APPEAL NO. 92314

A contested case hearing was held on June 15, 1991. The hearing was held on remand directed in Texas Workers' Compensation Commission Appeal No. 92131, decided May 15, 1992. The remand was directed because of a blank tape in the original hearing. The hearing officer determined, on remand, that the claimant did not sustain a repetitive trauma injury while in the employment of the employer; that he failed to timely report his alleged injury; that appellant does not suffer from disability; and that he was, therefore, not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Appellant urges that the great weight of credible evidence supports the appellant's contention that his present back problems were attributable to his employment with the employer; that his notice of injury was timely or, alternatively, he had good cause for any deemed failure to timely report his injury; and that he does suffer from a disability. No response was filed.

DECISION

Determining there is sufficient evidence of record to support the hearing officer's findings and conclusions, this decision is affirmed.

The appellant had been an 18-wheeler truck driver for some 15 years and had worked for (employer) for about four years, driving liquid tankers. He testified that driving tankers without compartments in them to control the sloshing of the liquid cause the truck to jerk whenever the driver shift, brakes or goes over bumps. He stated this caused his back to start hurting which he first noticed about the middle of (month of injury) 1991, "the ____ or (date of injury) or somewhere between the ____ or (date of injury)." At a later point in his testimony he stated he remembered that it was definitely the (date of injury) of (month of injury) when he noticed the first problem with his back and knew that it was related to his job of driving a tanker truck. He also stated that he first associated his back problems with his employment on July 5, 1991 when he had his routine Department of Transportation physical. He stated he mentioned his back hurting to the doctor and was given a pamphlet describing back exercises. The report of the physical examination performed on July 5th does not mention anything about any back injury or problem and reports the exam as "normal." Also, on the report under "Health History," a block on "head or spinal injuries" is checked "no," and the examination of extremities, including spine, is filled in as "normal."

The appellant testified that he talked to his supervisor, Mr. DP, after the physical, showed him the pamphlet and told him about his back problem and that it was job related. MR. DP testified that he and the appellant did talk about lower back pain in general as Mr. DP, also a truck driver in the past, experienced lower back pain occasionally and did the same exercises depicted in the pamphlet. Mr. DP states that the appellant never indicated to him that he was contending or claiming the back problem was job related. Mr. DP testified that the first indication he had that the appellant's back problem was work-related was on (date employer was notified of injury) when the appellant talked to him after being

seen at the emergency room of a hospital.

The appellant testified that he was at his sister's house on (day before date employer was notified of injury) and that his brother-in-law was rotating the tires on his car. He states he did not help his brother-in-law but did bend over to look at the tread on the tires and when he did so he felt a sharp pain in his back, got dizzy, went into the house and passed out on the kitchen floor. His brother-in-law testified and generally confirmed the appellant's version of what happened on (date employer was notified of injury). The appellant subsequently went to the emergency room of a hospital on (date employer was notified of injury). The physician's notes on the Emergency Service Report state the appellant got dizzy and fell face down onto kitchen floor yesterday, that appellant now complains of neck and low back pain, and that he fell down while "bending over fixing tires." Appellant states that the doctor at the emergency room told him the back problems were job related.

The appellant was subsequently seen in the hospital and in a consultation report from a Dr. GA dated "07/31/91" the following notations were made:

> The patient states that on the (day before date employer was notified of injury), he had a spell wherein he passed out for approximately two minutes. He was changing tires and, when he bent forward, he felt lightheaded and short of breath, and also experienced a vertiginous sensation. He managed to walk and enter his house, and he fell forward, hitting his right frontal area against the floor.
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> The patient states also that he has been bothered by a low back pain which radiates towards the back of the right thigh. The patient is a truck driver. For the past several weeks, he has had low back pain exacerbated by prolonged driving, as well as via inertia caused by the liquid reverberating inside a tanker.

The appellant was referred to another doctor and a subsequently performed MRI showed "desiccated disc at L4-5 and L5-S1 with Grade III herniations at L4-5 and L5-S1." An Initial Medical Report dated "12-30-91" from a Dr. MR indicated in the history section: "Driving tank truck, sudden stop causing liquid in tank to `slush' causing impact to jerk patient with resulting pain in neck, lower back and headache."

Evidence was admitted concerning an automobile accident the appellant was in during 1983 wherein he sustained neck and back injuries. He stated these injuries resolved themselves within a couple of months and that he did not experience back problems until 1991. The appellant also stated that he had a "run" that he completed on July 15, 1991 and that he had not had any problems. At one point the appellant stated that

although he told his supervisor on July 5th about the injury being caused by his job, he did not tell the hospital personnel on (date employer was notified of injury) that his back problem was job related. Later, he indicated he had mentioned his job related back problems to the doctor and he said "yes, it was job related."

Mr. DP testified that the first that the appellant indicated any job related injury was on (date employer was notified of injury). He also testified that he was familiar with the truck the appellant drove, that he had driven those trucks before, and that the truck was equipped with an "air ride seat to keep you from jerking around or bumping." He stated the seat is much better than car seats.

From the evidence before her, the hearing officer determined that the appellant had not sustained a repetitive trauma injury. She indicated in her discussion of the case that "[a] review of the medical records introduced at the hearing tends to support the conclusion that Claimant suffers from an ordinary disease of life, in that the lumbar disc problems which were diagnosed by his treating doctors, even if caused by Claimant's sitting and driving, resulted from a condition to which the general public is exposed outside of employment." While we do not subscribe to any notion that driving a tank truck and all the requirements, duties and difficulties associated therewith, is something with which the general public is exposed, we view the hearing officer's position to be that, under the particular circumstances of this case, the level of any physical trauma to the back from driving the truck was not appreciably different from that level of trauma to which the general public is exposed in driving various motor vehicles. We have upheld a determination that a compensable injury resulted from repetitive trauma in a case involving a truck driver where there was evidence the vehicle was in such a state of disrepair and lacking in adequate shocks and suspension that the claimant's back was "being continually and repeatedly `beat' and vibrated over a period of several months." Texas Workers' Compensation Commission Appeal No. 92171, decided June 17, 1992. *See generally* Texas Workers' Compensation Commission Appeal No. 92135, decided May 18, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 91050, decided November 27, 1991. In this case the appellant tended to be somewhat inconsistent in his testimony which could reasonably have affected his credibility in the eyes of the hearing officer. The hearing officer also had evidence before her that the appellant injured his back in a separate, distinct incident at his sister's home on (day before date employer was notified of injury), and it could be reasonably inferred that the debilitating injury resulting from this incident was unrelated to appellant's earlier general complaints to Mr. DP of low back pain. The medical records in the file are not inconsistent with such an inference. As we noted in Appeal 92171 *supra*, a claimant has the burden to establish that an injury was received in the course and scope of employment, citing Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 378 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). A claimant also has the burden to establish that a causal connection exists between his employment and his injury. Texas Workers Compensation Commission Appeal No. 92272, decided August 6, 1992. In the instant case, the hearing officer quite apparently believed that there was no greater

physical trauma from the sitting involved, considering the condition of air cushion seating testified to by Mr. DP, than would be generally experienced in other long duration sitting-type job activities. Appeal No. 92272, *supra*.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e) Only were we to conclude that her determinations were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would it be appropriate to disturb those determinations. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992, and cases cited therein. Since the hearing officer determined there was no compensable injury in this case, it follows that there was no disability. The definition of disability under Article 8308-1.03(16) is "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury."

Appellant also faults the hearing officer's finding that appellant was aware on (date of injury) of the potentially serious nature of his claimed injury and that it was caused by his employment. The appellant's supervisor testified that he was first notified that the appellant was claiming a job related injury on (date employer was notified of injury). This testimony was quite apparently believed by the hearing officer as she found, that although the appellant reported his back condition on July 5th, it was not until (date employer was notified of injury) that the appellant informed his employer it was job related. As we have previously held, notice to the employer of an injury must also notify the employer that it is job related. Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991. The hearing officer found such not to be the situation here. Regarding the date of (date of injury) as the date the appellant knew his claimed injury was serious and job related, it is true the appellant vacillated in his testimony between "mid-(month of injury)" and "the ___ to the (date of injury)" of (month of injury). When pressed on cross-examination, he stated "I know the date to be (date of injury" and in response to an inquiry concerning that he felt on (date of injury) that it was job related, he answered "that is correct." This is a sufficient basis for the hearing officer's findings. The appellant, whose burden it is to establish that notice of injury was timely given (Texas Workers' Compensation Commission Appeal No. 92271, decided July 30, 1992) did not meet his burden of proof by a preponderance of the evidence.

Determining there is sufficient evidence to support the findings, conclusions and decision of the hearing officer, the case is affirmed.

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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