APPEAL NO. 94278

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 4, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues were whether appellant, (hearing officer), who is the claimant herein, sustained a compensable injury on (date of injury), and whether he had, as a result of such injury, the inability to obtain and retain employment equivalent to his pre-injury wage (disability).

The hearing officer determined that claimant had not proven that he sustained a compensable injury, and that he did not have disability due to his alleged injury of (date of injury). The hearing officer held that there was insufficient medical evidence to establish the causal connection between claimant's contended injury and his work. The hearing officer did observe that he deemed claimant's explanation concerning initial confusion over the date of injury to be sufficient.

The claimant appeals, arguing that the evidence proves that he sustained an injury on the job. The claimant points out that he is not required to prove a discrete task that caused injury, but that the lifting period on (date of injury) is sufficient to prove accidental injury. He further argues that as no doctor has released him back to work, that disability has been established. The carrier responds that the decision should be affirmed. The carrier argues the lack of evidence of a definite time, place or event leading to injury. The carrier notes the weakness of the evidence on the disability issue.

DECISION

After reviewing the record, we reverse and remand the decision for further proceedings in accordance with this decision. We believe that the hearing officer has applied the incorrect legal standard to weigh the evidence, in that he has apparently faulted claimant's case for failure to identify a precise event on (date of injury) that caused the injury, and has also held that medical evidence of causation is required.

Prior to (date of injury), the claimant had worked as a laborer for about two months for (employer), a company which assembled and installed railroad ties for railroads. On (date of injury) the claimant started out setting end plates, and then was switched to a job where he lifted boxes of metal end plates from morning until 3:30, when he left for home. The end plates were used to attach cross-ties.

Claimant said that each box of end plates weighed between 35 and 50 pounds. A coworker, (Mr. T), testified that a box of end plates would weigh 30 to 40 pounds. Claimant said that he had to lift such boxes off a pallet and carry them about five feet, lifting them over a rail to another worker. Claimant estimated that he carried about 30 boxes that day and, in between, worked setting the end plates for more secure anchoring by machine. Claimant characterized the workday as busy, although he acknowledged that a 3:30 discharge was earlier than usual. The evidence is not well developed, however, on his usual day-to-day tasks.

Claimant said he got home, turned on the television and sat down to watch, and that his back began to hurt. Although he said he went to the emergency room that night, and then the next day, medical records indicated that he went to the emergency room the early morning hours of (the day after the date of injury). Claimant said that his fiancee attempted the night of the (date of injury) to call his supervisor, (Mr. A), to report his back pain, but was unsuccessful. He said that she called in sick for him the following day.

Claimant stated that he could recall no particular occasion during the day when he felt a pop or a pain while lifting or working. There was no evidence at all of back pain prior to (date of injury). Claimant testified he had never had a work-related injury or claim before. A five-year record check of Texas Workers' Compensation Commission (Commission) records (submitted by the carrier) revealed that claimant had not filed other workers' compensation claims in that time period.

Claimant said that after (the day after the date of injury), he went back to the emergency room six days later, and was in bed at home during the interim. Claimant testified he received about two weeks therapy from the hospital but had not seen a doctor since an unidentified date in December 1993. Claimant testified that he could not work for two reasons: because he considered that he was still employed by the employer, and because of his pain. He said that his pain had gradually improved, and he had leg pain along with back pain. He said that it occurred every day, although not all day. On the date of the hearing, he rated his pain about a 3 or 4 on a scale of 1 to 10.

The claimant acknowledged that he signed a claim on June 15th that claimed a date of injury of (five days before the date of injury). He explained that this was what he attempted to recall in thinking back, but refreshed his recollection later from his medical records that the date was the (date of injury). Claimant stated he was not contending a repetitive trauma injury.

Claimant said that he told the emergency room personnel that he was hurt on the job, and that statements in medical records to the contrary were wrong.

Mr. T stated that work was slow on the last day in (month of injury) that claimant worked, and that he and claimant were involved with setting ends and ties. He did not recall, one way or the other, whether claimant lifted boxes, but thought he probably lifted some, no more than four or five, as required by the volume of work they were doing that day. Mr. T said he worked all day around claimant and could see him, and that he did not appear to be hurt. Mr. T could not recall the exact date in (month of injury) that he last saw claimant.

Emergency records from (the day after the date of injury), note that claimant said he didn't feel anything until he got home, and that he denied being hurt at work. However, the same record indicates in the section for physician's notes: "50# boxes of metal end plates?" On (a week after the date of injury), it is noted that claimant did not fall or injure himself "in any particular way" but that he lifts boxes in the 35-50 pound range at work. The diagnosis

recorded on these records is lumbosacral strain. On June 18th, again from the emergency room, the doctor's notes indicate "status is not able to work due to back pain." Medication was prescribed each time. Physical therapy is documented through May 28th. There is some evidence that claimant claimed payment through his regular health insurance, but he testified that carrier was not paying his medical bills.

The carrier presented emergency room records from another hospital dated (four days before the date of injury and two days before the date of injury), in which claimant was seen for mid-abdominal pains. The significance of this is not explained nor were the illegible portions of the report deciphered for the record. A transcript of an interview with claimant's supervisor, (Mr. B), said he was not aware that claimant hurt himself and that claimant told him he was having muscle spasms in his back but did not mention he was hurt at work. However, (Mr. G), another supervisor, stated in an interview that he reviewed Mr. A's notes and determined that claimant's fiancee called in at 6:45 a.m. on (the day after the date of injury) to report she was taking claimant to the hospital due to a back injury. Mr. G's statement further reported a meeting on (two days after the date of injury) between claimant and other supervisors, and in that conversation claimant recounted his history of pain and was reported as having said that he couldn't be sure if his pain were work related or not due to the lack of pain at work.

What is troublesome about the hearing officer's analysis of the evidence is that he appears to believe that, in the absence of claimant's ability to recall a specific instance of pain at the job site, that claimant's attribution of back pain to work is merely speculation or guess. We agree that a claimant contending an accidental injury must prove specific time, place and event leading to injury. Olson v. Hartford Accident & Indemnity Co., 477 S.W.2d 859 (Tex. 1972). However, the requirement of a "definite event" may be met by showing that claimant was injured after being engaged in an unusual or stressful activity on the job. *See* Texas Employers' Insurance Ass'n v. Murphy, 506 S.W.2d 312 (Tex. Civ. App.-Houston [1st Dist.] 1974, no writ) (court finds "definite" event for a period of inhalation over three day time period).

The allegations in this case are substantially similar to those made in Hartford Accident & Indemnity Co. v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.). In that case, the claimant spent a day lifting 50 pound sacks, and felt pain in his back that evening. Citing another case, Transport Insurance Co. v. McCully, 481 S.W.2d 948 (Tex. Civ. App.-Austin 1972, writ ref'd n.r.e.), the Court of Appeals noted that a claimant need not meet the nearly impossible task of proving which specific task in a period of exertion at work led to injury. The court noted that claimant's testimony about his activities, combined with medical evidence of a soft tissue injury to the back, sufficiently established the accidental nature of the injury, traceable to a definite time, place, and cause.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). Likewise, we agree that the trier of fact is not required to

accept a claimant's testimony at face value, even if not specifically contradicted by other evidence. Bullard v. Universal Underwriters' Insurance Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ).

We would also note that medical evidence is only required to establish causation where the link to work is beyond common experience, which we do not believe to be the case with a back injury and lifting as in this case. *See* Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). In this decision, it does not appear that the hearing officer disbelieved that claimant was moving boxes so much as he found that claimant failed to prove his case because he could not recall a discreet event within the work day. As we have pointed out, this is a higher standard of proof than is required by caselaw. Although carrier responds that claimant was not credible, it could be argued that if claimant were going to lie about his injury, he would have gained more by claiming to have popped his back while lifting boxes, rather than emphasizing that he did not recall an episode at work which caused pain at that time. Even if he did not draw an immediate connection, there is evidence that claimant discussed his lifting activity with doctors from his first visit. The fact that claimant is not contending a repetitive trauma does not preclude him from proving an accidental injury based upon an activity throughout the duration of a day.

Although we would tend to support the hearing officer in his findings that claimant had not proven that his inability to work was caused by his alleged back injury, which appears to be a simple strain, we cannot determine (in light of evidence that claimant was taken off work for some period of time after his injury) whether the hearing officer decided against claimant because he did not believe that claimant sustained a compensable injury. Therefore, the hearing officer may reconsider the issue of disability in light of his findings on the injury issue on remand.

We leave it to the discretion of the hearing officer to determine whether a further hearing is needed or whether the evidence already taken can be re-evaluated in light of applicable case law. The decision and order of the hearing officer are reversed and remanded for further proceedings in accordance with this decision. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I do not find a reasonable basis to conclude that the hearing officer, well experienced in hearing workers' compensation cases, applied an incorrect legal standard in deciding this case. Rather, I find it abundantly clear that he was left with a situation where, as the majority notes, the evidence was not well developed in several particulars. Under the circumstances, he concluded, as he so states, that the claimant failed to prove, by a preponderance of the evidence, that he sustained a compensable injury. The claimant has the burden to establish that he sustained a compensable injury. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93302, decided June 2, 1993; Texas Workers' Compensation Commission Appeal No. 93876, November 9, 1993. If that burden is not met, the claimant cannot prevail. As I evaluate the record and the hearing officer's decision in this case, it is apparent that the hearing officer was concerned that the various factors, considered together, did not preponderate to establish that a compensable injury was sustained. Without indicating in any way that such was a conclusion or standard of law, he stated several facts in the case which led him to conclude the claimant had not met his burden of proof. These factors were that: (1) there was no incident or indication of any injury during the working day in question; (2) the medical evidence did not show a causal connection between the work and the back injury and contained an entry that the claimant denied injury during work; (3) the claimant's injury and medical evidence did not square with the lengthy period of time that he did not look for work; and, (4) the testimony of carrier'sy witnesses that no injury or manifestation of any injury was observed on the day in question or at any other time. Of course, the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)), and he is the one to resolve any 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). I believe he did just that and find no basis to conclude he somehow applied incorrect legal standards. That a reviewing level body might have reasonably drawn inferences different from those deemed most reasonable by the hearing officer, is not a sound basis to disturb a decision. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). I would affirm the decision.

Stark O. Sanders, Jr.
Chief Appeals Judge