APPEAL NO. 92020

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On October 9, 1991 and December 3, 1991, a hearing was held in (city), Texas with (hearing officer) presiding. He found claimant did not provide timely notice of injury and did not sustain a new injury on (date of injury). Appellant stresses that weight should be given to a telephone call she made the day after injury to an office that provides replacements for nurses, that inconsistencies occur in records submitted by respondent, and that her 1984 back injury resulted in lifetime changes without adequate compensation.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence, we affirm.

Appellant worked for 18 years for (Hospital) as a therapist (assisting patients). She claims that on (date of injury), she injured her lower back while lifting, with help from other therapists, a 300-pound patient to turn her in bed. She did not report it at that time. She named the other employees present but did not offer a statement or testimony from any. She telephoned the next day to talk to "coverage" at the hospital (the office that at a minimum assures sufficient nurses are on duty) and reported she would not be at work; she said she reported then that she hurt her back. She testified she also called the employee health department and the employer's workers' compensation representative. She did not return to work. She called her doctor but could not see him until January 29, 1991. The doctor is (Dr. F) who also treated her for her 1984 injury to the same part of her back which she incurred when she was assisting a 300-pound man. She says she reported the (date of injury) injury to him.

During much of the hearing appellant reiterated that she reported her absence as a back injury incurred on (date of injury). She did admit she was not sure that she said she had a new injury to the workers' compensation representative. She acknowledged that she got a copy of a worker's handbook "a couple years ago" that described how to report injuries - to be reported to one's supervisor.

Carrier offered employer's business records that indicated that appellant or a family member called six times in January 1991 to report an absence from work; none indicated an injury. On May 14, 1991, the employer reported receiving its first notification of an injury by a telephone call from appellant. The employer's report quoted appellant as saying, "This is a reactivation from my injury in 1984. My back and leg were hurt then and now they hurt me consistently lifting and pulling on patients." The employer's representative who took the call, (C. T.), observed," cannot give any specifics regarding exactly how or when injury occurred." Similarly the medical notes of "WHF," introduced as the medical record of Dr. F, show that on January 29, 1991, Dr. F saw appellant for the first time since June 1985. He states she has had pain "off-and-on." The notes further state that: "The pain is aggravated by any physical activity." "She denies any new injury." Carrier also produced the employer's workers' compensation employee, (EE), who denied that appellant ever told her she injured her back in January 1991. Rather EE stated appellant indicated it was an old injury. Communication by appellant of problems with an old injury does not satisfy the requirement that notice of an injury needs to provide the general nature of the injury plus the fact that it is related to the job. Texas Employers Insurance Asso. v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied).

Appellant complained that one business record shows she called in absent the day

she says the injury occurred - (date of injury). Respondent stood by that record. Appellant also complained that some of her statements were not recorded accurately in business records. We note that an entry for a (date of injury) call shows that appellant's daughter made the call and reported "back pain." As to "coverage," the safety director of employer testified that "coverage" refers to the nursing pool out of which substitutes are used to replace others to assure enough nurses are on duty. The 1984 injury was not an issue at the contested case hearing and a question about the sufficiency of a settlement therefrom is not within this panel's capacity.

The hearing officer is to weigh evidence and consider credibility. Article 8308-6.34(e) of the 1989 Act. He could view appellant's testimony and information provided to her doctor, employer, and at hearing as only creating fact issues for him to resolve. Burlesmith v. Liberty Mutual Ins. Co., 568 S.W.2d 695 (Tex. App.-Amarillo 1978, no writ). He could disbelieve appellant's testimony based on a serious question of credibility. Montes v. TEIA, 779 S.W.2d 485 (Tex. App.-El Paso 1989, writ denied). He could choose to believe part of appellant's testimony and not the part about how she was injured. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. App.-Texarkana 1961, no writ). He is to reconcile conflicting evidence. Taylor v. Lewis, 553 S.W.2d 153 (Tex. App.-Amarillo 1977, writ ref'd n.r.e.).

We note that the hearing officer made Finding of Fact 8 which reads as follows:

Although the Claimant's work may have aggravated the existing injury, the Claimant did not incur a new injury on (date of injury).

From our review of all the evidence, it is apparent that the hearing officer had before him sufficient evidence on which to base his decision that found no injury and a failure to report the injury within 30 days. Nevertheless, the appellant, had she sustained her burden of proof, could have been found to have a compensable injury by showing an aggravation of a prior injury, condition or disease. Gill v. Transamerica Ins. Co., 417 S.W.2d 720 (Tex. Civ. App.-Dallas 1967, no writ). Because her notice was not timely, the outcome would not have been different even if an injury had been proven.

The findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust or wrong. International Ins. Co. v. Torres, 576 S.W.2d 862 (Tex. App.-Amarillo 1978, writ ref'd n.r.e.).

The decision of the hearing officer that appellant was not injured on (date of injury), and did not report an injury within 30 days, is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Susan M. Kelley
Appeals Judge