APPEAL NO. 92260

On May 12, 1992, a contested case hearing was held in (city), Texas, (hearing officer) presiding as hearing officer. He determined that the appellant had not proven by a preponderance of the evidence that his injury was sustained within the course and scope of his employment or that he gave timely notice of his injury. He further determined that good cause does not exist for appellant's failure to give timely notice of his injury to his employer. The appellant disagrees with several of the hearing officer's findings of fact and conclusions of law and urges the evidence is sufficient to establish an injury within the course and scope of employment, that there was timely notice of the injury and even if the notice was not timely, the employer had knowledge of the appellant's back condition and that his job required heavy manual labor. Respondent urges the evidence sufficiently supports the findings and conclusions of the hearing officer and also assert the appeal was not timely filed.

DECISION

Determining the findings, conclusions and decision of the hearing officer are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm. There is sufficient evidence to support his decision. We also determine the appeal was timely filed since the decision was mailed on May 27, 1992. Allowing for mailing time for receipt of the decision, the appeal was filed on the final allowable day.

The appellant was employed by the respondent, a self-insured entity, as a maintenance man who readied housing units for occupancy. He worked for the respondent for approximately 7 years and his duties regularly involved the moving of appliances on a dolly and carrying items such as floor tile and 5 gallon cans of paint.

The evidence was somewhat confusing. Nonetheless, the statement of evidence by the hearing officer fairly and substantially summarizes the pertinent matters and is set forth here in large part.

The appellant initially claimed that he sustained an injury to his back and testicles on (date of injury) when he slipped while moving a refrigerator on a dolly. However, the appellant, indicating some confusion with dates, testified that his back injury claim was based upon injury to his back over a period of time prior to (date of injury). The evidence indicated that an injury to his testicles occurred sometime in late 1990 and was resolved. Also, the evidence showed that the appellant had not been on duty since (date) and that he had made a doctor's appointment some two weeks previous to (date of injury). He testified at one point that the appointment was because of low back pain which he started experiencing approximately two weeks before (date of injury), and at another point indicated he had been experiencing back pain for three to five months before this date. Documentary evidence in the file shows that in his claim for workers' compensation, in a telephone interview in October 1991, and in answer to interrogatories in April 1992, the appellant was

asserting that his back was injured on (date of injury) when he slipped and fell into a dolly which held a refrigerator.

The appellant states that he did not notify anyone that his back injury was work-related until October 7, 1991 and the reason for this was because when he first noticed the back pain and it getting gradually worse, he was not sure of the cause. He states that when he reviewed an MRI report with a doctor in late September 1991 was the first time he realized the seriousness of the back injury and that it was work-related because at the time of the review he asked the doctor if the back injury was work-related and was told that there was "a possibility." Nothing in the medical reports submitted sets forth any opinion that the appellant's back injury is related to his work.

(BR), appellant's supervisor during the period in question, testified that monthly safety meetings were conducted which were attended by appellant. In these meetings, the employees were instructed to report all injuries immediately, no matter how minor. Appellant had reported injuries in the past. All injuries were to be reported either to BR or to the Maintenance Clerk, (AT). BR indicated that he saw the appellant working every day and did not notice any indication of a problem. He did recall that on one occasion appellant had been off on sick leave. When he returned on a Monday, he had reported that his back was hurting. When he was asked if this was work-related, appellant said "No." However, BR could not remember when this conversation occurred. He further indicated that at no time had appellant reported to him that he had received a back injury on the job.

AT testified that she was working as a Maintenance Clerk during the period appellant alleges that he was injured. Her boss is BR. If he is not available, then injuries are to be reported to her. She knows the appellant and saw him on most mornings. She never saw any indication that he was having a problem nor had he reported a back injury to her. However, some time in May he had called and indicated that he had hurt himself. She asked if his injury was work-related and he indicated "[n]o, he had hurt himself at home." She transferred his call to BR. She remembered him coming in with a paper from his doctor regarding returning to work. As a result, they sent appellant to the company doctor, (Dr. C), to determine if it was all right for him to be returned to work.

Medical records from the (health plan), were admitted. Appellant at this time was being seen under his medical insurance plan. He saw (Dr. T) on (date of injury). The diagnosis was low back strain. He was seen again on June 4, 1991. To the question what triggered the pain, the answer given was "unknown." In describing the pain, he indicates constant lower back pain, occasional numbness but less when sitting or prone and that the back was gradually becoming worse. It further states that a 1980 back injury took six months to become painful and that a CT scan showed arthritis in the lower back in 1989.

In a statement dated September 20, 1991, Dr. T states that the patient was there for a liver function test and for results of his MRI. He states that "[t]he patient L3 through L4 mild congenital stenosis, and in L4-L5 he had a moderate to severe effacement of the thecal

sac, secondary to moderate congenital stenosis. He had a mild to moderate hypertrophy of the facets and he did have a broad base symmetrical disc herniation and disc L5-S1 he has moderate congenital stenosis . . . ." He, thereafter, states that he was referring the patient to a neurosurgeon, (Dr. Y). No mention is noted throughout the exhibit as to the potential cause of appellant's problem being the work he performed for his employer.

Additional records from the health plan include a radiology report, dated July 17, 1991. This states that there is a narrowing of the lumbosacral interspace with localized hypertrophic change and some slight eburnation in that region. There probably is a calcified disc at this level. The lumbar spine is normal elsewhere. This is signed by a (Dr. B). An x-ray on August 2, 1991 resulted in the following impression by (Dr. S) "[s]clerotic appearance of the lateral wall of the left maxillary sinus and zygoma, corresponding to an area of activity on the bone scan." She recommends further evaluation with CT scan. No mention is noted with regard to the potential cause of appellant's problem.

In a statement dated October 28, 1991, Dr. Y indicates that appellant was referred to him by Dr. T. He states that in 1981 appellant suffered an on-the-job low back injury which resulted in low back pain which was resolved within three months. He did well until the second week of (date) when he began to note the onset of progressive low back pain. By August 1991 the pain was radiating into the right buttocks posterolateral thigh, and the proximal half of the latter calf.

Dr. Y describes the nature of appellant's work and that appellant attempted to return to some sort of light duty but was told at that time that no such work was available. He states that the MRI of the lumbar spine shows a moderate degree of congenital stenosis at L4-5 and L5-S1 with mild stenosis at L3-4. There is also facet arthropathy and disc degeneration and protrusion at the lower two levels with neural foraminal compromise also contributing to acquired spinal stenosis. In summary, he states that the appellant has both congenital and acquired stenosis with degenerative disc disease and protrusion manifested by low back and left lower extremity pain. There is no discussion of the back problems and any work relationship.

Appellant filed his initial Notice of Injury or Occupational Disease on October 7, 1991. In that report he states that the nature of the injury is low back pain and that the pain began during working hours. Subsequently, he filed an Amended Notice dated January 27, 1992. In that report he states that the nature of the injury is herniated disc and strained testicles. In response to the question how did your accident happen, he replied "[w]hile pushing a dolly and refrigerator I slipped and caught the refrigerator." Appellant's attorney testified that she had misunderstood the appellant in his description of the accident and that she had typed out the form after he had signed it in blank.

The findings of fact and conclusions of law with which the appellant takes exception are:

Finding 5:That appellant did not injure his back as a result of repetitive lifting while performing work for his employer resulting in his seeing a doctor on (date of injury).

Finding 6:That in (date) appellant was aware that his back was getting progressively worse, was hurting him more when he engaged in heavy lifting and that the pain subsided when he rested.

Conclusion 3:That the appellant has not proven by a preponderance of the evidence that his injury was sustained within the course and scope of his employment.

Conclusion 4:That the appellant has not proven by a preponderance of the evidence that he gave timely notice of his injury to his employer.

Conclusion 5:That good cause does not exist for appellant's failure to give timely notice of his injury to his employer.

Conclusion 6:That the appellant is not entitled to any benefits under the Texas Workers' Compensation Act.

Not only was the testimony and documentary evidence conflicting and confusing in this case, but because of an apparent mechanical failure, part of the record had to be reconstructed during the hearing. There is no complaint that the reconstruction is not substantially complete and accurate and we accept the record as substantially and accurately reflecting the contested case hearing proceedings in this case. *See* Texas Workers' Compensation Commission Appeal No. 91017 (Docket No. redacted) decided September 25, 1991.

The hearing officer 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), TEX. REV. CIV. STAT. ANN. art 8308-6.34(e) (Vernon Supp. 1992) (1989 Act). He is charged with the responsibility of sifting through the evidence before him, resolving conflicts and inconsistencies in the evidence and making findings of fact. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Article 8308-6.34(g), 1989 Act. The hearing officer may believe all, part or none of the testimony of a witness, judge the credibility to be given the particular testimony and assign the weight to be given it. Ashcroft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). A claimant's testimony merely raises a question of fact and such testimony, like that of other witnesses, may be believed

or disbelieved totally or in part. *See* Highland Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ).

As indicated, the claimant initially appeared to be proceeding on a claim of a specific injury to his back which occurred on (date of injury). The evidence did not bear this out and the case turned to a repetitive trauma injury theory, a term included within the definition of "occupational diseases." Article 8308-1.03(27) and (36). We have previously held that a back injury can be compensable as a repetitive trauma injury. Texas Workers' Compensation Commission Appeal No. 92171 (Docket No. redacted) decided June 17, 1992; Texas Workers' Compensation Commission Appeal No. 92063 (Docket No. redacted) decided April 1, 1992. However, just as in other injuries, it is the claimant's burden to establish that an injury was received in the course and scope of employment. Reed v. Aetna Casualty and Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). As stated in Appeal No. 92171 *supra*, citing Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist] 1985, writ ref'd n.r.e.), "[t]o recover for a repetitive trauma injury, one must not only prove that repetitious, physical traumatic activities occurred on the job, but also prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally."

We believe there was probative evidence before the hearing officer to support his findings that the appellant did not injure his back while in the performance of his employment on (date of injury) and that he did not injure his back as a result of repetitive trauma activity while performing his employment. And, even though there might be some evidence that could support different inferences or findings, this is not reason to abrogate the determinations the hearing officer concluded from the evidence to be most reasonable. Texas Workers' Compensation Commission Appeal No. 92048 (Docket No. redacted) decided March 20, 1992.

The conflicting versions of events given by the appellant, the medical records which indicate a long and progressively degenerating back condition, the MRI examination which indicated *inter alia*, congenital and acquired stenosis with degenerative disc disease and protrusion, no medical opinion concerning any relationship between the back condition and appellant's work other than appellant's statement that when he asked, the doctor indicated that it was a possibility that his injury was related to his work, together with evidence that the appellant's earlier medical visits were concerned with "non-workers' compensation" matters and evidence that the appellant stated he injured his back at

home form a sufficient basis for the hearing officer's findings and the conclusions that flow from such findings.

With regard to the issue of timeliness of notice, although not essential in view of our disposition of the threshold issue discussed above, we find there is sufficient evidence to support the hearing officer's determination that notice was not timely and there was no good cause shown for not giving timely notice. Article 8308-5.01(a) of the 1989 Act requires that notice of an injury be given not later than the 30th day after the date on which the injury occurs and, in the case of an occupational disease, not later than the 30th day after the date

which the employee knew or should have known that the injury may be related to the employment. The failure to notify relieves a carrier, under Article 8308-5.02, 1989 Act, of liability unless the employer has actual knowledge of the injury, good cause exists for the failure to give timely notice or the matter is not contested. Notice of injury must give notice to the employer that the condition or injury is work-related. Texas Workers' Compensation Commission Appeal No. 92154 (Docket No. redacted) decided June 4, 1992. It seems reasonable that if a specific injury to the back occurred on (date of injury) and it manifested itself within two or three days, the appellant was required to report the injury within 30 days. On a repetitive trauma injury theory, the appellant stated his back was bothering him when he lifted heavy objects on the job for three to five months prior to (date of injury) and that it became severe enough that he made a (date of injury) doctor's appointment for this condition. The hearing officer could reasonably disbelieve the appellant's claim, in light of his entire testimony, that he had no knowledge that his back condition or injury was job-related until late September 1991, therefore justifying his notice of October 7, 1991. And, the appellant's urging that the employer knew of the "back injury" beginning in May 1991 because of the various medical reports indicating the appellant was receiving treatment for his back, is not persuasive. As previously noted, until his notice of October 7, 1991, there was no documentation or other indication that the appellant's injury or condition was work-related. Indeed, the contrary was indicated in some of the documents which reflected "non-workers' comp." The employer had no basis to be on notice that the appellant's injury or condition was job-related prior to October 7, 1991. Appeal No. 92154, *supra*.

For the foregoing reasons and our concluding that there is sufficient evidence to support the findings and conclusions of the hearing officer, the decision is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Susan M. Kelley
Appeals Judge