APPEAL NO. 92044

On January 7, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that appellant failed to notify her employer of her repetitive trauma injury not later than 30 days after appellant knew or should have known her injury was job related. Though not articulated by the parties as an additional disputed issue upon which evidence was adduced and argument made, the hearing officer further determined that good cause did not exist for appellant's failure to give timely notice. He ordered that benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-101 *et seq* (Vernon Supp. 1992) (1989 Act) be denied. Appellant contends on appeal that the decision of the hearing officer was against the great weight and preponderance of the evidence; that appellant's burden of proof should be a preponderance of the evidence and not a higher standard such as clear and convincing evidence; and, that the hearing officer improperly considered and gave undue weight to certain irrelevant evidence.

DECISION

We affirm. The evidence is factually sufficient to support the hearing officer's findings of fact and conclusions of law; he did not require nor apply an improper burden of proof standard; and, he did not improperly consider irrelevant evidence.

The parties stipulated that appellant was employed by (Employer) "on April 15th, 1991, the date of the alleged injury," that Employer was a subscriber to compensation coverage on (date of injury), and, that appellant was a resident of (city), Texas, on "(date of injury), the date of the alleged injury." In brief, appellant's evidence, which consisted entirely of her own testimony and that of (D M), an employee of Care Chiropractic Clinic, showed that appellant had been employed by Employer as a seamstress at its (city), Texas, plant from February 1980 to April 25, 1991, the date she was involuntarily terminated for unsatisfactory production. She worked four ten-hour days per week with occasional overtime on other days. Her specific duties involved work on a production line sewing hems in slacks manufactured by Employer. She used a sewing machine to accomplish the hemming and from time to time throughout the day had to get up and go to another area to pick up piles of slacks and return with them to her work station to sew the hems. She was dismissed on April 25, 1991, after a series of counselings by her supervisor, (D J) and the plant manager, (R S), during the February - April 1991 period.

Appellant's position at the contested case hearing below was that her repeated lifting and carrying of heavy piles of slacks to her sewing machine caused her left shoulder and arm, neck and back to hurt. Though not precisely articulated, her apparent contention was that she knew by at least (date of injury), that her sore neck, left shoulder and arm, and back constituted a repetitious trauma injury caused by repeated lifting of heavy bundles of slacks to carry to her sewing machine. Although the date of (date of injury), was not, according to the evidence, a date on which any specific work-related event occurred or on which a medical diagnosis was made for or received by appellant, there was no apparent disputed issue as to the "date" of appellant's repetitious trauma injury. The parties' stipulations

referred to "April 15th, 1991, the date of the alleged injury" and the "Initial Medical Report" prepared by appellant's chiropractor on July 22, 1991, stated the date of injury as "(date of injury)." That date appeared to be a "not later than" date that appellant knew she had sustained a work-related repetitious trauma injury.

The sole disputed issue upon which the parties presented evidence and argument was whether appellant had timely notified Employer of her injury. After stating that issue and getting the agreement of the parties, the hearing officer said that if he found appellant had not provided timely notice, he would have to decide whether good cause existed for such failure as an additional issue. Notwithstanding the hearing officer's attempt to enlarge the issue, no evidence was presented on good cause for failure to timely notify the Employer since that was not appellant's theory of her case. Accordingly, the finding and conclusion of the hearing officer that appellant did not establish good cause for her failure to provide timely notice were superfluous.

As for her provision of timely notice of injury to Employer, appellant's theory appeared to be two-fold. In the first instance, appellant contended that she herself provided timely notice by telling her supervisor and the plant manager about the soreness in her left arm, shoulder, neck and back on several occasions in (date) before she was terminated. In the second instance, appellant contended that (D M), office manager of Care Chiropractic Clinic, where appellant first visited on May 2, 1991, had called the Employer's facility on May 4, 1991, to verify appellant's employment and inquire about Employer's workers' compensation carrier. Appellant urged that Ms. M's telephone conversation with some unidentified employee of the Employer on May 4, 1991, also constituted timely notice to Employer of her (date of injury), injury. Respondent, on the other hand, contended that appellant never complained of any physical problem to her supervisor and plant manager in April 1991, and, that the two employees of Employer who would have taken a call from (D M) for information about Employer's workers' compensation coverage of appellant and the identity of its carrier were not at work on May 4, 1991, a Saturday.

Article 8308-5.01(a) of the 1989 Act requires the following notice:

"[A]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. If an injury is an occupational disease, the employee of person shall notify the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment."

Article 5.01(c) provides that the notice of injury may be given "to the employer or any employee of the employer who holds a supervisory or management position." Article 8308-5.02 provides that if an employee fails to notify the employer of the injury as required by article 8308-5.01(a), the employer and its insurance carrier are relieved of liability under the 1989 Act unless the employer or carrier have actual knowledge of the injury, the Texas

Workers' Compensation Commission (Commission) determines that good cause exists for failure to give timely notice, or the claim is uncontested. Appellant's claim was, of course, contested. Appellant did not contend at the hearing that good cause existed for her failure to provide timely notice. Appellant's theory, evidence, and argument were all to the effect that she herself provided timely notice in (date) prior to her termination, and, that Care Chiropractic Clinic also provided timely notice to the Employer on May 4, 1991, when telephonic inquiry was made on her behalf concerning her workers' compensation coverage.

According to appellant, the bundles of slacks she lifted and carried to her sewing machine were approximately two feet high and weighed about twenty pounds. Apparently it was left to appellant's discretion to determine the number of slacks she would pick up and carry to her machine. However, the fewer slacks she carried the more often she would be required to replenish her supply and time spent away from her machine affected her production rate.

Appellant testified that she began to tell her supervisor in early (date) that her "back and arms" were "hurting very bad", that she had "soreness in her left arm, neck and back." She said she also made such a complaint to her supervisor during a week in April in the presence of Employer's safety official from (city), Texas. She last voiced such complaint to her supervisor during the week of April 19, 1991. She said she also told the plant manager of such in the presence of the supervisor sometime around the end of March or in April 1991. She told the plant manager she couldn't produce more because "my body's killing me." On this occasion the safety official asked appellant whether she had fallen to which she responded that she had once fallen but couldn't recall the date. According to appellant, her supervisor then left to check on the date, returned and advised that appellant's fall had occurred two years earlier. Appellant said she responded: "I can't help it, my body hurts and I don't know why." Neither her supervisor nor the plant manager suggested she see a doctor. However, appellant made an appointment, apparently with Care Chiropractic Clinic, on April 24th, the day before she was dismissed. The earliest appointment she could obtain was for May 2, 1991. She went to the chiropractor on that date and subsequently went there at least three times weekly to the date of the hearing in January 1991.

When asked on cross-examination when she first realized she had a work-related injury appellant responded that it was around the end of February (1991) but "I never put it together that I had some damage to my body," and, "I don't really know if I really put it, you know, till it started, you know, constant . . . [I]t just got constant . . ." She also said she began to suspect her physical problems were work related during the week of April 15th when she again told her supervisor of her complaints and that she would have to go to the doctor. Appellant also testified to a conversation with the plant manager who told her to do more work. She said she told him she couldn't do more work because her arm and back hurt. She testified she didn't know her problem was job related because she hadn't yet gone to a doctor. Appellant had been trained to report incidents and physical problems to the Employer, knew a log book of such reported incidents was maintained, and had herself previously reported injuring a finger and a slip and fall incident. Appellant also testified that

she had told the plant manager and her supervisor that she couldn't continue to lift bundles of pants and in response her machine was moved, apparently to put her closer to the source.

The plant manager, (R S), testified that he saw appellant every day she worked and spoke to her on occasion. In early January 1991, appellant's productivity level became unacceptable. Appellant was counseled on approximately eight occasions in the February - April 1991 time period by her supervisor or Mr. S and he took a number of actions to assist appellant's efforts to increase her productivity. According to Mr. S, at no time after January 1991 did appellant ever tell him she had injured herself on the job, or complain to him of any physical problems affecting her work. Her complaints related to the frequency with which she had to leave her machine to obtain the slacks to hem. Further, Mr. S never observed any manifestations of physical problems by appellant and had no actual knowledge of such. Mr. S's review of the Employer's log book of reported injuries and incidents, which also included reports of repetitious injuries, revealed no report on appellant in 1991. Mr. S testified that Employer did not know appellant was claiming to have a work-related injury until July 30, 1991, when the Employer's First Report of Injury was prepared after receiving some bills from appellant's chiropractor. The chiropractor's bills for appellant's office visits and treatments from May 2 through July 8, 1991, had been sent to Employer's (city) office and then "faxed" to Mr. S on July 29, 1991. The Initial Medical Report accompanying the chiropractor's bills was signed by the doctor on July 22, 1991, and contained a date of injury of (date of injury). Upon receiving the chiropractor's bills, Mr. S called the safety officer in (city) and also reviewed information on appellant's fall in 1988 in an effort to determine why such bills had been sent to Employer. With regard to the telephonic inquiry made of Employer as testified to by (D M), Mr. S had only two employees, Ms. S and Ms. L, to whom notice of an employee's injury could be given and to whom inquiries concerning insurance coverage would be referred. Not only do these two employees not work on Saturday, but Mr. S was never advised by either of them that any telephone call had been received concerning group health or workers' compensation insurance coverage on appellant.

(D J), appellant's supervisor, similarly testified that appellant had never said she had a physical problem in performing her work nor had appellant ever advised Ms. J of having any physical problem including repetitious trauma injury. Appellant would complain of being tired but such was to be expected from employees working 10-hour shifts. Appellant never complained about a sore shoulder, neck or back and didn't miss any work during the February – (date) period. Ms. J never observed appellant manifesting any physical problems on the job.

(S S), one of Employer's two employees whose duties included fielding inquiries concerning employees' insurance coverages, testified she recalled no telephone inquiry from (D M) or from any doctor's office regarding workers' compensation coverage on appellant. Consistent with Employer's practice, a record would have been made of any such telephone inquiry about coverage and Employer had no such record. Further, coverage on a terminated employee would not have been confirmed without approval from the manager. Both she and (Ms. L) are trained to obtain sufficient information from callers

to ascertain whether information on the group health carrier or the workers' compensation carrier is required. An inquiry from a doctor's office which merely asked about insurance coverage of an employee would probably result in information on the group health insurance carrier. Neither (Ms. S) nor (Ms. L) work on Saturdays.

Ms. (C G), a claims representative of respondent, testified that respondent, on August 12, 1991, received an "E-1" accident report from Employer dated July 30, 1991. She then talked to "(Ms.D)" at Care Chiropractic Clinic who advised she had obtained the verification of appellant's workers' compensation coverage from (A V) in respondent's (city) office on May 4, 1991. Ms. G then contacted (A V) who advised she had not been called about coverage on appellant. (A V) testified that in May 1991 she handled auto accident claims for respondent and didn't take over the handling of Employer's workers' compensation account until late June 1991. Ms. V testified she did not confirm respondent's workers' compensation coverage for Employer on May 4, 1991, nor was she contacted by any doctors about appellant after taking over the Employer's account in late June 1991. Ms. Vargas could not recall talking to a (D M) of Care Chiropractic Clinic and does not work on Saturdays. The hearing officer took official notice that May 4, 1991, was a Saturday.

Appellant argued that the only issue before the hearing officer was whether appellant had given notice of her injury within 30 days and that appellant's complaints to her supervisor and to the plant manager constituted her notice of her injury of (date of injury), but that such complaints were simply ignored by Employer. Appellant further argued that timely notice had also been given by (D M) when she called Employer on May 4, 1991, for information on Employer's workers' compensation carrier albeit she was erroneously given information on Employer's group health carrier and sent the chiropractor's bills to the wrong carrier.

The first matter appellant has presented for our resolution is whether the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust. We have carefully considered the evidence and find that there is sufficient probative evidence to support the hearing officer's findings of fact and conclusions of law. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motors Co., 715 S.W.2d 629, 635 (Tex. 1986). Article 8308-6.34(e) provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility it is to be given. The hearing officer found, *inter alia*, that appellant knew she suffered from the alleged repetitive trauma injury no later than (date of injury); that appellant failed to give notice of same to Employer until sometime after July 29, 1991; and, that Employer first received notice no earlier than July 22, 1991, when the chiropractor bills were received by Employer some 99 days after (date of injury), when appellant knew her alleged injury was related to her employment. The hearing officer obviously determined that whatever complaints appellant may have voiced to her supervisor and to the plant manager in (date) or earlier did not constitute notice of injury, and, that the Employer had not received notice from the office of appellant's chiropractor on May 4, 1991. We do not substitute our judgment for that of the hearing officer when, as here, his findings are supported by some evidence of probative value. Texas Employers' Insurance Association

v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). *Compare* DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980); Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied); and Texas Workers' Compensation Commission Appeal No. 91026 (Docket No. EP-00003-91-CC-1) decided October 18, 1991.

Appellant's second issue on appeal asserts that her burden of proof should be by a preponderance of the evidence and not some higher standard such as clear and convincing evidence. This issue is not well taken. The hearing officer announced at the outset of the hearing that "[T]he burden of proof is on the claimant to prove by a preponderance of the evidence that the relief she seeks is allowable under the applicable statutes and regulations." *And see* Traders & General Ins. Co. v. Stubbs, 91 S.W.2d 407, 408 (Tex. Civ. App.-Texarkana 1936, writ ref'd) wherein the court stated that "[T]here is a well-settled proposition of law following a rule in common-law actions for personal injuries and in civil actions generally that the burden of proof is on the compensation claimant to prove his case in all its parts by a preponderance of the evidence. (citations omitted)." Neither the 1989 Act nor the rules adopted by the Commission impose a more stringent burden of proof upon workers' compensation claimants. Appellant cites no authority nor portions of the hearing record which suggest that the hearing officer was required to or applied an incorrect standard of proof.

In her third issue on appeal, appellant contends that the hearing officer "improperly considered, and gave undue weight, to irrelevant evidence, over objection." Appellant goes on to point out that in the hearing officer's "Statement of Evidence" contained in his Decision and Order, he included references to evidence concerning: (1) appellant's having filed a discrimination complaint against Employer with the Equal Employment Opportunity Commission (EEOC) after she was discharged; (2) testimony of (Ms. G) concerning her telephone conversation with "(D)" (M) at Care Chiropractic during which she was advised that Ms. M had contacted respondent's (city) office (A V) about appellant's workers' compensation coverage; and, (3) the testimony of (A V). As for the evidence of appellant's EEOC complaint, appellant opposed its admission on relevancy grounds. Respondent argued that appellant had filed her workers' compensation claim in retaliation for her termination and that the EEOC complaint tended to show appellant's "intent and her claim that she notified the employer, which is denied." The hearing officer admitted a copy of the EEOC complaint as relevant to appellant's "motive." Article 8308-6.34(e) provides that "conformity to legal rules of evidence is not necessary; . . ." Appellant's testimony was the primary and a substantial source of her evidence in support of her contentions on the disputed issue. Thus her credibility was certainly a matter of interest to the hearing officer who was the sole judge not only of the relevance but of the weight and credibility to be given appellant's testimony. He made no finding concerning appellant's EEOC complaint and appellant has not shown, nor do we find, that she was unfairly prejudiced by the admission of the EEOC complaint. *See* Texas Workers' Compensation Commission Appeal No. 91103 (Docket No. CC-000-001-CC-1) decided August 14, 1991. Appellant's apparent concern with the testimony of Ms. G and Ms. V was that the hearing officer may have

misconstrued such evidence and confused (D M's) telephone call on May 4, 1991, to the employer with some later telephonic contact with respondent. Appellant contended that the real issue was when the employer, not the respondent, was notified. Appellant made no objections on relevancy or other grounds to the testimony of Ms. G and Ms. V and conducted cross-examination of both witnesses. Clearly, the testimony of Ms. G and Ms. V was relevant to the disputed issue and to the evidentiary controversy concerning whether or not (D M) had provided Employer with notice or with actual knowledge of appellant's injury by telephone on Saturday, May 4, 1991.

The hearing officer's decision is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge