APPEAL NO. 92204

On April 1, 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, was injured in the course and scope of her employment while working for her employer, (employer), on (date of injury), and that she timely reported her injury to her employer on (date). The hearing officer decided that appellant, the employer's workers' compensation insurance carrier, is liable to respondent for payment of workers' compensation benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant contends that respondent did not meet her burden of proof with respect to certain Findings of Fact and Conclusions of Law, and that the hearing officer committed error in excluding an exhibit from evidence. Appellant asks that the decision of the hearing officer be reversed and a new decision be rendered in its favor. Respondent asserts that she met her burden of proof and asks that the decision be affirmed.

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. redacted) 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 we might have reached a different factual conclusion. *See* Spillers, *supra*; Texas Workers' Compensation Commission Appeal No. 92133 (Docket No. redacted) decided May 18, 1992.

During 1991, respondent worked as a cashier/sales assistant at two convenience stores operated by the employer. Her duties included waiting on customers, cleaning the stores, and stocking the inventory. Respondent said she usually worked the morning shift at Store No. 117, and that Friday was the day deliveries were made to the store and stocking was done. Respondent said that on Friday, (date of injury), she worked the morning shift at Store No. 117 stocking "quite a bit" of oil, can goods, groceries and large boxes of cups, that were delivered by a truck about 8:30 a.m., and that she felt pain in her lower back while working which she thought was due to a kidney infection or from standing on her feet a lot. She said that the only other employee at the store at the time she did the stocking was the manager of the store, (Ms. H), who only helped stock smaller items such as toothpaste. Respondent said she told (Ms. H) she had back pain that day and that she thought it was from a possible kidney infection. At 3:00 p.m. that day, respondent said that the assistant store manager, (Ms. M), arrived for the afternoon shift and relieved her. Respondent said she again reported her back pain to (Ms. H) while at work on Saturday, (date), and Monday, (date), but that she continued to attribute the pain to a possible kidney infection. On Tuesday, (date), respondent said she told (Ms. H) she needed to see a doctor about her back pain and left work early for that purpose. Respondent testified that she told the doctor at (Hospital) on (date) that she thought her lower back pain was from stocking at work, and that the doctor said she had a strained lower back and released her to light duty work with no bending or lifting activities. The next day, (date), she said that she worked at Store No. 130 managed by (Mr. W), and that she gave her light duty work release slip to (Mr. W) who said he would give it to the employer's field supervisor, (Mr. G). Respondent said she stopped going to work sometime during that same week because her back constantly hurt. On December 27, 1991, respondent said Dr. B diagnosed a strained back, took her off work, and advised her to make a report to her employer. She said she called (Mr. G) and told him "what the doctor had said" and when he asked her if she had made a report, she told him she had "told (Ms. D)." Respondent testified that she had told (Ms. H) her "complaints" were related to work right after she went to (Hospital) on (date), but before she stopped working for the employer. Respondent was treated by (Dr. G) after two visits to (Dr. B). Respondent explained that due to the location of her back pain, she initially thought she might have a kidney infection, but that none of her doctors have diagnosed a kidney infection. She also said that she had never before had a serious back problem and that except for stocking at work, she did no strenuous or unusual activities during (date of injury).

Several medical records and reports were admitted into evidence. (Hospital) records of (date), stated that "exam shows that your back pain is caused by a strain of the ligament muscles that support your spine," but work activities are not mentioned as a cause of the strain, and a check mark was made next to the statement "not work-related." In a report dated December 30, 1991, (Dr. B) stated that he saw respondent on December 27th and diagnosed a low back strain. The history of the injury is given as "hurt lower back while lifting stock - left leg tingles." In a report dated January 8, 1992, (Dr. G) diagnosed a probable low back strain and placed respondent on therapy. The history section of the report recited that respondent began to have back aches when she lifted a case of oil while stocking at work on (date of injury). In a subsequent report dated February 13, 1992, (Dr.

G) recommended that respondent have an MRI because he could not find any objective abnormality and no explanation for respondent's complaints of pain. The results of the MRI were stated as "essentially negative exam."

Ms. H, manager of Store No. 117, testified for appellant and her affidavit was admitted into evidence. She said that although respondent's usual work schedule was to work the morning shift on Fridays at Store No. 117, the day stocking is done, on (date of injury), respondent did not work the morning shift, but rather worked the afternoon shift at Store No. 117 with (Ms. M). (Ms. H) said that she worked the morning shift of (date of injury) by herself. The witness stated in her affidavit that (Ms. M), and not respondent, did the stocking, but admitted while testifying that she did not see whether respondent stocked on (date of injury) and that stocking was part of respondent's job duties. She further stated that respondent told her on (date) that her back hurt because of a kidney infection, and that respondent told her the same thing on (date of injury). She also stated that around December 21, 1991, (Mr. W), the manager of Store No. 130, told her that respondent had told him that she (respondent) had hurt her back at Store No. 117. The witness denied that respondent told her that she (respondent) had hurt her back at Store No. 117.

(Mr. G) also testified for appellant and his affidavit was admitted into evidence. He stated that on (date), respondent told him her back hurt because of a kidney infection; that respondent told (Mr. W) on (date) that she thought she had hurt her back stocking the cooler at Store No. 117 on (date of injury); that he saw a doctor's note which stated that respondent had lower back strain and that she was to remain on light duty; that the doctor's note indicated the back strain was not work related; that he told respondent on December 30th that if she hurt her back at work she needed to fill out an incident report; and that prior to (date of injury) (Mr. W) told him that he could not afford to keep respondent on his schedule because she called in sick at least three times a month. He also said that no incident report was filed on respondent.

(Ms. M) also testified for appellant. She said that respondent was a good employee, that respondent usually worked the morning shift on Fridays, but that on Friday, (date of injury), respondent worked the afternoon shift with her; that she (Ms. M) always did the stocking when respondent worked with her; and that on (date of injury) respondent said that her back hurt and that she thought she had a kidney infection.

In our opinion the evidence is sufficient to establish, as found by the hearing officer, that respondent notified her employer of her injury within 30 days of her injury. Article 8308-5.01(c) allows the notice of injury to be given to an employee of the employer who holds a management or supervisory position. In this case, (Ms. H) and (Mr. G) both acknowledged that respondent had told (Mr. W), a store manager for the employer, within 30 days of (date of injury) that she thought she hurt her back at work on (date of injury). Furthermore, Article 8308-5.01(a) allows the notice to be given by a person acting on the employee's behalf. The evidence shows that (Mr. W) relayed respondent's report of a work-related injury to (Ms. H) and (Mr. G) within 30 days of (date of injury). Thus, not only did (Mr. W) have notice of

the injury, but (Ms. H), the manager of Store No. 117 where the occurrence is claimed to have occurred, and (Mr. G), the managers' supervisor, were given timely notice of the injury.

The testimony was conflicting as to what transpired at Store No. 117 on (date of injury). Respondent's testimony that she felt back pain while stocking items during the morning shift was contradicted by the testimony of appellant's witnesses who said that respondent worked the afternoon shift and not the morning shift, that respondent worked with (Ms. M) that afternoon, that (Ms. M) did the stocking when she and respondent worked together, and that respondent had reported back pain from what she thought was a kidney infection the day before the claimed work-related injury. The medical reports indicated that respondent was diagnosed with a back strain within four days of the claimed date of injury, and that the diagnosis was confirmed by two other doctors. However, by February, 1992, (Dr. G) could not find evidence which would explain respondent's continued complaints of back pain. There is no indication in the medical records that respondent suffered from a kidney infection, to which she had initially attributed her back pain.

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 hearing officer chose to believe respondent's testimony concerning the onset of her back pain while stocking on (date of injury). There is no evidence that respondent actually suffered from a kidney infection. The diagnosis of back strain within four days of the claimed occurrence tends to support respondent's claim of an injury, and her testimony concerning the onset of back pain while stocking at work, if believed by the trier of fact, as it was, could support an inference that her back strain arose out of and in the course and scope of her employment. Strains and sprains occurring in the course and scope of employment have been held to be compensable. *See* Hanover Insurance Company v. Johnson, 397 S.W.2d 904, 905 (Tex. Civ. App. - Waco 1966, writ ref'd n.r.e.). *See also* 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. In our opinion there is sufficient evidence to support the hearing officer's conclusion that respondent was injured in the course and scope of her employment on (date of injury), and that such conclusion is not so against the great weight and preponderance of the evidence as to be manifestly unjust. We also conclude that Findings of Fact Nos. 6, 7, and 9 concerning respondent's hours of work on (date of injury), the arrival of a stock truck at Store No. 117 on that day, and respondent's back pain while working that day, respectively, to be supported by the evidence. Although the evidence could support contrary inferences as to respondent's hours of work on (date of injury), and her experiencing back pain while working that day, that is not a basis for interfering with the hearing officer's decision where the findings are supported by sufficient evidence and are not against the great weight and preponderance of the evidence.

We find no merit in appellant's contention concerning the exclusion from evidence of

its Exhibit No. 5, which consisted of several pages of employee time records for Store No. 130 for December, 1991. Appellant admitted that these documents had not been exchanged with respondent prior to the hearing. An employer representative at the hearing admitted that the documents had been in existence since December, 1991, but that they had been extracted from the employer's files only the day before the hearing which was held on April 1, 1992. Under these circumstances, we cannot conclude that the hearing officer abused her discretion in finding that appellant did not have good cause for failing to previously exchange the documents in accordance with Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE Sec. 142.13(c). *See* Texas Workers' Compensation Commission Appeal No. 91076 (Docket No. redacted) decided December 31, 1991. Appellant's assertion that the time sheets were offered as "impeachment/rebuttal" evidence to respondent's testimony that she worked the morning shift and not the afternoon shift on (date of injury) is equally without merit. Appellant's testimony was that on (date of injury) she worked the morning shift at Store No. 117. The time records sought to be introduced pertain only to Store No. 130. The entry next to respondent's name for (date of injury) is blank, which would merely indicate that she didn't work at Store No. 130 on that day. It does not, as asserted by appellant, "specifically and conclusively establishes that [respondent] did not injure herself on the shift she claimed in her direct testimony at the contested case hearing." The documents shed no light whatsoever on what shift respondent worked at Store No. 117 on (date of injury). We also note that appellant has cited no authority for its proposition that "impeachment/rebuttal" evidence is excepted from exchange requirements, and, considering the irrelevancy of the excluded documents, that question is not properly before us. Appellant's contention is overruled.

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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Philip F. O'Neill
Appeals Judge