APPEAL NO. 92271
FILED JULY 30, 1992

A contested case hearing was held at [City], Texas, on May 12, 1992, with [hearing officer] presiding as hearing officer. She determined the appellant-cross respondent (hereafter referred to as claimant) suffered an injury in the course and scope of his employment and that he had given timely notice of his injury. However, she determined he failed to prove by a preponderance of the evidence that he suffered any disability as a result of his injury. Accordingly, the hearing officer ordered the respondent-cross appellant (hereafter referred to as carrier) to pay medical benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act) but decided that the claimant was not entitled to temporary income benefits (TIBS). The claimant appealed the determination that he has not proved by a preponderance of the evidence that he suffered any disability as a result of his on the job injury. The carrier appeals the determination of the hearing officer that the claimant timely reported his on the job injury as required by the 1989 Act.

DECISION

Determining that certain of the findings and conclusions of the hearing officer are deficient, we reverse and remand.

As might be anticipated, the evidence in this case was conflicting in several important areas and was far from certain in others. Clearly, it was a challenging effort for the hearing officer, as the fact finder, to cull through the testimony and documentary evidence, resolve the conflicts and make necessary findings of fact. However, this is the very function of a hearing officer: to judge the relevance and materiality of the evidence offered and to weigh and assess credibility (Article 8308-6.34(e)), and then to make findings of fact. Article 8308-6.34(g); Texas Workers' Compensation Commission Appeal No. 91058, decided December 6, 1991. In performing this function, the hearing officer may believe one witness and not others, and may believe the testimony of an interested party to the exclusion of other testimony. Texas Workers' Compensation Commission Appeal No. 92002, decided February 19, 1992 and cases cited therein. Of course, a claimant must prove by a preponderance of the evidence not only that his or her injury was sustained in the course and scope of employment, Reed v. Casualty & Surety Company, 535 S.W.2d 377 (Tex.App.-Beaumont 1976, writ ref'd n.r.e.), but also that notice of injury was timely given. Texas Workers' Compensation Commission Appeal No. 92180, decided June 11, 1992.

Article 8308-5.01 of the 1989 Act provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th

day after the date on which the injury occurs," and failure to do so relieves a carrier of liability unless, under Article 8308-5.02, the employer or carrier has actual knowledge of the injury, good cause exists for failure to give notice, or the claim is not contested. The notice "may be given to the employer or any employee of the employer who holds a supervisory or management position." Article 8308-5.01(c). Texas Workers' Compensation Rule 122.1 implements these statutory provisions. Tex. W. C. Comm'n, TEX. ADMIN. CODE §122.1.

The Claimant testified that at the time of the injury to his back he was working as a night stocker for (employer). He stated the injury occurred on the night of [date of injury 1] or [date of injury 2], when he was stacking a wooden pallet on top of a stack of pallets about shoulder high. He stated that he felt a sharp pain in his lower back. There were no witnesses to the injury and he stated that after doing a few "stretches" his back began to feel better, so he tightened his back brace and returned to the sales floor stocking frozen foods. He testified that the next evening, when both were on duty, he told (MD), whom he believed was his frozen foods supervisor, about injuring himself lifting the pallet. He also acknowledged that he told MD not to mention his injury to upper management because he feared losing his job. Claimant also testified that he told (CD), who occupied a position as a "third man," about the work related injury "around mid-December."

Claimant also related that the back pain was not severe at first, but became more painful as time went on and he would do more heavy lifting. He stated he would tighten his back brace in order to ease the pain. He stated that by the end of December his back pain was so bad he could not sleep well and had to try sleeping on the floor. Claimant testified that at the time of the injury he was convinced that the customer service manager was planning to get rid of him after the first of the year. He also stated that he did not believe his injury was that serious at first but that the pain got worse and he finally went to a back pain clinic the day after he was suspended from his job on January 3, 1991, for insubordination in refusing to write a grocery order. Claimant stated he did not return to work because his doctor told him "he showed (from an EMG report) abnormally high readings and I think I had planned on taking a vacation at that time to hear from the doctor and that decision led me to decide to stay off work." He also stated that on January 6, 1992, his chiropractor wrote him a doctor's excuse (which he subsequently gave to the store manager) which stated that he was not to work until further notice and that on January 7th, he was told the X-ray showed he had a curvature of the spine which, according to what his doctor told him, is usually caused by lifting heavy objects. He continued seeing the chiropractic doctor on a daily basis, was referred to the doctor's in-house therapist for treatment 6 days a week, and was subsequently entered in a work hardening program.

A medical report from the claimant's chiropractic doctor lists the following impression from a January 6, 1992 examination:

1.Lumbar I.V.D. Syndrome

2.Lumbosacral strain/sprain syndrome

3.Thoracic strain/sprain syndrome

4.Cervical segmental dysfunction

MD testified that he was head of frozen foods for the employer and that he felt that he was the claimant's supervisor at the time of the injury. He stated the claimant came to him approximately a week before Thanksgiving and told him that he had injured himself lifting a pallet, but not to say anything about it because he, the claimant, was in fear of losing his job. MD testified that as the frozen foods person in charge or the lead man in frozen foods, the claimant had occasion to fill in for him and that he would leave instructions for him as to the type of duties or work that needed to be done in MD's absence. He said that he gave a statement that he was the claimant's supervisor, but gave another statement later, after being told to do so by the employer, that he was not in a supervisory capacity over the claimant; that he was no longer a supervisor.

The customer services manager testified that MD is only a supervisor of himself and that he was not a supervisor of the claimant. He also testified that other people who had filed workers' compensation claims came back to work for the employer and filing a claim was not held against them. He testified that he suspended the claimant on January 3, 1992, for insubordination; that he knew the claimant would not follow his order when he gave it but that he was not setting up the claimant but rather the claimant set up himself. He stated that when he suspended the claimant on January 3rd, the claimant said "okay, fine, but I want to file a workman's (sic) comp claim for a back injury."

CD testified that he recalled the claimant reporting that he had injured himself. In a prior statement he indicated he thought this was in "late December" but that he was not sure and it could possibly have been in early or mid-December. In his earlier statement, he stated he would be one of the individuals to whom a report of injury could be made.

The hearing officer found as fact that the claimant had reported his injury "the following night which would have been on [date of injury 2], to [MD], who was the lead man in frozen foods" and that, "[o]n or before [31 days after date of injury], the claimant reported to [CD] a work related injury that had occurred on [date of injury 1]." She

further found that CD was one of the individuals to whom the claimant would report an injury on the job.

From the hearing officer's findings of fact, we cannot determine the efficacy of her conclusion of law that "[t]he Claimant did timely report an on the job injury as required pursuant to the Act." There is no finding made by the hearing office (although there may be some suggestion of it in the finding that MD was the lead man in frozen foods) that MD was in a supervisory position for the employer as contemplated by the Act, regardless of whether or not he was a supervisor over the claimant. Article 8308-5.01(c) provides that notice may be given to "any employee of the employer who holds a supervisory or management position." Without this factual determination by the hearing officer, we are not able to adequately evaluate the issue of timeliness of notice, or to determine the basis for the hearing officer's concluding there was timely notice. In this regard, the hearing officer also found as fact that "[o]n or before [31 days after date of injury]," the claimant notified CD of the injury. Clearly, this finding of fact, as stated, does not necessarily bring the notice within the time requirements of the Act. Presupposing the notice to CD occurred on [31 days after date of injury], that would be 31 days from the date of injury which the hearing officer found as fact to have occurred on [date of injury 1]. Article 8308-5.01(a) provides for notice "not later than the 30th day after the date on which the injury occurs."

After further consideration and development of evidence, if deemed necessary by the hearing officer, it is determined timely notice was given, the issue of disability should also be readdressed. In this regard, our review of the record discloses that once the claimant sought medical attention, his doctor rendered a medical diagnosis concerning his injury and took him off of work status at that time. This work excusal was, according to the claimant, subsequently given to the store manager. This evidence was not controverted and was not mentioned in the hearing officer's Decision and Order report. There was testimony that the claimant continued to work up to the day he was suspended (January 3, 1992), although he stated the pain from his injury became worse from its inception to the time he sought treatment on January 4, 1992. Since there is no mention of this medical evidence or work excusal, we are unable to determine from the findings, conclusions and decision whether potentially significant evidence was overlooked in the hearing officer's rendering of her decision on this issue.

For the above reasons, the decision and order of the hearing officer are reversed and remanded for further consideration, not inconsistent with this opinion, and development of evidence as deemed necessary by the hearing officer.

Pending resolution of remand, final decision is not rendered.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge