APPEAL NO. 92108
FILED MAY 8, 1992

On February 13, 1992, a contested case hearing was held in (City 1), Texas. The hearing officer determined that the claimant, respondent herein, sustained a compensable back injury on _____, and that he timely reported his injury to his employer. She ordered the employer's workers' compensation insurance carrier, appellant herein, to provide respondent with any and all benefits due pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act).

Appellant contends that the great weight and preponderance of the evidence demonstrates that respondent did not sustain a compensable injury, and contends that there is insufficient credible evidence to support the finding that respondent timely reported his injury to his employer. Appellant also contends that the hearing officer erred in not admitting into evidence the affidavit of respondent's supervisor. Appellant requests that we reverse the hearing officer's decision. Respondent requests that we affirm the hearing officer's decision.

DECISION

Finding that the hearing officer's finding that respondent sustained an injury to his back on _____, while moving office furniture is so against the great weight and preponderance of the evidence as to be manifestly unjust, we reverse and render.

When reviewing questions of "factual sufficiency," we consider and weigh all of the evidence, both in support of and contrary to the challenged finding. We uphold the finding unless we determine that the evidence is so weak or the finding is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *See* INA of Texas v. Howeth, 755 S.W.2d 534, 537 (Tex. App.- Houston [1st Dist.] 1988, no writ). *See also* Texas Workers' Compensation Commission Appeal No. 91085 (Docket No. SA-00010-91-CC-1) decided January 3, 1992.

Under the 1989 Act, a "compensable injury" is defined as "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act," and an "injury" is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(10) and (27). An employee or a person acting on the employee's behalf must notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Article 8308-5.01(a). The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g).

The employer provides security services. Respondent was hired in 1989 and at the time of his claimed injury was an area supervisor of security guards. Respondent testified that his supervisor, asked him to help move some of the employer's office furniture from its (City 1) office to its (City 2) office, and to move other office furniture

within the (City 1) office. Respondent said the office move began on _____, and took three days to complete. He said that several other employees helped in the move, but that he, his supervisor, and Mr. RP did most of the work. According to respondent, they moved desks, chairs, tables, bookcases, a credenza, and four and five drawer file cabinets that were full of files. They used a dolly to move the larger items on to and off of a "U-Haul" truck. He specifically recalled moving file cabinets from (City 1) to (City 2) and rearranging other file cabinets at the (City 1) office after the move. Respondent said that he didn't have a "specific instant of time" that his back injury occurred, but said that he "could have done it moving furniture or I could have done it moving the file cabinets." He said he had "no problems at all " at the time of the move, but that about a week or more after the move he noticed his back bothering him when he picked up and carried a sack of groceries from his car. He said it was "approximately correct" that he first felt pain when he lifted the groceries. Before that, he said he "had some soreness, but nothing that sort of grabbed you." He further testified that, on a scale of 1 to 10, the noticeability of his back condition was "zero" before lifting the groceries, a "6" after lifting the groceries, and that it got worse after he went to a chiropractor in August 1991. He testified that he doesn't believe his back problem was from carrying the groceries. Respondent said that he did not go to a doctor prior to August 27, 1991, more than five months after he moved the furniture, because he "didn't have any back problems." Respondent indicated that, except for moving the office furniture in February, he had not done any lifting. He also testified that he did not have any trouble doing his job after the move and that he lost no time from work due to his claimed injury from the time of the move until he was terminated in late May or early June of 1991. The reason for his termination was not developed. After being terminated, he said he thought he could work and that he applied for jobs, but found nothing acceptable because the jobs didn't pay enough. Before going to the chiropractor, respondent said that he felt like he could "go pretty good," but that after seeing the chiropractor he couldn't sit or walk right. Of the chiropractor, respondent said "that boy liked to have killed me." Respondent said his condition has deteriorated to the point where he doesn't think he can do security work now. Respondent further testified that on the 18th or 19th of March 1991, he told his supervisor he had a backache and that he thought he hurt his back moving the file cabinets. He said it was not a "debilitating injury" at the time he reported it to his supervisor. He said he did not report his injury to anyone else.

Mr. P, who was the supervisor of respondent's supervisor, testified for the appellant. He said he was involved in the moving of office furniture on _____. He stated that respondent, respondent's supervisor, and Mr. RP did most of the work. According to this witness, the items moved from (City 1) to (City 2) were three desks, three bookcases, one credenza, 24 chairs, and 25 boxes of files. He said there were no steps or climbing involved in the move. He also said that respondent did not move file cabinets. He said new file cabinets were purchased and were delivered to the (City 2) office by the seller. He said respondent was not present at the time when two old file cabinets were moved by Mr. RP. Mr. RP also testified that it was not until August 8, 1991, that he became aware that respondent alleged a work-related injury. After he heard about the claim, he talked to respondent's supervisor who told him that he had never heard about any injury to respondent. Mr. RP further testified that respondent did not mention being hurt on the job during their discussions relating to respondent's termination.

LA and KM also testified for appellant. Ms. LA testified that respondent made no complaint about having hurt his back the day she helped in the office move. She said that after the move she and respondent worked in the same office for about a month and a half and that during that time respondent did not complain of any physical problems or mention having hurt his back during the move. She observed no sign of physical injury to respondent. Ms. KM testified that she was present when the U-Haul was loaded and that respondent made no complaint of injury nor showed any sign indicating an injury at that time. She was unaware of any file cabinets being loaded on the U-Haul. Ms. KM also testified that during the three or four months she worked with respondent after the move, she did not observe respondent having any kind of back problems.

Respondent introduced into evidence medical reports from his chiropractor, Dr. B. In an Initial Medical Report to the Commission dated September 9, 1991, Dr. B stated the history of respondent's injury as: "Low back pain after moving office furniture. Lifted a heavy file cabinet and turned experiencing low back pain." Dr. B diagnosed acute lumbar subluxations, lumbar radiculitis, and cervical subluxations. In a letter to appellant dated October 25, 1991, Dr. B stated that respondent "is currently being treated for injuries sustained on the job." He also stated that respondent was completely disabled from work. In what appears to be an addendum to that letter, Dr. B stated that he had been treating respondent since August 27, 1991.

Appellant introduced into evidence copies of records of work schedules which revealed that respondent worked on the day of the claimed injury, _____, and the next day, but that he did not work the weekend of March 2nd and 3rd. The reports also indicated that respondent missed only one day of work from March 4th through May 10th. No reason is noted for his absence from work on March 22nd. No work records were offered for the period after the weekend of May 11th and 12th.

As claimant of workers' compensation benefits, respondent had the burden of proving that he was injured in the course and scope of his employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.- Beaumont 1976, writ ref'd n.r.e.). There must be evidence establishing a casual connection between the injury and the employment. Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). In the present case, there is evidence to support findings that respondent moved his employer's office furniture on _____; that he was within the course and scope of his employment while moving the furniture; and that he has a back injury. The problem is establishing a casual connection between the injury and the employment. In a case such as this where the subject of inquiry is not so scientific or technical in nature as to require expert testimony to establish causation, lay testimony and circumstantial evidence may combine to establish a casual connection between the employment and the injury. *See* Insurance Company of North America v. Kneten, 440 S.W.2d 52 (Tex. 1969); Travelers Insurance Company v. Stretch, 416 S.W.2d 591 (Tex. Civ. App.-Eastland 1967, writ ref'd n.r.e.); Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.- Texarkana 1974, writ ref'd n.r.e.); Houston

Independent School District v. Harrison, 744 S.W.2d 298 (Tex. App.- Houston [1st Dist.] 1987, no writ); Northern Assurance Company of America v. Taylor, 540 S.W.2d 832 (Tex. Civ. App.-Texarkana 1976, writ ref'd n.r.e.). In the five cited cases, evidence of prompt onset of symptoms following a specific work event was a significant factor in establishing a casual connection between the employment and the injury. In the present case, respondent testified that he had no problems with his back while moving the office furniture. Although he said he had soreness before lifting the groceries a week or more after the office move, he described that as "zero" on a scale of one to ten and he said he first felt pain when he lifted the groceries. Respondent did not consult a doctor until more than five months after the office move because, according to his testimony, he had no back problems. Thus, the present case is distinguishable from the cited cases in that there is no evidence in this case of the prompt onset of symptoms following the work activities which respondent claims caused his back injury. Of course, recovery has been allowed in workers' compensation cases where the manifestation of an injury occurs later than the precipitating event and at home. *See* Lujan v. Houston General Insurance Company, 756 S.W.2d 295 (Tex. 1988). However, the claimant must prove that the injury "had to do with his work," and the cause of the injury "originated at his work." Lujan, *supra*. *See also* Article 8308-1.03(12). It is the lack of evidence of probative value bearing on the matter of causation between the injury and the employment which is of concern to us in this case. We also believe that this case is distinguishable from those cases where the evidence established a sequence of events strong enough from which the trier of fact could properly infer that the work activity caused the injury. *See* Morgan v. Compugraphic Corporation, 675 S.W.2d 729 (Tex. 1984) (a personal injury case); Transport Insurance Company v. Campbell, 582 S.W.2d 173 (Tex. Civ. App.-Houston [1st Dist.] 1979, writ ref'd n.r.e) (on motion for rehearing). Respondent did not experience a back problem while moving the furniture. He didn't notice pain until a week or more after the work event when he was engaged in a nonwork-related lifting incident. He had no problems and continued to work. He didn't consult a doctor for over five months. In our opinion, this sequence of events simply does not link the back injury to the work-related furniture moving incident.

There is in evidence Dr. B's statement that he is treating respondent for injuries sustained on the job. However, it can only be concluded that his statement as to an injury sustained on the job was based on the history of the injury noted in his Initial Medical Report. There was no evidence to indicate any source for such history other than respondent. That history related that respondent experienced low back pain when he lifted a file cabinet and turned. The history of the injury relied upon by Dr. B was directly contradicted by respondent's own testimony at the hearing. Respondent said he had no problems while moving the office furniture and only started experiencing pain a week or more after the office move. In effect, Dr. B gave his statement as to a job related injury in reliance on prompt onset of symptoms where, in fact, there were none. Under the facts and circumstances presented in this case, Dr. B's statement of a job related injury cannot be said to have much, if any, probative value in establishing a casual connection between respondent's injury and his employment. Also, a doctor's recitation of the history of an injury as reported to him by the claimant, although admissible for showing the basis of the doctor's opinion as to the cause of the claimant's problems, is not competent evidence that the injury occurred on the date alleged.

Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

We conclude, based on all the evidence, that the hearing officer's finding that respondent injured his back on _____, while moving office furniture is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. The hearing officer's conclusion that respondent sustained a compensable injury which is based on that finding is, therefore, not supported. Consequently her decision that respondent sustained a compensable injury must be reversed.

We overrule appellant's two remaining points concerning the sufficiency of the evidence to support the hearing officer's finding and conclusion on timely notice, and alleged error in excluding from evidence an affidavit that was not exchanged. Respondent testified that he gave notice of a work related injury to his immediate supervisor approximately two weeks after the occurrence of the claimed injury. Mr. P said that respondent's supervisor told him no report of injury was made. Thus, the evidence was conflicting on this matter and the hearing officer was entitled to believe respondent. *See* Associated Employers Insurance v. Burris, 321 S.W.2d 112, 117 (Tex. Civ. App.- Amarillo 1959, writ ref'd n.r.e.).

The benefit review conference in this matter was held on November 19, 1991. The excluded affidavit was made by respondent's supervisor and is dated December 6, 1991, and appellant's attorney represented that he received it on that date. The hearing was held over two months later on February 13, 1992. Pursuant to Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE 142.13(c), parties must exchange, among other things, any witness statements no later than 15 days after the benefit review conference, and thereafter must exchange additional documentary evidence as it becomes available. This same rule provides that the hearing officer must make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing. Appellant admits that the affidavit was not exchanged prior to the hearing, but asserts it had good cause not to exchange the affidavit since it had listed the affiant as a witness known to have knowledge of relevant facts in its exchange letter. Thus, appellant concludes respondent was not surprised by the offer of the affidavit and good cause has been established. Lack of surprise does not equate to good cause for failing to comply with exchange requirements. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986); Texas Workers Compensation Commission Appeal No. 91058, decided December 6, 1991. In this case, appellant had ample time prior to the hearing to exchange the affidavit with respondent. Appellant gave no reason for not doing so other than that it had listed the affiant as a witness in its exchange letter. Rule 142.13(c) requires the exchange of both any witness statements and the identity of witnesses known to have knowledge of relevant facts. In the circumstances presented in this case, exchanging the witness' name was not good cause for not exchanging the witness' statement. We hold that the hearing officer did not abuse her discretion in excluding the affidavit.

The hearing officer's decision is reversed and rendered.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge