APPEAL NO. 94367

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 4, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues presented for resolution were:

1.did the claimant sustain a compensable injury on (date of injury); and

2.did the claimant have disability from (date of injury), to the present from the injury sustained on (date of injury)?

The hearing officer determined that the claimant had sustained a compensable injury in the course and scope of his employment on (date of injury) (all dates are 1993, unless otherwise noted) and had disability as defined by the 1989 Act from (date) to the date of the CCH. Carrier herein, contends that the hearing officer erred in finding the claimant sustained a compensable injury, that the hearing officer's determinations are against the great weight and preponderance of the evidence and are insufficient as a matter of law. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, did not file a response.

DECISION

The decision and order of the hearing officer are affirmed.

It is undisputed that claimant had sustained a prior back injury in August 1990 and had back surgery in November 1990. Although claimant testified he was completely recovered from that injury and was released for full duty, the medical reports indicate that claimant had been told he should not return to his occupation of truck driving and four days before he started employment for (employer) employer, claimant was told "to start Lido therapy for strengthening of his back due to persistent weakness in this area." (Report of [Dr. A] dated "2/4/93.") Nonetheless, claimant applied for a position with the employer as a truck driver hauling fluids in the oil field business and stated on the employment application that he had not had any serious "head or spinal injuries." Claimant passed a pre-employment physical and began work for the employer on February 8th. It is undisputed that claimant told (PL), one of employer's owners, about his pervious back injury and the surgery, and that the employer had not asked for a medical release from the claimant's doctor. PL testified that claimant was a good worker, who regularly worked long hours (anywhere from 50 to 100 hours a week). Claimant testified his job involved lifting, bending, stooping, turning valves on heavy machinery and driving over rough terrain. PL testified that on the afternoon of (date of injury), claimant said he did not feel good and that PL told him to go home. Claimant testified that by the time he arrived home on (date of injury), he was suffering from considerable back pain. Claimant has consistently stated he is unable to point to a specific event, or explain when, where or how he was injured, other than saying it was (date of injury). Claimant called in sick the following day, (date). Notice is not an issue in this case. What occurred in the ensuing days after (date of injury), is subject to

dispute. Claimant apparently had some medical benefits remaining from his 1990 injury and at least initially attempted to relate his current condition to the 1990 injury. Claimant returned to Dr. A, who had treated him for his prior injury, on September 1st with an Initial Medical Report (TWCC-61) reporting an assessment of "pain and swelling in lumbar spine and pain radiating down both legs." Dr. A noted a history of "Recovered from previous back injury . . . . the driving and bouncing and lifting caused further problems with his back." In a work release status, Dr. A indicated claimant was unable to work form "9-1-93 to 9-14-93." Claimant had numerous s follow-up visits with Dr. A throughout the remainder of 1993, with all of the reports showing a date of injury of "8-22-90." Claimant at one time attempted to have employer's secretary change his employment records to show a reduced number of hours worked. The hearing officer accurately summed up claimant's representations to Dr. A by saying " . . . . claimant also was not initially forthcoming with his doctor [Dr. A], in describing his duties with [employer] presumably because such duties were not in line with previous medical advice given after the 1990 injury." Claimant was diagnosed as having "low back strain" and in a report dated October 21st, Dr. A stated "The possibility of recurrent lumbar disc syndrome, post laminectomy, is entertained." X-rays of the lumbarsacral spine on October 26th were seen to be normal. A report from Dr. A in January 1994 summarized claimant's course of treatment as follows:

> Initially, [claimant] was injured on 8/22/90 and following conservative treatment and diagnostic testing with no improvement, he had surgery on 11/1/90 for bilateral decompression lumbar laminectomies with bilateral foraminotomies at L4-5 and L5-S1 and excision of herniated nucleus pulposus at L4-5. An MRI of the lumbar spine performed on 8/10/92 was essentially normal.
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> The patient returned to work in the early part of 1993 driving a truck for [employer]. September 1, 1993, the patient presented himself in our office with complaints of pain and swelling in his back. Again, he was treated conservatively with physical therapy, medications, rest, and diagnostic testing. An MRI of his lumbar spine was done on 12/7/93 and indicated a bulging annulus at the L4-5 level. This would indicate a new injury sustained from the jostling and jarring of truck driving while on the job.

The claimant's position at the benefit review conference (BRC), and as argued at the CCH by the ombudsman, was that he aggravated a previous back injury in the course and scope of employment.

The carrier's position is that claimant did not sustain an injury in the course and scope of employment because he was unable to detail when, where, and how he was injured; that claimant had never been released to full duty from the 1990 injury; that claimant had lied on the pre-employment physical and application, and that there was no link between the injury and claimant's employment.

The hearing officer made the following two "Findings of Fact" which have been appealed:

3.On or about (date of injury), the claimant sustained harm to his back while engaged in an activity that originated in and had to do with [employer's] business and that was performed by the claimant in the furtherance of the business or affairs of [employer].

4.The claimant has been unable to obtain and retain employment at wages equivalent to his wage before (date of injury), from (date), to the present as a result of the injury he sustained on or about (date of injury).

Carrier recognizes, in its appeal, the correct standard of review as enunciated in Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986) and that the "hearing officer is the sole judge of the relevance, materiality, weight, and credibility to be placed on the evidence . . . . " Section 410.165(a). Carrier further recites case law Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.) and Appeals Panel decisions for the proposition that the claimant bears the burden of proving that an injury occurred while claimant was in the course and scope of employment. We do not disagree. Carrier's point is that the hearing officer only concluded in the statement of evidence that claimant's current back condition is due to work activities without making specific "fact finding describing these supposed work activities . . . . " and apparently basing her conclusion "solely on claimant's unsubstantiated testimony" which did not link the injury to the work activity. Clearly, claimant's position at the BRC was that the "lifting, bending, stooping and driving over rough terrain were activities which aggravated what claimant called his "delicate" back condition. Claimant's testimony is substantiated by Dr. A's January 1994 report. Here Dr. A recited claimant's history, and concluded driving a truck for employer "would indicated a new injury sustained from the jostling and jarring of truck driving . . . . " Clearly, claimant is contending the lifting, stooping, and truck driving aggravated his "delicate" back condition. For the hearing officer to find this as fact is more than "mere conjecture." We further noted that a finding of injury may be based on the testimony of the claimant alone. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ); Texas Workers' Compensation Commission Appeal No. 94325, decided May 2, 1994. In this case, claimant's testimony is supported, at least to some extent, by Dr. A's reports.

Carrier next attacks claimant's credibility, pointing out numerous inconsistencies and contradictory testimony, incorrect notations on the pre-employment physical and application. We agree those contradictions exist and the hearing officer noted "some potentially inconsistent statements" and the fact that claimant was, in some instances, not entirely "forthcoming." Nonetheless, even recognizing the inconsistencies, the hearing officer chose to believe the claimant. The hearing officer may believe all, part or none of the testimony of any witness, Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.), and further the hearing officer may accept some parts of a witness's testimony and reject other parts when the testimony given is inconsistent or contradictory.

Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). Clearly, claimant made some misrepresentations that he had been released by his doctor to go to work, that he had kidney stones and misrepresented his back injury. The hearing officer could, and possibly did, find that claimant did so in order to obtain a job driving a truck, the only occupation by which claimant felt he could support himself. These misrepresentations only reflect on claimant's credibility and do not directly bear on whether or not claimant aggravated his pre-existing back condition on (date of injury).

The carrier, particularly at the CCH, stressed that claimant was unable to state with specificity, how, where and exactly when his injury occurred. Carrier's contentions on this point are substantially similar to those made in Hartford Accident and 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.

Carrier further contends that the hearing officer's Finding of Fact No. 3, quoted above, "is conclusory" and did not "find basic facts from the credible evidence . . . to support a course and scope injury." Carrier maintains it is not permissible merely to paraphrase the law and label it a "finding of fact." Carrier cites Texas Workers' Compensation Commission Appeal No. 92258, decided August 7, 1992, and No. 92230, decided July 17, 1992, to support its position. We do note that the hearing officer's findings of fact regarding the injury are sparse, however, the hearing officer's statement of evidence makes clear her position. It would have been desirable for the hearing officer to have expressed her findings more in detail, however, we believe that the carrier was sufficiently aware of the facts as found by the hearing officer to intelligently prepare an appeal. Both Appeals Panel decisions cited by carrier involve situations where there were no valid findings of fact and the cases were remanded for the hearing officer to make findings based on the evidence presented. In the instant case, the hearing officer made a finding that claimant was unable to obtain and retain employment at his pre-injury wage as a result of the injury on (date of injury). This finding in conjunction with the hearing officer's statement of evidence implied a finding of a compensable injury. The hearing officer could have made a finding that driving a truck over rough terrain, stooping and bending, while working on valves, aggravated claimant's pre-existing back condition on (date of injury). We do not believe carrier was misled by the hearing officer's failure to make such a specific finding.

Carrier cites Miller v. Railroad Commission of Texas, 363 S.W.2d 244 (Tex. 1963) for its proposition that findings must be in precise and direct language and not be conclusory or vague summaries of the evidence. We note that carrier is citing as precedent, an Administrative Procedure and Texas Register Act, TEX. REV. CIV. STAT. ANN. art. 6252-13a (West 1993) (APTRA) (now Administrative Procedure Act, TEX. GOV'T CODE ANN. §

2001.001 to 2001.092 (APA)) case. We have dealt in some detail regarding how both the APA and Miller do not apply to the specificity of workers' compensation hearing officer's findings under the 1989 Act in Texas Workers' Compensation Commission Appeal No. 93147, decided April 12, 1993. *See also* Texas Workers' Compensation Commission Appeal No. 94169, decided March 25, 1994.

Carrier also contends that the hearing officer erred in finding claimant sustained disability as a result of his injury. We agree that the "threshold issue (on this point) is whether there was a compensable injury." Having determined that the hearing officer, as the trier of fact, has determined that claimant sustained a compensable injury, based on claimant's testimony and Dr. A's medical reports, we find that the hearing officer's determinations that the claimant has disability, as defined by the 1989 Act is supported by sufficient evidence. We would further point out that in a workers' compensation case the issue of disability may be based on the sole testimony of the injured employee. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). However, in the instant case, the claimant's testimony is support, at least in part, by Dr. A's medical reports.

We would agree that in this case there were a number of inconsistencies and contradictions and a different conclusion may have been reached by another fact finder, however, this alone is not a sufficient reason to reverse a decision of a hearing officer. It was for the hearing officer to resolve any conflicts and inconsistencies. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). We do not substitute our judgment for that of the hearing officer where there is evidence sufficient to support his or her determination. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994; Texas Workers' Compensation Commission Appeal No. 931148, decided February 1, 1994. Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge