APPEAL NO. 92239

Pursuant to the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act), a contested case hearing was held in (city), Texas, on April 30, 1992, (hearing officer) presiding, to determine whether appellant had sustained an injury in the course and scope of her employment on or about (date of injury); and, whether she had reported such injury to her employer not later than 30 days after the injury date and, if not, whether she established good cause for her untimely reporting. The hearing officer resolved these issues against appellant, who in her request for review challenges the sufficiency of the evidence to support the pertinent factual findings and legal conclusions. Respondent urges that the evidence is sufficient to affirm.

DECISION

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

Appellant testified that on or about (date of injury), while working as a sewing machine operator for (employer), she injured her back while seated at her machine as she jerked around from her left to her right to catch and straighten a stack of materials which had begun to slide off the table. She said that (L M), an assistant supervisor, had just come by and placed a stack of materials on the remaining pile. When appellant tried to straighten herself up, she experienced immediate, severe back pain. She had pain the rest of the day but continued to work. The evidence concerning the actual date of this incident was in substantial conflict. An Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), signed by appellant on May 30, 1991, stated the date of injury as (date). A subsequent TWCC-41 signed on June 17, 1991, restated the date of injury as (date of injury). According to the testimony of employer's bookkeeper, (B B), the plant was closed on both those dates. Appellant frankly admitted confusion concerning the date of injury. She said the (date of injury) date was arrived at by backing up by about a week from the date she first visited a doctor at (Clinic) for her back, namely, (date). She also seemed to indicate the (date) injury date had come from her recollection that she had left work on the day of the injury, or perhaps the following day, to see a doctor. Appellant testified she first attempted to reconstruct the injury date from various receipts while being interviewed by respondent's representative shortly upon returning home from back surgery performed on May 20th. She ultimately testified that the injury date was "on or about (date of injury)" and iterated that date for the remainder of the hearing.

Appellant testified that coworker (Ms. C), who was working three machines away, was present at the time of her injury and asked appellant what was wrong to which appellant responded she had hurt her back and couldn't straighten up. (Ms. C) testified she had no recollection of any such event or conversation, that she would have remembered an event involving a coworker being injured or hurt, and that sometime in May appellant spoke to her about her back hurting during a casual converation at bingo at which time (Ms. C) assumed it had happened that day. (Ms. C) also testified that appellant had called her to try to refresh

(Ms. C's) memory about the discussion at work; however, (Ms. C) maintained she had no recollection of any such conversation.

Appellant said that sometime after (L M) placed the additional materials on the stack, she returned and appellant told her the stack had fallen to the floor, and that her back was hurting and she couldn't straighten up. Appellant felt her conversation with (Ms. M) was notice of her injury to employer and said she was not later contacted by anyone in management after this conversation with (Ms. M). According to a transcript of a telephone interview with (Ms. M), later incorporated into her affidavit, she said appellant had not told her of hurting her back and that she probably wouldn't have paid any attention to such a complaint since appellant was always complaining about soreness, including her neck and back. Appellant said she had had a prior workers' compensation claim but didn't know what she was supposed to do about giving notice of injury.

Appellant testified that floor supervisor (Ms. B) was on vacation on the date of her injury. However, (Ms. B) testified she was not away from the plant until the period from April l5th to April 22nd. (Ms. B) also said she first realized that appellant may have felt her back problem was work related sometime in May, about one week before her May 20th diskectomy surgery, when appellant called (Ms. B) at home. During that call, appellant indicated she was not going to file a workers' compensation claim. Sometime after her surgery, appellant again called (Ms. B) and told her she hurt her back at work when she bent over to pick something up and broke a chip off a disc which became lodged against the sciatic nerve. She also told (Ms. B) she had reported the injury to (L M). When (Ms. B) asked her why she hadn't reported the injury to the plant manager, (D H), or to (Ms. B), appellant did not respond. (Ms. Be), the bookkeeper, testified that appellant called her at work on May 28th to report she had undergone back surgery and had been injured at work. This was (Ms. Be) first knowledge of such. (D H) said in an affidavit that appellant didn't report her back injury to him.

Appellant also testified that in November 1990 she applied for a position as a corrections officer with the (TDC) and commenced five weeks of TDC training classes in the evening during the time frame of her injury which included physical fitness exercises. At one point appellant said she had started these classes when her injury occurred, and at another point said the classes began on April 15th. She also said she was able to be excused from the exercises and denied the occurrence of any other event as causative of her back pain.

The records of (Dr. H), who performed the diskectomy surgery on May 20th for appellant's herniated disc at L4-5, stated that appellant developed severe back and leg pain approximately ten days previously. The records of (Dr. N), who saw appellant on May 14th, stated that appellant had insidious onset of pain radiating down her left leg with numbness three to four days previously. After initial treatment at (Clinic) on (date) and 9th, appellant was treated by (Dr. M) before being seen by Drs. (N) and (H). (Dr. M's) records contained the following entry for June 10th:

Patient called to ask for the date that she was first seen by (Dr. M) with low back pain. (date). She stated that she did not tell us at the time that she was injured at work because she did not want the injury to go on her work record. She also stated that the injury was not reported to her employer at the time.

Appellant said she did not tell the doctors treating her back injury that it was work related because of concern she might lose her prospective TDC job if it became known she had a workers' compensation claim.

The hearing officer found that appellant did not injure her back while working for employer "on (date of injury)" and concluded she had not injured her back "on (date of injury)" in the course and scope of her employment. The hearing officer went on to find that appellant "failed to establish the date of injury or timely notice, not later than thirty (30) days after the date of injury," and that she "presented insufficient evidence to establish `good cause' that would excuse her failure to give timely `notice of injury.'"

"An insurance carrier is liable for compensation for an employee's injury, without regard to fault or negligence if: . . . (2) the injury arises out of and in the course and scope of employment." Article 8308-3.01(a). Appellant had the burden of proving by a preponderance of the evidence that an injury occurred within the course and scope of her employment. Reed v. Aetna Casualty & Surety Co., 535 S.W. 2nd 377 (Tex. Civ. App. - Beaumont 1976, writ ref'd n.r.e.) Article 8308-5.01(a) provides that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Whether appellant sustained an injury in the course and scope of her employment, and whether she timely provided employer with notice of her injury, presented the hearing officer with fact issues which he resolved against appellant. Article 8308-6.34(e) provides the hearing officer, as the fact finder, with the sole responsibility for judging the relevance and materiality of the evidence, as well as the weight and credibility it is to be given. We will not disturb the factual findings of the hearing officer where, as here, there is some evidence of a substantial and probative character to support them. Commercial Union Assurance Company v. Foster, 379 S.W.2d 320,322-323 (Tex. 1964). We note that in his Decision and Order the hearing officer repeatedly framed the date of the injury in terms of its occurrence "on (date of injury)," including his finding, while at the hearing he stated at the outset that the issue was whether the injury was sustained "on or about" (date of injury). At the hearing, appellant persisted in her position that the date of injury was "on or about" (date of injury). In her request for review, however, appellant does not take issue with the hearing officer's restrictive framing of the claimed injury date and herself refers to the hearing officer's finding that she did not sustain an injury "on or about (date of injury)." We are satisfied that from the circumstances in this case and the evidence of record, we can reasonably and appropriately construe the hearing officer's finding to imply that appellant sustained no injury in the course and scope of her employment "on or about" (date of injury). Texas Indemnity Ins. Co. v. Staggs, 134 S.W.2d 1026 (Tex. Comm'n App. 1940, opinion adopted). The findings are

not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge