APPEAL NO. 92262

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On April 10, 1992, a contested case hearing was held on written submission of the parties, after remand, in (city), Texas, with (hearing officer) presiding. The hearing was held after a remand for reasons cited in Appeals Panel Decision No. 92028, of the same docket number, decided March 11, 1992. (Claimant), the respondent herein, was employed as a laborer for (employer) while working at a project for (client company) on (date of injury), the contended date of injury. The carrier for employer has appealed the decision of the hearing officer.

The hearing was held to determine three issues: 1) whether the carrier had waived its right to contest respondents' claim by operation of Art. 8308-5.21 of the 1989 Act; 2) whether the respondent suffered a compensable injury on (date of injury), in the course and scope of his employment; and, 3) whether the respondent gave timely notice of injury to the employer within 30 days of the date of injury.

The hearing officer determined in his conclusions of law that the respondent did suffer a compensable injury within the course and scope of his employment. The hearing officer found as fact that client company had actual knowledge of the injury the day it occurred, because the injury was observed by the field supervisor for the client company; he attributed that knowledge to employer. Specifically, the hearing officer found sufficient compliance with the notice provisions of the 1989 Act, Articles 5.01 and 5.02. On remand, the hearing officer concluded that appellant had timely filed notice of its contest to compensability of respondent's claim.

The appellant has appealed the determinations that the respondent was injured within the course and scope of his employment on (date of injury). The appellant also asks the appeals panel to consider whether adequate notice was given to employer as required by Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE. Section 122.1 (Texas Workers' Compensation Commission Rule 122.1, effective January 11, 1991), and whether the evidence supports a finding that employer had actual knowledge of the injury based upon the notice given.

DECISION

We affirm the determination of the hearing officer, finding sufficient evidence to support his determination that the respondent was injured in the course and scope of his employment, and that employer had timely notice of his injury.

The parties stipulated that the respondent was an employee of employer on (date of injury), and that the appellant was the insurance carrier for employer. Respondent, who was 68 years old, testified that on (date of injury), a Sunday, he was working for employer's client, client company, for whom he had worked off and on for three years. He stated that he was working on a construction project at an apartment complex in Irving, Texas, and had worked about 10 hours. He stated that (Mr. EW), the supervisor, instructed him to pick up a door and discard it in a dumpster. Respondent stated that the dumpster was high above his head and, as he lifted the door, he lost his balance and fell back hard on his buttocks. The door fell across his legs. He stated that Mr. EW saw this happen and helped him up, and that he said, "[EW], that hurt bad." EW replied, "Papa, you'll be alright" and said that it was quitting time. Respondent's claim for compensation indicates that the accident occurred at 4:30 in the afternoon. He said that the next day, (date), he showed up for work, but had rectal pain and bleeding. He was unable to pick up a ladder. At that time, he asked EW if he could go home. He stated that he went home to (city) and did not immediately see a doctor because he was not the type of person to "run and see a doctor" for every physical ailment. He took hot baths, and went on for two or three weeks in pain. He went to the emergency room of (Hospital) where he consulted with a few doctors. He said that he was told by a (Dr. L) that he had more problems than he realized. Dr. L's subsequent medical report indicates that the date of his visit was March 18, 1991. He was admitted to the hospital January 28, 1992, underwent rectal surgery, and was in the hospital about a week. The hospital discharge summary in the record indicates that respondent was diagnosed with a rectal abscess and fistula, post traumatic, as well as lumbosacral sprain and chronic back pain. The hospital discharge summary indicates further that respondent was treated on an outpatient basis for pain
and swelling but developed an anal fistula.

Respondent stated that he gave the hospital evidence of insurance coverage through the employer. He stated that he was informed by the staff prior to his discharge

that the employer told the hospital he was no longer employed by them. Respondent said that he was never informed that he was terminated or would not be covered by workers' compensation. He stated in direct testimony that he was aware that Mr. EW and the client company owner, (Mr. SW), disputed his testimony, and claimed that Mr. EW was not working on (date of injury). Respondent was adamant that Mr. EW was there. He stated that one matter that "proved" this was that his wife was sick with pneumonia at this time, and that her stepdaughter called him at the job site the Saturday before he was injured, and it was Mr. EW who answered the telephone, and gave the telephone to him. He stated that he decided not to travel to (city) at this point to be with her.

Respondent stated that he met with Mr. EW and SW in a cafe sometime after the accident, but before his surgery; that they discussed his medical problems; and he told them he was not feeling all that great but would like to return to work. He testified that he had

not worked for wages since (date), when he returned to (city) because he was injured. He stated that he did not have rectal problems prior to the accident on (date of injury). He stated that he went to a livestock show with Mr. EW and Mr. SW the weekend before the injury.

Respondent entered into the record a copy of a letter from his attorney dated May 28, 1991, to the appellant, forwarding the respondent's claim for compensation. The claim indicates, under the provision asking how the accident happened, "While in the course and scope of my employment I injured my leg, buttocks, spine, and other parts of my body causing indefinite incapacity under the law." As pointed out by appellant in his cross-examination, the claim form does not repeat the occurrence involving the door.

Mr. EW testified that he was employed by client company as a working foreman. He knew respondent, whom he called "Papa," and stated respondent had worked off and on for client company as a laborer for three years. He states that he was off work the weekend of (date) and (date of injury) because he went home to (city) that weekend. He later testified that he had been at home the weekend before, but during the weekend of the injury taught a Sunday school class and attended an outing on (L T B). He said that he knew that respondent's wife was sick before that weekend, on the Thursday or Friday before he left. He stated that he saw respondent the morning of (date) at the job site, and that respondent told him that he felt he was needed at home because his wife was sick. Mr. EW said that respondent did not mention he was injured. He stated that he met with his son, Mr. SW, and respondent on February 17th at the coffee shop in (city) and respondent talked like he was coming back to work. He also said that on a Monday morning after (date), on a date he could not recall, respondent came back to the job site and had an argument with Mr. SW. Mr. EW said that, by then, respondent had been gone from the job site for quite sometime and they had to replace him with another employee. He stated that he "absolutely" never witnessed respondent putting a door into a dumpster, and that the client company would put the doors out for daily pickup by a man who sold them. Under cross-examination, Mr. EW testified that his company did not have a financial interest in the outcome of the case because employer wasn't his company, that respondent was a good worker and he had never caught him in a lie. He stated that he felt that he first heard that respondent was claiming a work-related injury when his son told him, which he testified occurred a week to three weeks after (date of injury), although this testimony was later modified that he did not know exactly when his son told him.

On written submission, an affidavit was submitted by Mr. EW's pastor stating that Mr. EW attended a church outing the weekend of (date-date of injury), and had been at church on Sunday, (date of injury).

(Mr. SW), the son of Mr. EW and the owner of client company, stated that he first became aware that respondent was claiming a work-related injury in May, when contacted by employer. He stated that his wife works for employer and was given a copy of the letter

from respondent's attorney. Mr. SW stated that he met with respondent several times prior to this. He said he was at the job site on (date of injury), because his father had a church outing to go to. Mr. SW stated that client company did not work a full day on (date of injury) because it was raining, and only worked about four hours in the morning. He stated that he became aware the previous Friday that respondent's wife was ill because his own wife called him to say that she was contacted by respondent's stepdaughter. Mr. SW stated that respondent called his wife Friday, as well as Sunday at 3:57 p.m., a time he verified from his telephone records of the job site telephone. He stated that he recalls that respondent told the person he was talking to that there was nothing he could do. He stated that he did not observe respondent working that afternoon and that no one worked that afternoon.

Mr. SW testified that after this weekend, there was a message on his telephone recorder from respondent stating that his wife was still ill; respondent called him that night and stated that his wife was still ill and they talked about when he could come back to work. Respondent did not mention that he had been hurt. Mr. SW said that two weeks later, respondent showed back up at the job site, that they argued because respondent had not called since February 12th, and that respondent got mad and left. Mr. SW then called employer from his office and informed him that respondent had been terminated. On redirect, Mr. SW indicated that this occurred on February 17th.

Mr. SW testified that two weeks after the argument, his father called and said that respondent contacted him about going back to work. Mr. SW, Mr. EW, and respondent met at the (city) diner on a Saturday morning. The substance of the conversation was that they would put the past and the fact that respondent had not called behind them, that he could return to work, and that Mr. SW needed to sit down and line out a work schedule. Respondent was asked to call Mr. EW the next day to get work, but never did. Respondent did not tell them he had been injured nor did they discuss his medical condition. Under cross-examination, Mr. SW noted that his company was notaffected if the claim was compensable because he leased employees through employer, and wasn't rated on the number of workers' compensation claims he had.

The hearing officer is the sole judge of the relevance and materiality, the weight and credibility of the evidence offered in a contested case hearing. Article 8308-6.34(e), 1989 Act. In reviewing a point of "insufficient evidence," if the record considered as a whole reflects probative evidence supporting the decision of the trier of fact, we will overrule a point of error based upon insufficiency of evidence. Highlands Insurance Co. v. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, writ denied). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). The claimant has the burden of proving, through a preponderance of the evidence, that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d

377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). An injury includes the aggravation of a pre-existing condition, whether or not that condition was job-related. Gulf Insurance Co. v. Gibbs, 534 S.W.2d 720 (Tex. Civ. App.- Houston [1st Dist.] 1976, writ ref'd n.r.e.). Corroborative evidence is not necessary, as the testimony of a claimant alone may be sufficient to establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). An accident may be of such nature that the employer who views it has notice of compensable injury as a matter of law. Miller v. Texas Employers' Insurance Ass'n, 488 S.W.2d 489 (Tex. Civ. App.- Beaumont 1972, writ ref'd n.r.e.). It was the responsibility of the trier of fact to resolve the inconsistent testimony that is present in this record, and to assess the credibility of the witnesses.

Respondent testified how the accident happened. Dr. L's surgical notes list the fistula as "post traumatic". Mr. EW initially testified that he heard of the workers' compensation claim from his son, Mr. SW, who was the owner of client company, within a week to three weeks after the injury took place. Mr. SW claims he was not told until sometime in May. The respondent was adamant that Mr EW actually witnessed the fall. From these conflicting accounts, the hearing officer could chose to believe the respondent's recollection on the issues of course and scope and of notice of the injury.

As the evidence is sufficient to support the hearing officer's findings and conclusions that an injury occurred in the course and scope of respondent's employment, and that the employer had actual notice of the injury, the determination of the hearing officer is affirmed.

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Susan M. Kelley
Appeals Panel

CONCUR:

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Robert W. Potts
Appeals Panel

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Philip O'Neill
Appeals Panel