APPEAL NO. 92081
FILED APRIL 14, 1992

On February 3, 1992, a contest case hearing was held at _____, Texas, (hearing officer) presiding as hearing officer. The hearing officer determined that the claimant did not notify the employer of an injury in the course and scope of his employment within 30 days of the injury date and did not have good cause for such failure. Accordingly, she determined that benefits were not payable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq* (Vernon Supp 1992) (1989 Act). Claimant asks that we review two of the hearing officer's findings of fact and one of her conclusions of law, apparently on a sufficiency of evidence basis. Claimant also complains that a witness was not present at the hearing and urges a remand so the witness can be subpoenaed. Carrier urges that the request for review is inadequate and fails to comply with the requirements of the article 8308-6.41(b), 1989 Act, that there is no requirement for live testimony and even if there were, claimant waived any such issue. Carrier further asserts the evidence of record was sufficient to support the hearing officer's decision.

DECISION

Finding the evidence sufficient to support the findings, conclusions and decision of the hearing officer, we affirm.

The claimant worked for (employer) who carries workers' compensation coverage with the carrier. Claimant testified that he injured his back in the early morning hours of (date of injury), while lifting a box of produce. He claims he felt a sharp pain in his back, stopped moving any produce and told his supervisor of the injury within five to 10 minutes. He told his supervisor that he was going to the hospital concerning his back. He stated that his father picked him up and took him to the emergency room of a nearby hospital. The history on the medical report from the hospital gives no indication of any on-the-job injury, but rather sets forth:

HISTORY OF PRESENT ILLNESS: This is a 27-year-old white male who presents with complaints that four days ago the patient bent over to tie his shoes and felt the sudden sharp pain in his low back. The pain has become worse today and over the last several days.

PAST MEDICAL HISTORY: The patient claims that he had an injury to his back two years ago on the job and he had several studies done which revealed a disc problem, but he has been going to a chiropractor and not an orthopedic surgeon for therapy.

The claimant testified he told the doctor about the job-related injury and does not know why it isn't reflected in the medical report. He also stated he gave the hospital his group health insurance enrollment as payment for his treatment. Medical reports subsequent to

(date of injury), do not make any mention of any job-related injury on the 25th. One report dated June 25th stated that the claimant injured his back at work on May 17, 1989, when he was coming out of a freezer. Another report of consultation dated July 1, 1991, indicated that the claimant injured himself at employer two years prior to the visit on July 1st, and has experienced persistent and severely disabling pain over the period of the year prior to the July 1st visit.

The claimant stated he had a prior workers' compensation claim from a previous injury at employer and was familiar with the procedures to pursue a claim. He also acknowledged that he had been in an accident in which he rolled his truck several times but denied this resulted in any injury to his back. The accident was after his previous back injury at employer. The claimant had back surgery on July 8, 1991.

The claimant's supervisor was scheduled to testify for the carrier but did not appear at the hearing. However, a signed sworn transcript of an interview of the supervisor was admitted into evidence. He states the claimant never informed him of an injury at employer on (date of injury). He further stated the claimant told him on the morning of the 25th that he, the claimant, had to go to the doctor for back problems that were due to an auto accident the claimant had been involved in previously and an incident that had occurred at another employer's location four or five days prior to (date of injury). He also stated the claimant refused to pick up any heavy items of produce on (date of injury) because he, the claimant, said his back was already bothering him on that morning.

The current manager at employer where the claimant claims he injured himself on (date of injury) stated that she became the manager in June 1991. She testified that the claimant told her that he had a back problem as a result of an auto accident and a previous on-the-job injury at another employer's location. He never mentioned anything about an injury on (date of injury). She was not aware that the claimant was claiming an on-the-job injury until his surgery in July.

Sworn statements from several coworkers indicate that none knew of any injury to the claimant on (date of injury) and that the claimant had told them that his back problems occurred as a result the vehicle accident and the prior work-related injury.

With regard to the carrier's assertion that the claimant's request for review should be rejected as not complying with the requirements of the statute (Article 8308-6.41b) and Commission rules (Tex. W.C. Comm'n Rules, 28 TEX. ADMIN. CODE § 143.3(a)) (TWCC Rules), we find it meets minimum requirements. We can appreciate the difficulty in responding to such a brief and generalized statement in a request for review. However, we surmise the main thrust to be one of sufficiency of the evidence, that is, that there is sufficient evidence that proper notice was given. We have reviewed the complete record and the submissions and determine that the hearing officer's findings of fact and conclusions of law are sufficiently supported by the evidence and that his decision is correct.

Concerning the request that the case be remanded because the supervisor did not testify live, we find no merit to this point. Article 8308-6.34(a)(5) and TWCC Rule 142.8(a)(1) clearly provide for the use of affidavits and sworn statements of witnesses. And, with regard to whether it was desired to have the particular witness appear in person, we note the claimant stated on the record, "Judge, I suggest we close. I didn't realize anybody was waiting around for (the supervisor) on my behalf." There was no request for a continuance or any other remedy suggested even presupposing there was any particularly compelling reason to have the supervisor appear. There is nothing in the record to indicated the he was under subpoena by either party.

The specific findings and conclusion that claimant faults are:

4.[Claimant] did not inform his employer of an on-the-job injury occurring at [employer] on (date of injury).

5.The employer had no knowledge of [claimant's] alleged injury until July, 1991, when [claimant] had back surgery.

* * * * *

3.The preponderance of credible evidence does not establish [claimant] notified [employer] that he had been injured in the course and scope of his employment within 30 days of the injury date or that he had good cause for failing to notify his employer within 30 days of the injury date.

An injured employee is required to give notice of his injury not later than the 30th day after the date on which the injury occurs. Article 8308-5.01(a). And, an employee's failure to provide such notification relieves the carrier of liability unless the employer has actual knowledge of the injury or it is determined that good cause exists for the failure to give notice in a timely manner. Article 8308-5.02(1)(2). An issue of actual knowledge was not raised during the hearing and is not supported by the evidence. From the evidence before him, the hearing office determined notice had not been given, as required, and that good cause had not been shown by the claimant. As the finder of fact, the hearing office resolves conflicts in testimony and in the evidence. Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). He is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given it. Article 8308-6.34(e). In this case, there was probative evidence in the sworn statements of the claimant's supervisor and coworkers to support a conclusion the claimant did not give the required notice and did not otherwise have good cause for the failure. It is apparent the hearing office did not give great weight, if any, to the claimant's testimony on this point. The histories in the various medical reports and the actions or lack thereof on the claimant's part could reasonably cast some doubt on the version of events contained in his testimony. The hearing officer was free to believe all, part or none of his testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977 writ ref'd, n.r.e). We find his findings, conclusion

and decision are sufficiently supported by the evidence. Texas Workers' Compensation Commission Appeal No. 92082, decided April 10, 1992, and cases cited therein.

The decision is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge