APPEAL NO. 92120

This appeal arises under the provisions of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On February 10, 1992, a second session of the contested case hearing was convened in _____, Texas, with (hearing officer) presiding as hearing officer. The hearing officer found against appellant (claimant herein) on the two disputed issues, namely, whether claimant provided her employer with timely notice of the injury and whether claimant sustained an injury in the course and scope of her employment. Claimant challenges the sufficiency of the evidence to support the hearing officer's determination and seeks our reversal.

DECISION

We affirm the hearing officer's decision and order.

Claimant's written appeal was filed with the (field office), Texas, office of the Texas Workers' Compensation Commission (Commission) instead of the Commission's central office in Austin. Further, the appeal did not contain a certificate of service showing it was served upon carrier. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §143.3 (TWCC Rules) contains filing, service, and other requirements for the taking of an appeal from a contested case hearing. Notwithstanding the above mentioned defects, however, we find that the jurisdiction of the Appeals Panel was invoked by claimant and that the response of carrier was timely filed. Article 8308-6.41(a) (1989 Act).

The hearing officer convened the first session of the contested case hearing on January 24, 1992, and the carrier's attorney and witnesses were present as was claimant. However, claimant's attorney was not present. The hearing officer, over objection, recessed the hearing until February 10, 1992, after ascertaining that claimant's attorney was out of town and did not have the hearing on his calendar.

Claimant testified that she had been employed by (Employer) at its plant in (City 1), Texas, for a little more than a year when she injured her back on (date of injury). Claimant's primary duties at the plant were those of a cheese tower operator. Such towers made blocks of cheese which weighed approximately 42 1/2 pounds and claimant put the bags for the cheese blocks on the tower and then sealed them. Apparently this job involved the lifting of cheese blocks only infrequently. However, claimant was occasionally required to work in the boxing area lifting the cheese blocks from a chest-high conveyor belt down to pallets on the floor. On March 25, 1991, claimant had worked the tower and did not do continuous lifting. On (date of injury) claimant worked in the boxing area for the entire day. She hadn't worked in the boxing area for several months. She had to get the pallets, each of which weighed approximately 30 to 40 pounds, down from a stack and load them with cheese blocks from the conveyor belt. She didn't know how many pallets she loaded on (date of injury) but she worked the full day and did a lot of lifting and bending. When she left the plant on (date of injury) she was experiencing some back pain which gradually got

worse. Claimant did not feel a sudden pain or "pop" and couldn't relate her back pain to some specific traumatic event occurring on that day. She thought it was just her muscles, and didn't report the pain to anyone. The next morning she couldn't get out of bed. She called MH, the cheese floor superintendent, and told him her back was hurting really bad and that she couldn't come to work. Claimant testified she didn't know whether MH would know her back pain was from lifting cheese as she "didn't think about that." Claimant testified that she didn't tell anyone at the plant that she hurt her back on the job and wanted to see a doctor because she "didn't realize at that time what [she] had done."

Claimant said she stayed in bed a few days and, on April 1st, went to see Dr. JE of the (clinic). She told Dr. JE her back pain began several weeks earlier when she had the flu, that it got better, and then got worse after she worked in the boxing room. After seeing Dr. JE, claimant said she "realized what [she] had done" apparently meaning she then related her back pain to her work. Claimant viewed her injury as having occurred on (date of injury) and contended that she effectively notified MH within 30 days in conversations with him. Claimant didn't specify whether she regarded the 30-day notice period as commencing on (date of injury) or on April 1st. Her theory at the hearing seemed to consist of her contention that she sustained an injury from the lifting she did on (date of injury), and, that she did not relate her back pain to such lifting until after seeing Dr. JE on April 1st. Claimant claimed she didn't realize her injury was job related until she saw Dr. JE on April 1st. She told Dr. JE, and his report so reflects, that she lifted cheese boxes weighing approximately 43 pounds as a part of her employment duties. She said she spoke to MH at least twice within 30 days of her injury. Claimant didn't relate what she said to MH on such occasions. Asked whether MH knew her back pain was job related, claimant said that "after going to [Dr. JE] . . . I assumed he [MH] realized that I . . . had hurt it at work." Claimant also testified that "[MH] asked me if I had hurt it at work, and I said I was not sure at that time, but it had -- it was worse. Work had made it worse." She said she didn't specifically tell MH she hurt her back on the job but "I thought I got it across to him that's what happened." Claimant also testified that after seeing Dr. JE she didn't tell anyone at the plant she got hurt on the job "[b]ecause I was stupid . . . I was just going to handle it myself. I didn't want to cause any problems. I just thought it would be okay."

Claimant further testified that at sometime in April 1991, after telling MH she had been to see Dr. JE, MH required her to visit Dr. KWI, the company doctor, "to get a release." Dr. KWI examined claimant and released her to return to work without restrictions. She said she worked at the plant for approximately 10 days in April 1991 but has not been able to work since that time because of her back pain. Claimant said the pain was in the lower right side of her back and hip and ran down her leg to her foot.

Dr. JE's report, introduced by claimant, referred to claimant's April 1st visit and stated that claimant said her back problem began about two weeks earlier "which coincided with a flu-like condition . . . ."; that she was then treated by Dr. KI; that the antibiotics claimant was given didn't help her back condition; that claimant said she lifted 43 pound boxes of cheese as part of her work duties; that claimant had a work-related low back (left side) injury in June

1990 from lifting 5-gallon buckets of chloride and stacking them over her head; that her lumbar x-rays showed RLF and LLF subluxations with a right rotation; that claimant's present diagnosis was "[a]cute RLF subluxation of L-4 with external rotation of the right hip leading to sciatic neuralgia of the right leg;" and that claimant was responding to weekly chiropractic manual manipulation and heat therapy but must refrain from lifting. Dr. JE's report did not state a cause for claimant's diagnosed acute subluxation of L-4 nor connect it to claimant's lifting of cheese blocks at work. As of the hearing date claimant was still seeing Dr. JE for "adjustments" every other week and was on a 10 pound weight lifting restriction. She said her condition was improved and she had no pain in her leg.

Claimant testified she was sent, at the request of carrier, to see Dr. JH, an orthopedic surgeon, on August 29th, who told her the repetitive lifting she did probably caused her problem. According to reports from Dr. JH introduced by claimant, she recalled no "specific history of trauma or injury at work" although she mentioned having to lift 40 pound bags of cheese "3 or 4 times an hour during her normal work day" and that she had to work in the boxing area and lift 40 pound cheese boxes "periodically." His reports indicated that if claimant had to do repetitive lifting of heavy objects, such lifting "could cause her to have some back difficulties, however there was no specific incident of trauma related to her work at this time." Claimant said she told Dr. JH the onset was gradual and not some sudden "pop." Dr. JH's report also states that claimant related that she first started having back and leg pain along with nausea and vomiting "in early April" and that her family physician felt it was related to a flu and placed her on antibiotics. Dr. JH reviewed the x-rays taken by Dr. JE and stated they "basically look normal." He also clearly disagreed with Dr. JE's diagnosis when he stated he saw no evidence of any subluxation, particularly at L-4. Dr. JH's clinical impression was that claimant's "problems are most likely related to a mild disc problem" which caused sciatic nerve root irritation now resolved. Dr. JH felt that claimant should be placed on work hardening and vigorous exercise programs to strengthen her back and leg muscles rather than continuing the chiropractic manipulations, and, that she could then return to normal duties in six to eight weeks and perform light duty prior to that time.

Dr. JE referred claimant to Dr. PF, also an orthopedic surgeon, who saw claimant on October 2nd. In his report Dr. PF related that claimant was "lifting 40 pound boxes of cheese approximately three times a minute." Dr. PF felt claimant had "typical symptoms of a low back strain," would make a slow recovery, and that "activity is most important for her." He advised her about back exercises and opined that she should find some other occupation. According to Dr. PF, claimant's pain started at the end of March when she worked one afternoon and couldn't get out of bed the next day because of the pain. Dr. PF's report did not relate claimant's symptoms of low back strain to her lifting of cheese blocks.

Claimant related that she had experienced a prior job-related back strain injury in 1990 due to lifting heavy containers of chemicals. She was treated by Dr. KWI for that injury for three weeks and received workers' compensation benefits for three weeks. She reported this injury on the day it occurred because her back had "popped" and she had

known right then of her injury.

Claimant testified that she worked 10 days in April and "was trying to work this time and keep it from being any kind of claim." She said that on May 1, 1991, she and her husband went to the plant to fill out a report of her injury. The plant manager, SD, to whom claimant first spoke, called MH into the office and directed him to fill out an injury report. She had sensed that MH didn't believe she had injured herself on the job and had been giving her "a runaround." Claimant introduced a handwritten "Employer's First Report of Injury or Illness" which was filled out and signed by MH on May 1, 1991. This report listed claimant's date of injury as "(date of injury)" and stated that MH first knew of the injury on "4-30-91." In response to questions claimant appeared to view the date of "4-30-91" as corroborating her testimony that MH was aware of her injury before May 1st. Claimant was certain that (date of injury) was the date of her injury. However, as we previously noted, claimant testified that she first became aware that her back pain was job-related on April 1st when she saw Dr. JE. This testimony was not disputed. Carrier did dispute claimant's testimony that she gave notice of a job related injury to HM before her May 1st visit to the plant and her testimony on that point was equivocal at best. The fact of claimant's giving notice of injury on May 1st when she came to the plant with her husband was only somewhat controverted. Both claimant and her husband testified they went to the plant on May 1st to report the injury. MH also testified this visit occurred either on April 30th or May 1st. MH made out his report on May 1st.

Claimant's husband testified that his wife had been complaining of a sore back for approximately 10 days before March 27th when she couldn't get out of bed from soreness. At that time she also had headaches and intestinal distress. However, since Dr. JE said the flu couldn't have caused claimant's pulled back, they concluded it happened when she worked in the boxing area. He accompanied his wife to the plant on May 1st where MH filled out the report on his wife's injury.

SD testified for carrier that he was claimant's shift supervisor; that claimant didn't report any work-related injury to him; that "at one point in time" he noticed claimant walking with some difficulty at work and inquired of claimant who told him her back was sore and that she hurt it at home. SD thought this conversation took place on March 28th but later acknowledged that if claimant wasn't at work on March 28th, he must have simply recorded the conversation in the plant log on that date. According to SD's written statement, also in evidence, the conversation took place the first day claimant was back at work after being out with the flu.

A written statement from MH dated May 1, 1991, was also introduced. It stated that claimant claimed she hurt her back on "(date of injury) working on the 40# cheese boxer;" that she worked just six days during the period March 27th to May 1st; that she obtained two work releases in April 1991; that she visited the company doctor on April 22nd and he issued a written statement "saying her back is normal;" and that claimant "twice told me during this time that she did not hurt her back at work."

MH also testified that before claimant came to the plant with her husband on May 1st to report her injury, she had not previously told him she hurt her back on the job. During two telephone conversations with MH before May 1st about her sore back, claimant told him on the first occasion that her problem was related to her flu and that "she didn't get her injury on the job." On the second occasion claimant really didn't know. "She never specifically said she injured her back at work. She didn't know." Dr. KWI had given claimant a full work release after being out sick with the flu and another one on approximately April 9th after being out with her sore back.

Carrier also introduced a typewritten, unsigned Employer's First Report of Injury containing the typewritten name of SH and possibly her initials, dated "5/02/1991" and stating that date as the "date reported." This form also stated that the cause of claimant's injury was unknown and that she had twice stated her injury wasn't work related.

Carrier introduced an x-ray report of April 23, 1991, which revealed that claimant had an "[e]ssentially normal lumbosacral spine." This exhibit doesn't indicate who ordered the x-ray. Carrier also introduced the records of Dr. KI pertaining to claimant's visits of March 19 and 22, 1991. These records showed that claimant came to Dr. KI on March 19th "complaining of lower back pain, right side" together with headaches, dizziness, nausea, vomiting, and general malaise." Dr. KI's impression was "viral syndrome--flu." The March 22nd records state that while claimant is feeling better, "her low back is hurting" and that she had a "right paraspinous muscle spasm." Dr. KI's assessment was "rt. Paraspinous muscle spasm, secondary to bedrest from illness, resolving." Dr. KI's plan included putting a mattress on the floor, use of heating pad, and "[n]o work until Monday, if cannot work Monday, come in and re-examine her back for possible x-rays."

We will address first the issue concerning whether claimant proved she sustained an injury within the course and scope of her employment. In her appeal request, claimant points us to her testimony that she worked eight hours on (date of injury) lifting cheese blocks, couldn't come to work the next day, remained off work until April 1st, and was told by Dr. JE on April 1st that her back complaints were caused by lifting and were unrelated to the flu. In his Decision and Order the hearing officer concluded that claimant did not sustain a compensable injury on (date of injury). He based that conclusion on factual findings that claimant's "medical history and records indicated persistent back pain and flu-like symptoms prior to (date of injury);" that claimant "initially contended her back injury was not job-related with employer, and sustained her back injury at home;" and, that claimant "did not sustain an injury with employer on (date of injury)."

Claimant had the burden to prove that she sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. As is frequently the case, the hearing officer was faced with conflicts in the evidence which he had to resolve. Article 8308-6.34(e) (1989 Act) makes the hearing officer 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 is best positioned to sift through the evidence and sort out the conflicts since he has the opportunity to both observe the witnesses as well as review the documentary evidence. Notwithstanding that claimant was a party with an obvious interest in the outcome of the hearing, her testimony could and did raise issues of fact. Gonzales v. Texas Employers Insurance Ass'n, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ). However, as the finder of fact, the hearing officer is entitled to believe all or part of or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Neither claimant's testimony nor the doctors' reports related claimant's back injury, be it a paraspinous muscle spasm, subluxations, or a disc problem, to any specific trauma or event occurring at work on (date of injury). While the evidence could support a determination that claimant had sustained a repetitive trauma injury to her back from her lifting of cheese blocks at work over some period of time, it does not compel that conclusion. When reviewing questions of "factual sufficiency" we consider and weigh all the evidence, both in support of and contrary to the challenged finding. We will not disturb the hearing officer's findings and conclusions unless we determine that the evidence is so weak or the findings and conclusions are so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We find sufficient evidence to support the hearing officer's conclusions that claimant "did not sustain an injury which arose out of and in the course and scope of employment with employer on (date of injury)," and, that claimant "did not prove by a preponderance of the evidence that the relief [she] seeks is allowable under the applicable statutes and rules."

In view of our agreement with the hearing officer that claimant failed to establish that she sustained a compensable injury on (date of injury), it is not necessary for us to decide the correctness of his determination that claimant failed to provide her employer with timely notice of injury. Nevertheless, we have reviewed the evidence and find it supportive of the hearing officer's determination of this issue. Claimant's testimony regarding her provision of notice in her conversations with MH was equivocal and vague. The notice claimant provided when she and her husband went to the plant on May 1st was more than 30 days from the date of her claimed injury of (date of injury) and therefore untimely. Article 8308-5.01(a) (1989 Act) requires an employee to notify the employer of an injury not later than the 30th day after the injury occurs. We observe that while claimant contended she did not become aware that her injury may have been work-related until so advised by Dr. JE on April 1st, no issue of good cause for failure to give timely notice (Article 8308-5.02) was raised and pursued by claimant. We further observe that claimant did not articulate and pursue the theory that she suffered an occupational disease (repetitive trauma injury) for which the date of injury was April 1st. *See* Articles 8308-4.14 and 8308-5.01(a) (1989 Act). *And see* Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge