APPEAL NO. 92358

A contested case hearing was held in (city), Texas on June 12, 1992, with (hearing officer) presiding. The two issues were whether claimant (respondent herein) had suffered an injury in the course and scope of her employment, and whether such injury had been reported to respondent's employer within 30 days. The hearing was held pursuant to the Texas Workers' Compensation Act TEX. REV. CIV. STAT. ANN. arts. 1.01 *et seq*. (Vernon Supp 1992) (1989 Act).

The hearing officer held that on (date of injury), the respondent injured her lower back while moving stock in the performance of her work duties, and that on or before (date), respondent reported the injury to another assistant manager. Appellant, employer's workers' compensation insurance carrier during the time period in question, argues that the evidence is overwhelming that the employer had no notice of an on the job injury within 30 days of the injury date alleged. Appellant cites, among other things, conflicting testimony and no mention of an accidental injury in respondent's medical records. It also contends that the evidence overwhelmingly shows that the injury, if any, occurred over a period of time and not from an accident at a date, place, and time certain. Appellant accordingly argues that respondent failed to meet her burden of proof. The respondent contends that the decision and order is supported by the evidence, and that appellant's witnesses were either inconsistent, unbelievable, or impeached by prior inconsistent statements.

DECISION

We affirm the decision and order of the hearing officer.

Respondent was employed as an assistant manager with employer, a job which at times involved lifting and moving stock. She testified that while moving stock on or about (date of injury), her back began to hurt. She could not pinpoint a time certain, but said by early afternoon she began to experience severe throbbing in her lower back. She did not report this to her employer initially because she felt she had merely strained her back. She also believed it would be a "negative career move" for an assistant manager to file a workers' compensation claim. She started seeing (Dr. R), a chiropractor, on April 10th and received a series of treatments; however, she said she never told Dr. R this was a work-related injury. She testified that Dr. R had treated her for an upper back injury from water skiing in 1979. Although she said Dr. R did not think her condition was serious enough to require referral to another doctor, on her own she went to a neurologist, (Dr. M), on May 15th. When Dr. M told her she had a ruptured disc, she said she realized for the first time her condition was serious. (Dr. A) performed a laminectomy and discectomy on September 4th.

Respondent's original notice of injury, filed in July of 1991, gave the date of injury as (date of injury). Her first amended notice of injury filed September 19th, gave the date of injury as (date). Respondent testified that this was a clerical error which was corrected on a second amended notice filed on March 11, 1992, which said the date of injury was (date of injury). Employer's work records admitted into evidence show respondent was not at

work on (date). In a transcribed telephone conversation between respondent and an insurance adjuster, respondent said the injury occurred about mid-(month), and that she could not give a specific date.

Respondent testified that her coworkers were aware of her back pain, although not necessarily that it was job related. She said she first told (Mr. G), another assistant manager, about a work-related injury around the end of (month) when he noticed the way she was standing. She said they also discussed her injury at length in early March after a manager's meeting. At that meeting she said she had to stand because of her back pain. She said she had subsequent telephone conversations with Mr. G in which she referenced a job-related injury. She said she also discussed her back pain with her immediate supervisor, (Mr. D), but did not tell him it was work related because she was concerned about her career with the employer. She also discussed it with (Mr. M), employer's district supervisor, and he arranged for her to take two weeks off beginning in late April. She said the day she found out she had a ruptured disc she called Mr. M and told him she was going to file a workers' compensation claim.

Transcriptions from telephone conversations between respondent and Mr. G on October 23rd and November 14th were admitted into evidence. In the first statement, Mr. G responded affirmatively when asked by respondent whether he remembered her discussing a job-related injury with him in early March. In the second, he was hesitant to give a statement to the insurance company because of concerns about the effect it would have on his job, and said "[i]t was close you know. I thought it was pretty much April though." At the hearing Mr. G testified that he agreed with respondent just to get her off his back.

In a transcribed telephone conversation between a representative of appellant and Mr. G, he said respondent told him she had hurt her back at work, but he variously said this occurred in January, February, April, and June. He testified that he knew respondent had back problems, but that he was not aware it was job-related until she called him several months later.

Respondent's immediate supervisor, Mr. D, testified that he first recalled discussing respondent's back problems in the context of her inability to wear a certain type of shoe, but that she did not tell him it was from a job-related injury. He said he had gotten statements from employer's cooks, which were admitted into evidence, to the effect that she only occasionally lifted heavy items. However, he said that when a delivery was made the goal was to have all the items put away at once, and that the assistant manager would help. He also said a manager would have been terminated for failure to report an on-the-job injury.

(Ms. P), claims manager for appellant, said she was first aware of respondent having a work-related injury on May 15th, when she called Ms. P to report it. She said other of employer's managers had filed workers' compensation claims and it had not affected their employment.

(Mr. M), the district supervisor for the company that oversees employer restaurant, said respondent reported an on-the-job injury to him on May 16th, but did not specify a date of injury. He said in April, Mr. D had told him respondent's work performance was slipping because of her back pain. He said he met with her that day, and she told him she was seeing a chiropractor because of backache. She did not tell him she was hurt on the job. He suggested she take a leave of absence to rest.

Medical reports from Dr. R, which were admitted into evidence, included a patient progress report which on April 10th notes gradual onset of left hip and leg pain. A narrative report/first report from Dr. R gives the date of the accident as around March 20, 1991. The description of the injury was stated as follows: "[h]ad D&C and conization three weeks prior to date seen in which hip and leg were sore after surgery. Has not improved." The case history completed by respondent reports in response to the question, "[d]escribe any fall, surgery, and/or accidents since last adjustment," "Conization and DNC (sic)." Dr. M diagnosed a left sided L5-S1 disc herniation as well as a small central protrusion at the L4-5 disc, and a handwritten notation by Dr. M indicates respondent "was not seen under Workers' Compensation." A case history from Dr. A, respondent's neurosurgeon, notes that respondent's back began hurting at work in (date of injury), and that she did not know of any specific incident.

Because respondent by her own admission did not timely inform anyone but Mr. G that she had been injured on the job, much of the conflicting evidence centered around her testimony and that of Mr. G. There was also a question of conflicting dates of injury as reported by respondent. It was the hearing officer's responsibility to review the evidence and resolve any conflicts and inconsistencies therein. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). Upon our review of the record, we conclude that the hearing officer's decision is supported by sufficient evidence and not so clearly against

the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge