisor of all three shifts, (Mr. WS), testified that claimant called him on July 12, 1993, after undergoing an MRI, and said he was having back problems. According to Mr. WS, claimant related that while fishing on vacation, he started having problems with his legs and the next morning could not get out of bed. Mr. WS said he had been claimant's immediate supervisor prior to September 1992 and that because of his surgery in 1988 all coworkers were instructed to go out of their way to help claimant.

A report from (Dr. G) dated August 9, 1993, to whom claimant had been referred for evaluation of leg pain, stated that claimant had a "very extensive history that began really on July 6, 1993 when he was out fishing," that "[h]e got up and started walking across an area, not carrying anything, had not lifted anything, and developed severe suprapubic pain and then right leg pain." Dr. G continued that shortly after that, claimant began developing "severe left leg pain to the point that he could not walk," and was hospitalized for 10 days for an extensive workup. Dr. G's report further stated that claimant's MRI scan showed degenerative changes at L3-4 and L4-5, that he had had prior surgery by Dr. W for a ruptured disc at L4-5, and that at L3-4 claimant had a mildly bulging disc which Dr. G interpreted as "slight to moderate." Dr. G's diagnosis included "back, hip and leg pain of unknown etiology at this time." A letter of August 19, 1993, from Dr. G's office to employer stated that claimant had traced his onset of symptoms to the time he was on vacation and "could not really pinpoint a time prior to that when he felt he actually injured his back at work." (Dr. F) pain management program discharge summary of December 22, 1993, included a diagnosis of a positive discogram for concordant pain at L3-4 and L5-S1 with degenerative pattern at the L3-4, L4-5, and L5-S1 discs.

An August 18, 1993, statement of (Ms. F), who apparently was an employee of employer, recounted that two weeks earlier, claimant had come to employer's insurance department inquiring about a disability check whereupon she inquired whether claimant had been hurt on the job. Ms. F stated that claimant responded that he felt he hurt it while on vacation, that he had bent over and it felt like it caught, and that it was hard for him to stand up. According to Ms. F, claimant said he had an appointment to see a doctor and would find out whether it was from a prior injury. She stated that he later returned and said the doctor told him he thought it was a new injury. Claimant denied telling Ms. F he hurt himself on vacation but conceded he was showing his wife how to fish and baiting her hook when his back got worse and his leg started hurting. Claimant stated on a group accident and sickness benefit claim form dated "8-22-93" that his accident date was "(date)," that he "went fishing on (date)-had trouble getting up out again," that he went home that night and the next morning his legs would not move so he went to the hospital.

In a January 12, 1994, report, (Dr. DS) stated the history as claimant's being on vacation in July 1993 and "helping his wife take a perch off a hook that she caught and suddenly had the onset of low back pain and pain down his legs." The history further stated that after returning to work (apparently following surgery), claimant "had continuation of low back and leg pain up to that time, but that is when it got severe." Dr. DS diagnosed "lumbar discogenic pain L3-4, L4-5 and L5-S1."

On November 18, 1993, Dr. G reported: "Concerning [claimant's] most recent injury and problem, I think I would have to consider that it is either an aggravation of a pre-existing condition or a natural progression of the previous spinal problems that [claimant] was treated for before. At the time of his injury, he was doing essentially nothing; he was just walking along when he developed this pain and problem . . . considering the fact he continued his job for many years with [employer], it is very conceivable that this is a work-related aggravation of a pre-existing condition." In a "fax" to claimant, dated January 19, 1994, and

received during the hearing, Dr. W stated he dragreed with Dr. G "that this is from the original injury in 1988 when he had a herniated disc at L4-5." By order of January 20, 1994, the hearing officer reopened the hearing to receive another report from Dr. W and it is the admission of this document to which the carrier's conditional appeal is directed. A copy of this report was provided to the carrier and the carrier objected to its admission asserting that the "extensive contact" between the claimant's attorney and Dr. W "exceeds the bounds of fair play," and that "[i]t is apparent that Dr. W will simply write whatever the claimant desires." Dr. W's report of "1/20/94" stated: "To clarify my note of 1/19/94 regarding the above named patient, please note that I do agree with [Dr. G] that this is work related agrivation (sic) of a pre-existing condition."

Respecting the causal connection between claimant's work and his repetitive trauma injury, the hearing officer viewed the medical evidence as "contradictory and inconsistent at best." The hearing officer found that claimant did not sustain a repetitive trauma back injury while working for employer in 1993, that claimant was unable to establish the correct date of such an injury in accordance with Section 408.007, that claimant was unable to establish that he reported the injury to his employer within 30 days of the alleged injury date, that claimant's statements to employer within 30 days of the injury date were insufficient to inform the employer that claimant was alleging a new work-related injury, and that the claimant offered no reasonable explanation or justification that would excuse his failure to give timely notice of injury.

We are satisfied that the evidence sufficiently supports these factual findings and that they, in turn, support the ultimate legal conclusions drawn therefrom. Claimant had the burden, by a preponderance of the evidence, to prove that he sustained the compensable injury he claimed, and that he gave timely notice of such injury to his employer or had good cause for untimely notice. These matters are questions of fact for the hearing officer as the trier of fact to decide. The hearing officer could view the evidence as falling short of establishing that claimant encountered sufficient repetitive trauma on the job to cause a new lumbar spine injury by way of the aggravation of his pre-existing condition and as falling short of establishing that his new injury was causally related to his work. Similarly, the hearing officer could determine that claimant's mere statement to Mr. B in early (date) to the effect that his back hurt when pushing on a mold was not sufficient to apprise the employer that he was then reporting that he had sustained another job-related injury, as distinguished from merely stating that he had back pain upon exertion.

Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility to be given the evidence. The hearing officer resolves conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), including medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We will not disturb the hearing officer's findings unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust and we do not find them so in this case. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

It is not necessary to decide the carrier's conditional appeal in view of the outcome of claimant's appeal.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge