APPEAL NO. 950128

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On December 17, 1994, a contested case hearing (CCH) was held in_____, Texas, _____presiding. The issues from the benefit review conference (BRC) were:

1.Was the Claimant's back injured in the course and scope of employment; and

2.Did the Claimant timely notify his Employer of the injury?

Also not specifically certified at the BRC, the following issue was included by the hearing officer, and agreed to by the parties.

Assuming the Claimant had a compensable injury, did the Claimant have disability as a result and if so for what periods?

The hearing officer determined that respondent (claimant) was injured in the course and scope of his employment on _____ (all dates are 1994, unless otherwise noted), that claimant timely reported his injury to the employer and that claimant has had disability from _____, to the date of the CCH.

Appellant, (carrier) appeals certain determinations on a "no evidence" basis, other determinations on an insufficient evidence basis, contends that causation of claimant's back injury requires "expert medical opinion" of causation, asserts evidence was considered over carrier's "hearsay objections" and attacks the claimant's credibility. Carrier requests that we reverse the hearing officer's decision and render a decision in its favor. Claimant responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

Claimant testified that he was a truck driver, driving a tractor trailer rig, for Coastal Corporation, employer. Part of claimant's duties consisted of loading and hauling oil in a tanker trailer. Claimant testified his job required him to climb a ladder midway on the tanker unit, to open the dome top, and check the fuel level, as oil was being pumped into the tanker. It was important that the tanker be loaded to an optimal level but not so full as to cause an oil spill. When the oil was at approximately the correct level, claimant said he would descend the ladder, jump to the ground from the last rung (a distance that employer's witnesses said was 31¾ inches from the ground), rapidly turn to the left and run to the shut off valve which was approximately 25 feet away. Claimant testified that

although the tanker he was using had a fill or float gauge, that gauge was not working properly so he had to climb the ladder to the top of the tanker and visually check how full the tanker was. Claimant said that he had to perform the climbing/descending procedure about four times per load and that he was hauling four loads a day on average. Claimant testified that he began to experience a pain in the back of his leg for the three weeks prior to _____, but that the jumping off the ladder and twisting to the left on _____, made the condition much worse. Claimant testified that he told his supervisor, MDL (MG) that he needed to be off work for a while because of his back. Claimant concedes that at the time, around _____, he did not tell MG he had a work-related injury because at that time he did not know the cause of his pain.

Claimant consulted Dr. C (Dr. C) in Mexico about his condition on _____. Claimant agreed that Dr. C was his regular family physician and had treated claimant for some other non-work related conditions in the past. Two medical reports from Dr. C, dated "22-Mayo-94" and "29-Mayo 94" are in evidence but as the hearing officer noted, the reports are in Spanish and no translator was available to translate the records. Claimant testified that Dr. C told him he had a disc problem and that he should consult a doctor in the United States who has access to MRI equipment. Claimant testified that pursuant to Dr. C's suggestion, he consulted Dr. LF on June 2nd. Dr. LF conducted a neurological consultation on June 2nd, which stated in the history:

> He does not recall any significant event which precipitated the pain though he did have a change in his job where he was required to quickly shimmy down a ladder and run across an area to shut off a valve. He believes this may be related to the onset of his pain.

Dr. LF's impression was:

1.Low back pain with radiation to the left leg.

2.Probable left S1 radiculopathy because of distribution of the radiation of the pain as well as numbness in the lateral aspect of the left foot.

Dr. LF ordered EMG/nerve conduction studies and "an MRI of the LS spine." The MRI of the lumbar spine, dated June 7th, recorded an impression:

1.Disc degeneration at L5-S1 with moderate to large left posterior paracentral disc herniation.

2.Disc degeneration at L4-L5 with moderate size posterior central disc herniation.

Dr. LF, in a follow-up report dated June 9th, recited the MRI findings quoted above and gave as his diagnosis:

1.Low back pain with left S1 radiculopathy.

2.Evidence of disc herniation at L4-5 and L5-S1.

Dr. LF prescribed pain medication and a physical therapy (PT) program.

Claimant testified that he attempted to contact his supervisor, MG, on _____, but that MG was on vacation. Claimant then states he tried to call Mr. P, MG's supervisor, but that Mr. P was unavailable. It is undisputed that claimant then spoke with Mr. W who was Mr. P's supervisor. What was said and the emphasis given what was said is in dispute. Claimant testified that he advised Mr. W that he had suffered a job-related injury and wished to file a workers' compensation claim. Mr. W's version is that claimant called, asked about group disability and medical insurance, asked how to get workers' compensation and was told workers' compensation would cover 100% of claimant's medical expenses as opposed to the group health which would only cover 80%. Mr. W testified claimant did not report a work-related injury and was only inquiring about the options regarding a non-work related injury. Claimant testified that about a week later, Mr. P called him and told him that his injury would not be covered by workers' compensation. Interestingly, Mr. P testified, but neither denied or confirmed such a conversation. Mr. P only testified that claimant had never told him "he had been injured on the job." Apparently no one thought to ask Mr. P if he had called claimant as claimant testified, or whether he had knowledge from any other source (such as Mr. W) that claimant was claiming a work-related injury. The hearing officer, in her statement of the evidence, comments:

> The conversation that the Claimant had with [Mr. W] on _____, and the discussion he had with [Mr. P] a week or so after that date are critical to determine if the Claimant reported the injury as being work-related within thirty (30) days. Though reasonable minds might differ concerning how the comments made by the Claimant to [Mr. W] might be interpreted, the fact that [Mr. P] called the Claimant back and told him that his back injury did [not] fall within the ambit of workers' compensation coverage supports the Claimant's assertion that he reported an injury to [Mr. W].

Dr. LF, in a report dated _____, continues to report his impressions of claimant's condition, makes no further comment on causation and refers claimant to Dr. S (Dr. S) for a consultation. Dr. S, in a report dated July 18th, recites a history that claimant:

said he had no previous back difficulties, until an on-the-job injury that occurred _____. He was climbing a ladder on the truck that he was driving, jumping off, when he felt pain in his left buttock, radiating down the left leg. This was accompanied by a sensation of numbness and weakness in the left leg.

Dr. S's impression and recommendation were:

IMPRESSION: Lumbar radiculopathy due to HNP L5-S1 and L4-5. Symptoms have not responded to conservative management.

RECOMMENDATION: I believe surgery would be a reasonable treatment option for [claimant] at this point. I told him that the type of surgery that I would perform would be L5-S1 and L4-5 laminotomy, foraminotomy, and partial discectomy. Probably the procedure could be limited to the left side.

Claimant testified that he has not worked since _____ and that he was not really sure his injury was work related until his conversations with Dr. LF on _____ and _____.[1]

Carrier's position is that claimant was not injured at work, that claimant has offered no expert medical evidence establishing causation within reasonable medical probability, that expert medical evidence is necessary to establish causality for a back injury and that claimant did not report his _____ injury to the employer until _____ when the employer completed its Employer's First Report of Injury (TWCC-1). As initially noted the hearing officer resolved all the disputed issues in favor of the claimant.

First we would comment that the record and appeal references hearsay objections, the record contains argument whether the employer furnished "defective equipment," argument that the fill or float gauge was or was not faulty and whether claimant could have accomplished his task of filling the tanker more efficiently or some other way which required fewer trips up and down the ladder. The argument and testimony on these points were irrelevant to the issues in dispute as neither negligence nor contributory negligence is a factor in a worker's compensation case. Similarly, carrier points to two minor motor

[1] We would note that if an injury is an occupational disease (definition of occupational disease includes a repetitive trauma injury (Section 401.011(34)) the date of injury is the date the employee knew or should have known the injury may be related to employment. Section 409.001. The hearing officer determined that claimant became aware that his symptoms "were adversely affected by his employment duties on _____" which is supportable by claimant's testimony, but the hearing officer could have found the date of injury to be _____when Dr. LF, according to claimant, told him his injury might be caused by repeated jumping off the ladder.

vehicle accidents which involved claimant two and a half and three years prior to the incident in question. Both those accidents occurred while claimant was driving for the employer; claimant testified he had not been injured, no claims had been filed and apparently no time lost. If it is carrier's position that one or both of those accidents is the cause of claimant's current condition, the carrier has the burden of proving that those accidents were the sole cause of claimant's condition. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992 and others. Carrier further challenges the credibility of claimant by presenting evidence that claimant had not been truthful in presenting a personal matter totally unrelated to the injury or the matters at issue at some prior (possibly years) time. The hearing officer considered that matter, as indicated in her statement of evidence, and found the "falsehood was not related to [claimant's] job performance in any way." We will emphasize here that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As far as carrier's hearsay objections are concerned, we note that Section 410.165 also provides that conformity to legal rules of evidence is not necessary and it is the hearing officer that determines the weight or credibility to be given to the evidence. The hearing officer correctly overruled carrier's hearsay objections. Without going into each and every discrepancy and point made by carrier, we find that the evidence emphasized by the carrier does not constitute the great weight and preponderance of the evidence necessary to overcome the hearing officer's factual determinations.

Carrier contends that there "was no evidence presented" to support the hearing officer's determinations that claimant was injured in the course and scope of his employment or that as a result of claimant's activities, in jumping from the tanker ladder, he sustained a herniated disk. In reviewing a no evidence point, we have held, in accordance with Texas authority, that a reviewing body should consider only the evidence and reasonable inferences therefrom which support the finder of fact and reject all evidence and inferences to the contrary. *See* Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987); Texas Workers' Compensation Commission Appeal No.91002, decided August 7, 1991. The Appeals Panel has held that applying this standard of review, we should uphold the finding of the hearing officer if any evidence of probative force supports it. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. A claimant's testimony alone may establish that a compensable injury occurred. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. We find that the claimant's testimony was some evidence of probative value which supported the challenged findings of fact and conclusions of law. Carrier's "no evidence" contention of error is without merit.

Carrier cites Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.) and several Appeals Panel decisions for the general

propositions that the claimant has the burden of proof to establish that he suffered an injury in the course and scope of employment and that in a repetitive trauma case claimant must proved the repetitive trauma occurred on the job and that those activities caused the injury. We reaffirm those propositions. Carrier then goes on to cite Houston General Insurance Co. v. Pegues, 514 S.W.2d 492 (Tex. Civ. app.-Texarkana 1974, writ ref'd n.r.e.), Schaefer v. Texas Employers Insurance Association, 612 S.W.2d 199 (Tex. 1980) and various Appeals Panel decisions citing those cases, for the proposition that claimant's back injury must be proven by expert medical opinion because it is not an area of common expertise and requires expert or scientific evidence of causation. We disagree. First of all, Pegues cites the general rules relating to expert medical testimony which includes that "the issues of injury and disability may be established by testimony of the claimant alone, even though such lay testimony is contradicted by the unanimous opinions of medical experts." *Id.* at 494. As an exception to the "well settled" general rules, expert testimony is required when the matter is such that the fact finder is unable to form an opinion based on the evidence as a whole aided by one's own experience and knowledge. The court gave as examples "the cause, progression and aggravation of disease, and particularly of cancer . . . ." We note that Schaefer involved a rare lung disease which may or may not have been caused by bird droppings and did require expert medical opinion but is clearly distinguishable from the back injury in the present case. The Appeals Panel has held that medical evidence is only required to establish causation where the link to work is beyond common experience which did not include a back injury and lifting. Texas Workers' Compensation Commission Appeal No. 94278, decided April 12, 1994. Carrier's point that expert medical evidence is needed to prove causation in this case is not well taken.

Carrier emphasizes claimant's prior two auto accidents and claimant's failure to tell Dr. LF about those accidents, years before, as evidence that the auto accidents may have caused claimant's current condition. As mentioned previously, claimant does not have a burden to show that the car accidents did not cause his injury (the burden is carrier's if that is its contention). However, claimant did testify regarding the circumstances of those accidents, that he was not injured and that he had made no claims arising out of those accidents. The hearing officer considered the evidence, as stated in the discussion portion of her decision, and chose not to give it any weight, as the hearing officer was entitled to do.

Carrier attacks claimant's credibility and emphasizes the falsehood claimant made to avoid embarrassing himself. The hearing officer was fully cognizant of that incident, discussed it and obviously chose to give it little or no weight. At the risk of being repetitious, we again note that the hearing officer is the sole judge of the weight to be given such evidence and of the credibility of the witnesses. The hearing officer found all witnesses equally credible and she could 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.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947,

no writ). As an appeals level body we do not normally pass on the credibility of witnesses or substitute our judgment for that of the trier of fact, particularly where, as here, the hearing officer's determinations are supported by ample evidence. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

On the issue of timely reporting of the injury, claimant maintains he reported the injury to Mr. W on _____. Mr. W acknowledges the conversation but interprets claimant's statement differently than claimant. Apparently what may have been a determining factor for the hearing officer was claimant's uncontroverted testimony that Mr. P (Mr. W's supervisor) called claimant back a week after the conversation between claimant and Mr. W, and told claimant his problems would not be covered by workers' compensation. That conversation was not denied by Mr. P. We find the hearing officer's determination to be supported by sufficient evidence.

On the issue of disability, claimant testified that he was unable to work. His testimony appears to be supported by Dr. C who took him off work in addition to the documented evidence that claimant does, in fact, have one or more herniated discs. The Appeals Panel has many times held that the testimony of an injured employee alone is sufficient to prove disability. Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. In this case that testimony is supported by medical evidence regarding claimant's inability to obtain and retain employment.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight

and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge