APPEAL NO. 92268

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 3808-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on May 14, 1992, in (city), Texas, with (hearing officer) presiding. The hearing officer made factual findings and legal conclusions on the two issues unresolved at the benefit review conference (BRC) held on March 18, 1992, namely, whether respondent, a school cafeteria employee, sustained an injury to her back on (date of injury) while lifting a crate of milk cartons and has disability as a result of that injury, and whether respondent gave timely notice of her injury to her employer, (appellant). The hearing officer determined that respondent proved she sustained a compensable injury on (date of injury), and had disability from May 10, 1991 to the date of the hearing, but further determined that respondent failed to give notice to appellant within 30 days of her injury as required by Article 8308-5.01(a). On her own motion and over the objection of appellant, the hearing officer added an issue concerning whether appellant had, within the time required by Article 8308-5.21, specified as a ground for contesting the compensability of respondent's claim the timeliness of respondent's notification to appellant of her injury. The hearing officer determined this issue adversely to appellant and ordered appellant to pay compensation notwithstanding respondent's failure to have provided timely notice of her injury. In its request for review, appellant first challenges the sufficiency of the evidence to support the determination that respondent sustained a compensable injury. Appellant then contends that respondent failed to give timely notice of her alleged injury and asks us to find that she did fail to give timely notice of her alleged (date of injury) injury. However, that finding was favorable to appellant and has not been appealed by respondent, who filed no response. Appellant did not appeal from the hearing officer's having added the third issue at the hearing, nor from her determination of that issue.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer, we affirm.

Respondent testified that in October 1989, after passing a physical exam, she commenced employment with appellant working in one of the cafeterias of a high school as a food service specialist. On (date of injury), while preparing to serve lunch, she lifted a crate filled with one-half pints of milk and hurt her back. She said she dropped the crate and that (Ms. W), a coworker, picked up the milk cartons, asked her if she was hurt, and suggested she report the incident. Respondent did not report it right then and continued to serve food. Respondent testified that after lunch she told (Ms. B), her supervisor, in her office that she had hurt her back. She said that (Ms. B) response was to the effect that her back hurt too and inquired as to whether respondent felt she could finish the shift. Respondent said she believed this conversation with (Ms. B) was a report of her injury to her employer. She said (Ms. B) inquired of her daily as to how she was doing and whether respondent could make it through the day. Respondent worked the rest of that day and the following days until May 3rd when she called (Ms. B) to advise she was hurt and couldn't

come in. (Ms. B) didn't ask how she got hurt. Respondent went to an emergency room on that day for treatment and then continued to work until May 10, 1991 when the pain got too bad to continue. She hasn't worked since that date. She said (Ms. B) called her in July 1991 to ask when she was going to return to work but didn't ask what had happened to her. She said she told (Ms. B) during that phone call that she hurt her back on the job. She denied having told (Ms. B) and Kathy Wiggins that she didn't know how she had hurt her back.

Respondent said she didn't earlier seek medical treatment because she lacked the funds. She was subsequently treated by several doctors and in February 1992 underwent a lumbar laminectomy operation. She had no prior back injuries. She is presently in physical therapy and can do no lifting.

Respondent said she not only told family members of her back injury on the day of the injury but also told coworkers (Ms. Bu) and (Ms. P). A signed statement from (Ms. B) to that effect was admitted and additional corroboration appeared in certain medical records introduced by respondent. (Ms. P) testified that she was at work on (date of injury) in the other snack bar at the school, that respondent told her that day about injuring her back, and that a few days later she accompanied respondent to the emergency room. (Ms. P) also related in testimony, and in a prior written statement of August 1, 1991, that (Ms. B) had previously advised the cafeteria employees to avoid job injuries because she wouldn't report them. According to (Ms. P), (Ms. B) had gone on to relate that the prior year she had to report too many job injuries and it cost her a raise and an award. Respondent testified similarly. (Ms. P) also stated that (Ms. B) had failed to report a burn injury she suffered until (Ms. B) realized it was serious and later apologized.

Appellant called (Ms. W) who testified that she worked with respondent on (date of injury) and had no recollection of respondent's having hurt her back that day, or relating that she had done so, while lifting a crate of milk cartons. (Ms. W) was aware that respondent had a lot of back pain in (month), however. She said she inquired of respondent whether she had hurt herself on the job to which respondent replied in the negative. (Ms. B) testified that when she noticed respondent limping, she inquired and respondent said she had hurt her back. She said respondent, when asked, said she had not hurt herself on the job and that she said such on other occasions. (Ms. B) also testified that on May 13th she had a conversation with respondent in the presence of three other women, including (Ms. W), when respondent was crying and in pain. Respondent then said she didn't know where or how she had hurt herself. (Ms. B) regarded respondent as a good employee who was punctual and credible. She would have believed it had respondent told her she had injured herself lifting the milk crate. She acknowledged that a high incidence of employee injury would reflect negatively on managers, such as herself, but denied having stated such to employees. She insisted that at no time did respondent ever report to her that she had hurt her back on the job.

Appellant's documentary evidence consisted of a letter to appellant, signed by

respondent, dated July 23, 2991, which was prepared by respondent's former attorney. The letter recited that respondent was supplementing her May 22nd telephone conversation with (Ms. B) at which time she had advised (Ms. B) she couldn't return to her job because of her pain. The letter went on to state that respondent discovered she has a disc problem, is seeing a doctor, is quite sure she was injured while working at the school, and doesn't believe she can resume work once the next school year begins.

In addition to the BRC report, the hearing officer adduced as her exhibit a workers' compensation claim form (IAB-2 (Rev. 6-85)), signed by respondent on July 8, 1991, which left blank the injury date but stated that her last exposure to the cause of disease was "05-10-91," that her first knowledge the disease was work related was "07-03-91," and that she started losing time on "05-13-91." The hearing officer also introduced three forms entitled Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21). In its initial TWCC-21, undated but mailed to respondent on August 6, 1991, appellant's adjuster stated the date of injury as "5-18-91," the date carrier first received written notice of the injury as "7-1-91," and that the claim was disputed on the grounds that its investigation revealed that "there was no injury or accident that arose out of the course & scope of employment." The second TWCC-21 was prepared by another insurance carrier who had erroneously been notified of respondent's injury. The third TWCC-21, prepared by appellant's adjuster, was dated "3-17-92," stated the date carrier first received written notice of the injury as "8-1-91," and stated as an additional ground for disputing the claim that respondent "did not report an injury to her employer within thirty days per Rule 122.1."

At the close of the evidence, the hearing officer stated that the TWCC-21s "were either sufficient or not as a matter of law," that appellant had the burden to show that its grounds for contesting compensability were timely asserted, and asked appellant for comment. When appellant, who had earlier objected to the hearing officer's *sua sponte* addition of the third issue to the hearing, sought clarification, the hearing officer stated that the benefits review officer (BRO), while not stating it as a disputed issue, had surfaced the problem in the following note appended to the BRO's recommendation on the timely notice of injury issue:

> Note: This issue was raised by an amended TWCC 21, notice of refused or disputed claim dated 3/17/92. The date of the first written notice was dated on 8/1/91. Therefore, although this issue was raised by the carrier at the benefit review conference, the issue of untimely notice is barred as it was not filed in accordance of (sic) Article 8308-5.21(A).

Appellant advised the hearing officer that it could only assume that after the initial TWCC-21 was prepared (August 1991), further investigation led to the additional ground for dispute stated on the subsequent TWCC-21, dated March 17, 1992, the day before the BRC.

Respondent had the burden of proving by a preponderance of the evidence that she sustained an injury in the course and scope of her employment. Reed v. Aetna Casualty &

Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). In a contested case hearing, the hearing officer, as the trier of fact, must sift through and resolve conflicts in the evidence. Article 8308-6.34(e) vests in the hearing officer the sole responsibility for judging the relevance and materiality of the evidence offered, as well as its weight and credibility. An accident does not have to be witnessed to be compensable and a claimant's testimony alone can establish the occurrence of an injury. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). The hearing officer was privileged to believe all, part, or none of respondent's testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd, n.r.e.). The hearing officer obviously chose to believe respondent's testimony (and perhaps the corroboration) concerning the occurrence of her injury, and just as obviously chose to disbelieve respondent's testimony that she provided notice of her injury to appellant prior to her letter to appellant of July 23, 1991. Since we are not fact finders, we may not pass upon the credibility of witnesses or substitute our judgment for that of the hearing officer, even if the evidence would support a different result. National Union Fire Insurance Company v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, no writ). Respondent knew she was injured on (date of injury). She was required to provide notice of such injury to appellant not later than the 30th day thereafter, and her notification could be given to any employee who holds a supervisory or management position. Article 8308-5.01(a),(c). Respondent insisted she provided such notice to (Ms. B), her supervisor, on (date of injury) and several times thereafter, while (Ms. B) insisted to the contrary. Respondent's letter to appellant of July 23rd was certainly notice of her injury, as the hearing officer found. However, it was just as certainly untimely; and good cause for such untimeliness not having been shown, appellant would have been relieved of liability pursuant to Article 8308-5.02, but for the hearing officer's additional determination that appellant had not timely disputed compensability on the ground of respondent's untimely notice of injury.

The 1989 Act requires an insurance carrier, not later than the seventh day after receiving notice of the injury, either to begin the payment of benefits or notify the Texas Workers' Compensation Commission and the employee in writing of its refusal to pay and to specify the grounds for such refusal. Article 8308-5.21(b). "The grounds specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date." Article 8308-5.21(c). The hearing officer found that appellant received notice of the injury on August 1, 1991 and did not present evidence that information about respondent's untimely notice of injury could not have been reasonably discovered within 60 days of August 1st. Article 8308-5.21(a). The hearing officer thus concluded that appellant had not complied with the Article 8308-5.21 requirements in attempting to raise the additional ground for disputing the compensability of respondent's injury and we do not disagree. *See* Texas Workers' Compensation Commission Appeal No. 92038 (Docket No. redacted) decided March 20, 1992. As we stated in that case, "[a]rticle 8308-5.21(b) and (c) clearly provided that when the insurance carrier elects not to begin payments within seven days of notice of injury, it must notify the employer and Commission and the notice must specify the

grounds for refusal. The grounds specified constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably been discovered at an earlier date."

Article 8308-6.41(b) provides that a party appealing the decision of a hearing officer must clearly and concisely rebut the decision "on each issue on which review is sought." Article 8308-6.42(c) provides that the appeals panel "shall issue its decision which shall determine each issue on which review was requested." We have previously refrained from deciding the correctness of unchallenged legal conclusions. *See e.g*, Texas Workers' Compensation Commission Appeal No. 91048 (Docket No. redacted) decided December 2, 1991. Thus, we need not decide whether the hearing officer erred in adding the Article 8308-5.21 issue *sua sponte,* or whether she erred in her determination of that issue. Our abstention from deciding the correctness of a matter not made an appealed issue does not imply our agreement, however. Appeal No. 91048, *supra*. We note that "issues resolved at the benefit review conference and issues not raised at the benefit review conference may not be considered except by consent of the parties or unless the commission determines that good cause existed for not raising the issue at the earlier proceedings." Article 8308-6.31(a). Appellant did object below to the addition of the issue. We further note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (TWCC Rule), entitled "Statement of Disputes," provides for the addition of disputes by the parties after the benefit review conference, and contains no provision for a hearing officer's adding a disputed issue *sua sponte*. The rule provides that the parties may respond in writing to the BRO's report and describe and explain their positions on the unresolved disputes. Assuming, without deciding, that the "note" following the discussion of the timely notice issue in the BRC report may have incorporated the Article 8308-5.21 issue into the timely notice issue, the record below did not reveal that either party submitted a written response to the BRC report as permitted by Rule 142.7(c). In Texas Workers' Compensation Commission Appeal No. 92071 (Docket No. redacted) decided April 9, 1992, we reviewed the process by which disputed issues come before the Texas Workers' Compensation Commission. We remanded in that case because the hearing officer failed to determine the disputed issue from the BRC, having instead changed the issue. In the instant case, however, the hearing officer did resolve the two disputed issues, but added a third issue from which appellant has not appealed.

After carefully reviewing the record, we are satisfied that no reversible error was committed by the hearing officer under the particular circumstances of this case, and that the findings were not based upon insufficient evidence nor were they 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, 662 (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:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge