APPEAL NO. 92364

A contested case hearing was held in (city), Texas, on June 17, 1992, (hearing officer) presiding. The issue was whether the claimant (appellant herein) timely reported a hernia injury that allegedly occurred in (date of injury). At the hearing, the parties also agreed to include the issue of whether appellant suffered an injury while in the course and scope of his employment with (employer) and if so, on what date such injury was sustained.

The case was adjudicated pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992)(1989 Act). The hearing officer held that the appellant did suffer a hernia injury in either (date of injury), but did not report the injury to his employer within thirty days as required by the 1989 Act. The hearing officer also found good cause did not exist for appellant's failure to timely report his injury to the employer. Appellant argues that he reported his injury to his immediate supervisor, who appellant claims also had actual knowledge of the injury. He argues in the alternative that good cause did exist for his failure to timely file a formal report of his injury. Respondent contends that the evidence was clear and uncontroverted, that no one was certain as to the specific date of injury, and that the evidence supports the decision of the hearing officer.

DECISION

We affirm the decision and order of the hearing officer.

Appellant was first employed as a general laborer for employer in September 1990. His job involved, among other things, dumping containers of metal shavings that weighed 50-60 pounds into a shoulder-high bin. He testified that some time in (date of injury) he felt pain in his lower abdomen at the end of the day. When he went home that day he noticed a protrusion. He is uncertain as to the date or the day of the week this occurred, but he testified that he told his immediate supervisor, (Mr. K) within seven days. He continued working for employer, although he said he was in pain and was swollen at the end of every day, symptoms which would abate overnight. In January he was laid off due to a reduction in force. Thereafter, he was seen by a doctor and was operated on in February 1992. He filed a notice of injury with the Texas Workers' Compensation Commission in January 1992.

Appellant said he had originally planned to have his condition surgically corrected when he took his vacation in October 1991; however, he said he later decided to wait until the following year when he got two weeks' vacation. He had planned to have the surgery covered under his health insurance, but was denied coverage when he indicated that the injury was work-related. He said he was afraid that he would be fired if he filed a workers' compensation claim, but testified on cross-examination that no one from employer had ever threatened to fire him for that reason.

Appellant testified that he had had surgery to repair a previous hernia he suffered at a different job in 1988 or 1989. A workers' compensation claim was asserted for that injury,

and appellant testified that he knew the severity of a hernia and the procedure for filing a workers' compensation claim. He originally thought his pain and swelling was related to the previous hernia. The postoperative diagnosis after his February 28, 1992 surgery said he had suffered a new sliding inguinal hernia, no recurrence.

Mr. K, appellant's supervisor, said he was aware appellant was claiming a work-related injury after he had been laid off. He testified that he did not recall any conversations with appellant about being hurt on the job, and that if that had been the case he would have filled out an accident report. At some point he said appellant began to wear a belt while at work. When Mr. K asked him about it, he said appellant said that it reminded him not to lift anything heavy and that he had had a hernia before. After he became aware of appellant's claim, he said he investigated and found no record that appellant had reported the injury.

Admitted into evidence were written, unsworn statements of two of appellant's former co-workers, both of whom had been terminated from employer. (Mr. McC) statement said that appellant told him he had been injured pulling shavings from the chip bins. He said he believed other employees also knew about the injury because appellant was wearing a belt. (Mr. L) statement said he worked for employer during two separate periods; he did not recall whether he was working there in May of 1991. He said when he came back to work the second time he noticed appellant wearing a belt. He said appellant discussed his injury with all the employees, and for that reason he thought appellant's supervisor also knew appellant had been injured.

(Mr. N), employer's accounting manager who also handled personnel matters, including workers' compensation, said he had not been aware of appellant reporting an injury, and had checked the employer's files to verify that no report had been made. He said that neither Mr. McC nor Mr. L supervised appellant.

The 1989 Act requires an employee to notify its employer of an injury not later than the 30th day after the date on which the injury occurs. The notice may be given to the employer or to any employee who holds a supervisory or management position. Article 8308-5.01(a), (c). A failure to timely notify the employer relieves the employer and its insurance carrier of liability under the Act, with some exceptions. One of these exceptions is upon a finding of good cause, and another is where the employer or person eligible to receive notification or the insurance carrier has actual knowledge of the injury.

In this case, the hearing officer found that appellant did injure himself while working for employer in either (date of injury), but that he did not report this injury until approximately January 15, 1992. There was no finding of fact or conclusion of law regarding actual knowledge, although Conclusion of Law No. 5 states that good cause did not exist for appellant's failure to timely report his injury. Upon review of the record, there is sufficient evidence to support an implied finding of no actual knowledge. Basically, Mr. K testified that it was his understanding that appellant was wearing a belt as a result of a prior injury, and that he was not aware that appellant was asserting the injury occurred on the job until after appellant had been laid off. This contradicts appellant's testimony that he told Mr. K

within seven days of the injury, and the statements of the two non-supervisory former employees. The hearing officer is the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given it, Article 8308-6.34(e). As trier of fact, the hearing officer may believe all or part or none of the testimony of a witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer's decision will be set aside only if the evidence supporting the decision is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). We decline to make such a finding in this case.

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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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge