APPEAL NO. 92054

A contested case hearing was held at (city), Texas, on December 6, 1991, and January 8, 1992, (hearing officer) presiding. The appellant's attorney did not appear at the abbreviated hearing on December 6 and no explanation is contained in the record. Following the hearing on January 8, 1992, the hearing officer issued his decision and determined that the appellant did not sustain a compensable injury in the course and scope of his employment and was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant disagrees with the findings and conclusions which determine that he was not injured on the job and did not sustain a compensable injury in the course and scope of his employment. He asserts several other points of error in very broad, vague and uncertain terms, the substance of which, as we see it, will be discussed in this decision. He asks for, alternatively, a reversal and render or a reversal and remand.

DECISION

Determining that the findings, conclusions and decision of the hearing officer are not so contrary to the overwhelming weight of evidence as to be clearly wrong or unjust, we affirm. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Employers Casualty Co. v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ).

The appellant worked for (Employer) from February 18, 1991, to (date of injury), first as a backhoe operator and then as a cement forms carpenter. Employer carried workers' compensation coverage with the respondent. The appellant testified that he injured his groin and back on the afternoon of (date of injury), while carrying a cement form with either his first level supervisor or another employee. (The supervisor denies he carried any form with the appellant on (date of injury)). The appellant didn't mention anything about being injured to anyone at the time and the supervisor denied seeing or knowing about the injury producing incident. The appellant states he was terminated at the end of the work day on (date of injury). (There is probative evidence that this termination was planned at least several days earlier because of substandard performance and a final check had already been cut.) Before the appellant left the site on (date of injury), his second level supervisor states that he talked to the appellant and explained to him why he was terminated. The appellant did not mention anything about any injury to this second level supervisor although appellant states that he may have talked about his, the appellant's, bad ankle and generally sore back from being out of shape.

Later that evening, the appellant went to his former first level supervisor's home and talked with him generally about "ruptures" and that he felt like he might have one and that he was hurting. The supervisor told him if he was hurting to go to the company doctor (a private doctor the company apparently referred its medical business to). On the following Monday, the appellant states his back was so tight and painful he had difficulty getting out of bed. He again talked to his former first line supervisor and told him about his pain and was told again to go to the company doctor. He went to the doctor on Tuesday morning,

(date).

A medical report from the company doctor does not indicate any rupture or hernia but mentions that the appellant complained of lower back pain. The report states that "no significant positive clinical findings were found except the pain in the lower back in the right sacroiliac joint." Pain medication was administered. The appellant returned on Wednesday, March 20th and Friday, March 22nd. The medical report indicates the appellant told the doctor that the pain in the lower back subsided. The report also indicates "no neurological signs were found." Subsequent radiographic studies revealed multiple spinal subluxations including L3-L5, multiple thoracic discopathies and lumbar hyperlordosis. In late May, the appellant saw a chiropractor and has stayed under his care. The initial report from the chiropractor indicates a diagnosis of "Overexertion/Strenuous Movements; Brachial Neuralgia; Lumbosacral Plexus Disorder; Deep and Superficial Muscle Spasms."

The first level supervisor testified that he was on the job site all day on (date of injury), and that he did not see nor was he otherwise aware of the appellant sustaining an injury. He indicated he noticed the appellant limping somewhat during the first part of March and had inquired if the appellant needed medical attention. The appellant said "No" and the supervisor assumed he was just sore from the heavy work. The supervisor stated that when the appellant came to his house after being terminated on (date of injury), he was angry and the conversation involved the reason for the termination and the pain appellant was feeling. He told the appellant to go to the company doctor if he was hurting. The supervisor was under the impression that the appellant's pain related to an early March occasion when the supervisor noticed the appellant limping somewhat.

An employee who takes care of all the office duties testified that she prepared the appellant's final check and was there when he was terminated. She states there was no mention of any injury by the appellant. The first she knew the appellant was alleging an injury on (date of injury), was when the company doctor called on Tuesday, (date), and stated the appellant had been in for treatment of an infected finger (related to a separate incident) and for pain in the back. A report of injury was filed on the injured finger matter but nothing was filed regarding the back pain because this employee "didn't know anything about a back injury." She affirmed that on March 21, 1991, she wrote an "information letter" which, *inter alia*, indicated the appellant had told the company doctor he was injured on (date of injury) while moving a form. This information letter was subsequently received by the appellant. (Although not admitted into evidence, the letter is contained in a "Bill of Exception" and it shows a received date stamp of April 9, 1991, by the respondent carrier.)

To be certain, there was conflicting evidence in this case. The hearing officer saw and heard the testimony of the witnesses and had pertinent evidence before him. As the sole judge of the relevancy and materiality of the evidence and of the weight and credibility to be given the evidence [Article 8308-6.34(e)] the hearing officer as the fact finder in the case, is charged with resolving the inconsistencies and conflicts in and between the evidence. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex.

Civ. App.-Amarillo 1974, no writ); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. Civ. App.-Corpus Christi 1983, writ ref'd n.r.e.). It is apparent the hearing officer disbelieved the testimony of the appellant concerning his assertion of injury on (date of injury). It is settled that the unimpeached and uncontradicted testimony of a disinterested witness can not be arbitrarily or capriciously rejected. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Ft Worth 1947, no writ). Here, not only was the appellant an interested witness, his testimony was contradicted by other probative evidence that could be, and apparently was, given weight by the hearing officer. In sum, there was sufficient evidence to support his determinations, and the evidence contrary thereto was not so great or overwhelming as to preponderate against his decision or to otherwise render it manifestly erroneous or unjust. In re King's Estate, *supra*.

Another matter warrants our comment in this case. Although certainly not clearly articulated or otherwise developed with any reference to supporting evidence, argument or citation of authority, we surmise that appellant's points of error 2 through 6 are concerned with his attempt to raise an issue for the first time at the contested case hearing that the respondent had failed to timely contest (within 60 days of notification of injury) the compensability of the injury. Article 8308-5.12(a). This relates to offered and rejected Claimant Exhibit D (subject of the Bill of Exception), the "informational letter" of the office employee which was received by the respondent on April 9, 1991. The respondent objected to any enlargement of issues and the hearing officer refused to allow the addition of this untimeliness of notice issue.

Presupposing only that the "informational letter" of the office employee, which contained a reference to the appellant's assertion of an on-the-job injury to the company doctor on (date of injury), was sufficient notice of injury to the insurance carrier to cause the time clock to start running (notice of refused/disputed claim by respondent is dated June 13, 1991), we hold the hearing officer was correct in refusing to permit the addition of the issue at the hearing. *See* Texas Workers' Compensation Commission Rule 124.1(a). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (TWCC Rule).

At the hearing, appellant's counsel asserted that this timely notice matter was not a subject of discussion at the benefit review conference because he was not aware of the office employee's informational letter until after the conference. (The benefit review conference was held on October 7, 1991). On the record, appellant's counsel acknowledged he had a copy of this informational letter within at least 15 days following the benefit review conference.

There is no indication in the record nor assertion by appellant's counsel that any action was taken to enlarge or add to the issues reported out in the benefit review officer's report dated October 8, 1991, and sent to the parties on October 14, 1991. The only issue left unresolved following the benefit review conference and the only issue announced at the beginning of the contested case hearing was whether the appellant suffered an injury on the job on (date of injury).

The procedure to add disputes to those reported out in the benefit review officer's report is contained in TWCC Rule 142.7(e). "An amendment will be allowed only on a determination of good cause by the hearing officer and the request shall be made in writing, identify and describe the issue(s), state the reason for the request, be sent to the Commission no later than 15 days before the hearing and be delivered to the other parties." There is nothing in the record to indicate appellant's counsel followed this procedure nor is there any basis to conclude the hearing officer abused his discretion in refusing to permit this additional issue. *See generally* Texas Workers' Compensation Commission Appeal No. 92038 (Docket No. HO-00168-91-CC-1) decided March 20, 1992, and Texas Workers' Compensation Commission Appeal No. 91117 (Docket No. WH-00010-91-CC-1) decided February 3, 1992.

The decision is affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Philip F. O'Neill
Appeals Judge