APPEAL NO. 92180

On January 13 and March 16, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the claimant, (claimant), respondent herein, sustained a compensable injury on (date of injury), while working for (employer), and that respondent notified his employer of his injury within 30 days. The hearing officer also determined that appellant, the employer's workers' compensation insurance carrier, timely filed its notice of refused or disputed claim. The hearing officer ordered appellant to pay benefits to respondent in accordance with the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant disputes the hearing officer's findings and conclusion that respondent injured his back while working for the employer on (date of injury), and that he reported his injury to his supervisor on that day. Appellant requests that we reverse the hearing officer's decision and render a new decision denying benefits to respondent. Respondent requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

Under the 1989 Act a "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). It is the claimant's burden to establish that an injury was received in the course and scope of employment. Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied). 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 of injury 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 burden is on the claimant to establish the existence of such notice. Travelers Insurance Company v. Miller, 390 S.W.2d 284, 286 (Tex. Civ. App.-El Paso 1965, no writ). 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 to the evidence. Article 8308-6.34(e) and (g).

Unless the record shows that a hearing officer's finding on an issue is factually insufficient, or so against the great weight and preponderance of the evidence as to be manifestly unjust, we do not interfere with the hearing officer's decision. *See* Spillers, *supra*; Texas Workers' Compensation Commission Appeal No. 92166 (Docket No. SA-91110869-01-CC-SA42) decided June 8, 1992. Moreover, because the hearing officer is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we do not substitute our opinion for that of the hearing officer merely because he or she might have reached a different factual conclusion. *See* Spillers, *supra*; Texas Workers' Compensation Commission Appeal No. 92133 (Docket No. TY-91-144032-01-CC-TY41)

decided May 18, 1992.

Respondent worked as a welder for (employer). He testified as follows: On (date of injury), he and Mr. S were using small sections of pipe as rollers to move a 20 foot section of steel pipe weighing several hundred pounds. As he was holding on to the front end of the pipe, the pipe "flipped off" the roller on the back end causing him to twist around. He felt immediate sharp pain in his lower back, told Mr. S about his back pain, and stopped working. Within about 30 minutes of his accident, he reported his injury to his foreman, Mr. W, who, along with the superintendent on the job site, Mr. B, drove him to the employer's first aid office in a golf cart. Mr. S followed them to the first aid office. Respondent and Mr. S went into the first aid office, and the foreman and superintendent went to another office. Respondent told the "medic" Mr. T, he had hurt his back. The medic told him he had a pulled muscle and that he should try to work it out. Respondent returned to his workplace that day, but did not work. He worked the next four days, but each day reported to the medic that he had back pain. On July 19, 1991, the entire crew was laid off. Respondent did not know about the lay off until it occurred. Over the next month his back hurt. On August 23, 1991, at his wife's urging, he saw Dr. K. Dr. K stated in a letter which was in evidence that he saw respondent on August 23rd for injuries received in an on-the-job accident on (date of injury), and that he diagnosed cervical strain and lumbar strain. Dr. K didn't know when respondent would be able to return to work.

Mr. S testified that he was respondent's coworker and is respondent's friend. He said that on (date of injury), he and respondent were moving the 20 foot section of pipe when it twisted and "rolled" respondent. When that happened, respondent grabbed his back, cussed, and told this witness he hurt his back. This witness also said he was present when respondent reported his injury to the foreman, and that the foreman and superintendent drove respondent to the first aid office in a golf cart. He further stated that he was with respondent in the first aid office on (date of injury) after the accident happened, and that he saw respondent go into the first aid office every day thereafter until they were laid off.

Respondent's wife, Mrs. D, testified that on (date of injury), respondent told her he had hurt his back when a pipe he was moving swung him around. She said respondent was "hardheaded" so she ended up having to make an appointment for him with Dr. K. She also said that respondent cannot do anything he used to do without pain.

Appellant presented its case through depositions, affidavits, and transcriptions of recorded statements. Ms. W, whom respondent said was standing beside him at the time of his accident, and who is the foreman's wife, didn't know anything about respondent's injury. Respondent didn't tell her or complain to her about hurting his back. In his deposition, the foreman, Mr. W, said he didn't remember respondent reporting an injury to him or taking respondent to the first aid office. He first knew of respondent's claim of a work-related injury in October or November 1991. However, in his transcribed recorded statement this witness said that respondent "may have said something to me and I don't

remember it, it wasn't enough importance to make a note on my mind at the moment." He also said that sometimes respondent had to move pipe around and that a 20 foot section of pipe weighs more than one hundred pounds. Mr. S, the project manager, said he was responsible for investigating accidents and that no one reported to him an accident involving respondent. Mr. T, whom respondent referred to as the "medic," stated in his deposition that he was one of the employer's safety technician's on (date of injury) and that he did not recall respondent coming into the safety office on that day or any other day complaining of a hurt back. He said that if respondent had gone to the safety office his name would be in the employer's First Aid/Injury Register.

The employer's First Aid/Injury Register for the period of March 3 through August 1, 1991, was in evidence. Respondent's name is not in that register. However, the accuracy of the register was called into question through the testimony and statements of several witnesses. Mr. S said he had an accident at work about three days after respondent's accident, and that the foreman, Mr. W, had taken him to the first aid office where he was seen by Mr. T. Mr. W and Mr. T confirmed Mr. S's testimony as to the occurrence of that event, and Mr. T said Mr. S's name should appear in the register. For some unexplained reason, Mr. S's name also does not appear in the register.

As can be seen from our review of the evidence, the hearing officer was presented with conflicting evidence on the issues of injury and notice. The Supreme Court of Texas has said that the trier of fact has several alternatives available when presented with conflicting evidence. The trier of fact may believe one witness and disbelieve others, may resolve inconsistencies in the testimony of any witness, and may accept lay testimony over that of experts. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). The relationship of the witnesses could be taken into consideration by the hearing officer as bearing on the credibility of the witnesses. *See* Lindley v. Transamerica Insurance Company, 437 S.W.2d 371, 375 (Tex. Civ. App.-Fort Worth 1969, no writ). The hearing officer chose to believe respondent and respondent's witnesses. Believing their testimony, and taking into consideration Dr. K's diagnosis of back strain, the hearing officer could find, as he did, that respondent was injured at work and that he gave timely notice of injury. *See* Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ) wherein the court held that the claimant's testimony could support a finding of an on-the-job back injury. *See also* Associated Employers Insurance Company v. Burris, 321 S.W.2d 112 (Tex. Civ. App.-Amarillo 1959, writ ref'd n.r.e.) wherein the court held there was sufficient evidence to support a finding of timely notice of injury where the claimant swore he told the foreman about his injury on the day it occurred, and the foreman swore he didn't. The evidence supporting the findings on injury and notice in the present case is even stronger than that presented in the cases of Baugh and Burris in that respondent's testimony on both matters was corroborated by an eyewitness. After reviewing all the evidence we conclude that the hearing officer's findings of a compensable on-the-job injury and timely notice of injury are supported by sufficient evidence of probative value, and that those findings are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge