APPEAL NO. 92357

This appeal arises pursuant to the provisions of the Texas Workers' Compensation Act, art. 8308-1.01 *et. seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held in (city), Texas, on May 19, 1992, with (hearing officer) presiding, to determine two disputed issues, to wit: whether appellant notified her employer of an injury no later than the 30th day after the date of injury, and whether appellant elected group health benefits instead of workers' compensation benefits. On the timely notice of injury issue, the hearing officer found that while appellant, who had a history of back problems, did experience back pain at work for (employer) on (date of injury), she did not notify employer she sustained a work-related back injury on that date until September 23, 1991. The hearing officer concluded that employer did not have actual notice of the (date of injury) injury, nor did appellant have good cause for her untimely notice. Appellant raises specific points of error to challenge the sufficiency of the evidence to support two of the hearing officer's 13 factual findings, two of the six legal conclusions, and the ultimate decision and order that she wasn't entitled to benefits. The two challenged findings determined that appellant's supervisor, though aware of her prior history of back problems, didn't know appellant was alleging a work-related injury on (date of injury); and, that neither employer nor respondent were aware appellant was alleging a work-related injury until on or after September 23, 1991. The two questioned legal conclusions were to the effect that appellant failed to notify employer of a work-related injury no later than the 30th day after it occurred; and, that neither employer nor respondent had actual knowledge she was alleging an (date of injury) work-related injury until September 23rd. Respondent did not appeal the hearing officer's conclusion that appellant did not elect to receive group health insurance and disability benefits to the exclusion of workers' compensation benefits and thus we need not address it. Respondent does urge our support for the hearing officer's decision and challenged findings and conclusions, and points out that the unchallenged findings and conclusions are sufficient to support the decision.

DECISION

Finding the evidence sufficient to support the findings and conclusions of the hearing officer, we affirm.

Appellant, who had worked for (employer) since 1973, was performing her duties as an inspector of PC boards on (date of injury), and was experiencing the back pain she had been enduring since January 1990. Her job involved lifting "totes" of PC boards off a conveyor belt, inspecting the boards, and returning the totes to the belt. If a rejection was required, appellant would carry the tote, which weighed between 25 and 35 pounds, a short distance from her work station and lift it up over her head and onto a shelf. Sometime after lunch on (date of injury), she attempted to lift a tote up onto the rejection shelf but couldn't get it up there because of her back pain. The effort started pulling something in her back and she experienced sharp pains which were different from the pain she normally experienced. Appellant testified that she had suffered from back pain since 1989 and had been receiving medical treatment for back pain since January 1990. She said she had

been told at that time that her back pain was caused by all the lifting she did in her work. However, she insisted her claim was for a specific injury occurring on (date of injury), notwithstanding that some of her testimony also suggested repetitive trauma injury. In her interrogatory answers (in evidence), appellant stated (date of injury) as the date of her claimed injury and said it happened when she was lifting totes from a conveyor belt and began to experience sharp pains in her lower back which progressed into a spasm all over.

Appellant said that when she experienced the pulling and pain trying to lift the tote after lunch on (date of injury), she set it down and told her supervisor, (Mr. S), who worked nearby, that the tote was too heavy and was hurting her back. She said that (Mr. S) told her to just leave the tote there and he would put it up on the shelf later. Appellant's contention was that this conversation with (Mr. S) was her first notice to employer of her injury of (date of injury). She said that (Mr. S) knew she had a previous back injury and experienced back pain. Appellant finished the shift and the pain got worse that evening and over the weekend. She took a sick day on Monday, and on Tuesday went to (Dr. B), her family doctor. Upon her return, she called (Mr. S) and told him "I would be out a while with a hurt back . . . that's all I told him." This conversation, according to appellant, was her second notice to employer of her injury of (date of injury). Appellant never returned to work. Within three weeks or so of this telephone conversation with (Mr. S), appellant said she made some calls to various persons at employer's place of business for information about workers' compensation, of which she said she knew nothing. She said her sister told her she should file for workers' compensation, rather than accept the group health insurance and short-term disability benefits she had begun to receive. Nothing came of these phone calls and appellant testified she was told by employer's safety manager that her back injury was not regarded as job related. Appellant had back surgery in August, paid for by her group insurance carrier, and received disability benefit payments for 26 weeks. She said she was eventually referred to an attorney and on September 23, 1991 signed an "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" which stated her date of injury as (date of injury). Respondent introduced two other such notices, signed by appellant on February 27, 1992, which stated injury dates of "(date)" and "(date)." Appellant provided no explanation for the preparation of these forms. However, she had testified she first hurt her back at work in (date), and that she had fallen at the entrance to her workplace on (date).

Appellant's medical records revealed that she had been seeing (Dr. B) for back pain since October 1989, had several visits for back pain in (date), and was treated in (date) for an injured thumb and knees resulting from a fall. The record of her visit on (date) stated that she hurt her back lifting over a year ago and is now having spasms in her lower back. There was no reference to an injury, as such, occurring on (date of injury). Some, but not all, of the insurance forms appellant signed to authorize payment for medical treatment stated that her condition was not job related.

(Mr. S) testified that he had been appellant's supervisor since March 1989 and he denied that she reported to him on (date of injury) that she had sustained an injury to her back at work. He said he didn't know until the day before the contested case hearing that

appellant was claiming she had been hurt on the job. He said he knew appellant had back problems and recalled her having been off work in 1989 for some four to six months with back problems. She had complained of her back hurting prior to (date of injury) but never told him her back problems were job related. He was aware she had problems lifting in her job and he volunteered to do the lifting for her, as he does for the other women he supervises. He could not recall appellant's telling him on (date of injury) that she couldn't lift a tote onto the rejection shelf but acknowledged it was possible she had done so. He said that when appellant called him, she told him she would be out with her back hurt, not that she hurt her back at work. As (Mr. S) put it, these are not the same things.

Article 8308-5.01(a) requires that an employee notify the employer of an injury not later than the 30th day after the date on which the injury occurs. Article 8308-5.02 provides that if an employee fails to notify the employer of the injury as required by Article 8308-5.01(a), the employer and its insurance carrier are relieved of liability under the 1989 Act unless the employer or carrier have actual knowledge of the injury, the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to give timely notice, or the claim is uncontested. The purpose for the notice requirement "is to give the insurer an opportunity immediately to investigate the facts surrounding an injury." DeAnda v. Home Insurance Company, 618 S.W.2d 529, 532 (Tex. 1980). Appellant contended she did notify employer of her injury not later than 30 days after her (date of injury) injury and, thus, did not contend she had good cause for any failure to notify. Nor did she appeal the hearing officer's finding that no good cause was shown. Similarly, appellant did not contend employer had actual notice notwithstanding her failure to notify. She does, however, appeal the hearing officer's conclusion that employer did not have actual knowledge of her injury.

We are satisfied there is sufficient evidence of record to support the challenged findings and conclusions. Article 8308-6.34(e) provides that the hearing officer is the sole judge of the materiality and relevance of the evidence, as well as the weight and credibility it is to be given. The hearing officer, having the opportunity to both observe the witnesses and review the documentary evidence, is not only best positioned to sift through the evidence and sort out the conflicts, but is charged with doing just that under the 1989 Act. Although appellant was a party with an obvious interest in the outcome of the hearing, her testimony only raised issues of fact for the hearing officer to decide. Gonzales v. Texas Employers Insurance Ass'n, 419 S.W.2d 203, 208 (Tex. Civ. App.-Austin 1967, no writ). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701,702 (Tex. Civ. App.-Amarillo 1974, no writ). As the finder of fact, the hearing officer was entitled to believe all or part or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). It is apparent that the hearing officer believed, as he was free to do, that on (date of injury) and later on (date) during her telephone call to (Mr. S), she voiced complaints of back pain similar to those she voiced in the past but she did not provide employer with notice that she had sustained a work-related back injury on (date of injury). *See* Texas Workers' Compensation Commission Appeal No. 91016 (Docket No. redacted) decided September 6, 1991. The findings of the hearing officer are not 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 (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:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge