APPEAL NO. 92369

A contested case hearing was convened on April 22, 1992, in (city), Texas, and closed on April 24th. Presiding was (hearing officer). 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 sole issue was whether claimant (respondent herein) sustained a compensable injury in the course and scope of her employment with (employer) on (date of injury). The hearing officer found this issue in respondent's favor.

The appellant raises five points of error committed by the hearing officer: that he did not find that respondent failed to timely report her injury; that he refused to consider any part of one witness's testimony; that he did not find the surgery bill should be denied for failure to obtain a second opinion; that his finding of compensable injury was based upon misstated material facts; and that his decision is contrary to the great weight and preponderance of the evidence so as to be manifestly unjust.

Respondent contends that appellant failed to clearly and concisely rebut each contested issue in the hearing officer's decision; that appellant failed to perfect for review its point of error regarding timely reporting of an injury; that the hearing officer was not obligated to consider or include discussion of one witness's testimony; that the Appeals Panel lacks jurisdiction to hear the issue regarding a second surgical opinion; that the hearing officer did not misstate material facts in his decision and order; and that the decision and order are not against the great weight and preponderance of the evidence.

DECISION

We affirm the decision and order of the hearing officer.

Respondent was employed as a porter by employer hospital. Her job involved clearing dishes from meal carts and washing them. She testified that on (date of injury), she slipped in a pool of standing water in the dish room of the cafeteria and fell. She was alone at the time. After the fall, she said she was wet all over, so she changed into hospital scrubs. She went to (Ms. H), who was her supervisor that day, and told her she had fallen. She said Ms. H asked her if she was okay, and she replied affirmatively. However, she said she told Ms. H and two other coworkers, (Ms. E) and (Ms. J), that she was going home at lunchtime. At home, her husband applied medicine and a heating pad to her back. She returned to work to finish her shift, which ended at 2:30 p.m. That evening she and her family went to employer's picnic. She said she talked to several coworkers there, including (Mr. LS), her morning supervisor. She told Mr. LS what had happened that day. He asked whether she was all right, and she replied, "Yeah, that I know of . . . I'm a little sore but that's about it." She told him that she probably would be back at work the following day. However, she said she began feeling bad while dancing at the picnic, and stayed home from work the next day.

She went to one of her regular doctors, (Dr. McD) on (month) (day), and told him she

had slipped and fallen in the dish room at work. At that time, she said, she did not think she was hurt badly. Dr. McD diagnosed a strained muscle and told her to stay off work for a week. She returned to work the following Tuesday and worked most of (month) and (month), with some days off due to back problems. She continued to see her regular doctor, (Dr. L), but she did not tell him she had been injured at work. Dr. L took x-rays but could find nothing wrong until she had a CAT scan on August 16th. The CAT scan disclosed a herniated disc at L5-S1, for which she had surgery (lumbar laminectomy and discectomy) September 12th. She filed a notice of injury (TWCC-41) on September 19th. She had requested and was granted a leave of absence from employer on August 26th, pursuant to Dr. L's recommendation that she stop working.

Respondent said she went to employer's personnel manager, (Ms. A), about a week after she was injured to see about cancelling her health insurance because she was going to be covered under her husband's policy. At that time she asked if she could file a workers' compensation claim, but she said Ms. A told her she had not received an accident report on any injury. Respondent received a TWCC-41 from the Texas Workers' Compensation Commission (Commission) but said she was delayed in filing it because she had moved twice.

On October 28th respondent gave a recorded statement to a representative of appellant. In a transcription of that statement, which was admitted into evidence, respondent agreed that she told Mr. LS she had injured her back. She also went on to detail a conversation in which she asked to go home and Mr. LS refused to let her. At the hearing she testified that when asked whether she had told her supervisor of the injury, she thought appellant's representative meant her morning supervisor, Mr. LS. She said she tried to clarify this after the tape recorder was turned off, so that the transcription did not reflect this.

Respondent had been in an automobile accident approximately 10 years before. That accident had caused her to have swelling and blood clots in her legs, but had not caused injury to her back. She said she had been treated by Dr. L a few months before the (month) accident for a pulled muscle around her rib cage, which she said was not the same area which was hurting after her fall. She said the (month) injury caused her to limp while walking.

(Mr. D), respondent's estranged husband, testified that their divorce was pending. He said that on (date of injury) respondent had called him from work, crying and saying she had slipped and fallen. He told her to come home, but she said she was afraid she would lose her job. He said she came home at lunch and he rubbed her back with a topical medicine. At the picnic he said she talked to Mr. LS and told him she fell in the dish room. He also said she was in pain at the picnic but that she wanted to go and bring the children because they had never been to a hayride or a rodeo. The next day he said she was unable to get out of bed, and he called in to work for her, but he did not remember whether he mentioned her falling at work the previous day. He said that when he and respondent separated, he moved the furniture for her and that she only carried her clothes.

(Ms. H) testified that she was the only supervisor in the cafeteria on (date of injury). However, she said that day was so long ago she could not remember whether respondent mentioned an injury. She also said she could not remember respondent wearing scrubs nor being off work for one week. Ms. H said she knew she did not fill out an accident report for respondent on (date of injury). She said there have been times she has not filled out accident reports at work, but that she would like to think she would have filled out one even for a minor injury on (date of injury). However, she recalled an incident where respondent was bending over to pick up a coffee pot, "but her back had been bothering her prior to that so I did not make out a report on that." Ms. A also said during (month) and (month) she observed respondent walking slowly, at times limping, and experiencing trouble bending and stooping.

(Ms. T), who worked in employer's nutrition department, said she observed respondent at the picnic, picking up two small children and dancing. She said respondent did not appear to be in pain. Ms. T said when respondent came back to work after being off she could see she was physically hurting. Ms. T said she asked whether respondent was hurt at work, to which respondent replied that it was from a car accident. Ms. T said she did not notice respondent being in pain before the date of the picnic.

(Ms. S), who worked as a cook for employer, testified that she saw respondent at work picking up her last paycheck. She said respondent's father, who was with her, said she should get workers' compensation. Ms. S said she told respondent she could not get workers' compensation without disability, to which respondent replied to her father, "I told you that." She also said respondent had told her Dr. L said her injury stemmed from an automobile accident she had had several years before. However, she said it was obvious that respondent's back was hurting in (month) and (month), but that she was not exhibiting these problems in April or May.

(Ms. A), employer's personnel payroll manager, said employer's policy was that an incident report be filled out for all injuries. She denied that respondent asked her to fill out an injury report. She said when respondent brought in a doctor's release after (month) (day), she made inquiry of the director of nutrition services (who was not a witness at the hearing) and was told it was a "personal bill."

Ms. A completed the Employer's First Report of Injury on October 31st. She said she first found out respondent was claiming an on-the-job injury when the hospital called about a month before. She stated she never saw the notice of injury respondent filed. She also said respondent had been terminated by employer.

(Ms. E) testified that she was working as a cook in the cafeteria on (date of injury), and that she saw that respondent was wet in the back, but that she could not recall whether that was on (date of injury). She said she asked respondent if she was all right and was told that she was. Ms. E said she later observed respondent in pain and knew of an incident after (month) in which respondent's back hurt after picking up a coffee urn. She said

respondent had never said why she was in pain, and Ms. E assumed it was from the fall in the dish room. She said respondent told her about a prior automobile accident and said the fall had aggravated it.

Mr. LS, who was respondent's morning supervisor, testified that he was not at work on (date of injury). He said that respondent seemed fine at the picnic and that he did not recall her saying she had been hurt at work. The next day she was at work she said she had wrenched her back while dancing. He testified that he recalled her slipping in the dish room some time prior to the picnic, but that no report was filed because she did not seem to be hurt.

(Ms. J), a diet clerk, said she did not remember respondent telling her she fell on (date of injury), and that if respondent had testified she talked to Ms. J about it that would be untrue. In a transcribed telephone conversation between Ms. J and a representative of appellant, Ms. J said respondent had said her back injury was due to an old automobile accident, but that later she said she had been hurt at work.

Appellant's first point is that the hearing officer erred as a matter of law by not finding that respondent failed to timely report her injury, an issue appellant says was raised at the benefit review conference. Appellant correctly states that the hearing officer's decision did not contain findings or conclusions with regard to this issue. Our review of the benefit review conference report, which was made part of the record below, does not disclose that timely notice was an issue. Although that report shows appellant took the position that respondent injured her back at the company picnic and did not report an on-the-job injury, the disputed issue is stated as "[w]hether or not claimant sustained a compensable injury in the course and scope of employment." Pursuant to the 1989 Act and regulations, the hearing officer is bound to consider only those issues contained in the statement of disputes. Article 8308-6.31; Tex. W.C. Comm'n. 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). If appellant had reason to take issue with the statement of dispute as articulated by the benefit review officer, it could have filed a response thereto or sought to add additional issues by consent or by permission of the hearing officer. Rule 142.7(c)-(e). Nothing in this record indicates this was done.

At the outset of the hearing, the hearing officer stated as follows: "I understand the sole issue we're here today to consider is whether or not [respondent] sustained a compensable injury in the course and scope of her employment with [employer]. I guess the date---the date may or may not be in dispute, so we don't need I guess to make an observation on that at this time." While this may have to some extent clouded the issue as stated, the hearing officer also stated, during appellant's closing argument, that "[a] timely notice is not one of our issues," to which appellant's attorney responded, "[n]o it's not, Your Honor, but it just goes to the fact that the injury didn't happen." Based on the foregoing, we hold that timely notice was not a separate issue before the hearing officer.

Appellant's second point is that the hearing officer erred in arbitrarily rejecting the testimony of its witness Ms. S. Appellant notes the hearing officer's decision gave no

reason for never addressing the testimony of Ms. S. Because appellant claims this witness' testimony was crucial to its case, it contends the hearing officer's rejection constitutes reversible error.

It is true that the hearing officer did not mention Ms. S's testimony in either the statement of evidence or the discussion sections of his decision, although she was noted as a witness for appellant. We are unable to say whether this was an oversight on the part of the hearing officer or whether, as appellant contends, he rejected all her testimony outright. In either event, we note that the hearing officer is bound only to issue a written decision that includes findings of fact and conclusions of law, a determination of whether benefits are due, and an award of such benefits. Article 8308-6.34(g). The hearing officer is also the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). As the trier of fact, he 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).

If the hearing officer had excluded this witness's testimony, to obtain a reversal the appellant would have to show that the fact finder's determination was in fact error and that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Appellant claims this witness was crucial because her testimony allegedly demonstrated respondent was denying her injury was work related. The record shows Ms. S testified as follows:

> We were talking, and [respondent's] dad was sitting in the car and he said that he thought that she should get workman's comp for something. So I asked [respondent] . . . "did you have short-term disability?" She said, "No." I said, "did you have any kind of disability, you know, from the hospital?" And she said, "No." And I said, "well, if you know that, you can't get workman's comp." And [respondent] said, "I told you that, Daddy."

Ms. S later testified that ". . . to me that meant that she knew that she couldn't get any kind of help from the hospital." Ms. S also said she felt respondent was a dishonest person because she had told some people that no coworkers had tried to help her after she was hurt, although Ms. S testified she had helped respondent financially. Respondent testified that she did not remember the conversation with Ms. S. Based on all the foregoing, we find that the hearing officer did not commit reversible error to the extent that any findings or conclusions did not take this evidence into account.

Appellant's third point is that it should not be liable for the medical costs related to respondent's spinal surgery because respondent failed to obtain a second medical opinion before her surgery. Appellant argues that this was an unresolved issue from the benefit review conference; it also argues that it did not waive its right to a second opinion because it did not receive notice of the surgery as required by Rule 133.201. Appellant contends that the evidence does not show that respondent had a documented medical emergency

which would eliminate the need to report.

We have previously noted the single unresolved issue from the benefit renew conference, and the fact that appellant did not seek to add any other issues. Although the benefit review officer recommended that, if the claim be found to be compensable, the bill for respondent's surgery be denied for failure to obtain a second opinion, we believe this issue was a medical dispute that should be addressed by the Commission's medical review division. *See* Article 8308-4.67, 4.68, and 8.26; Rules 133.200 through 133.305. Therefore, the hearing officer's failure to address this issue was not error.

Appellant's final points of error are that the hearing officer's decision was based upon misstated material facts, and that it was contrary to the great weight and preponderance of the evidence so as to be manifestly unjust. Appellant bases its argument upon the hearing officer's analysis of the evidence in his summary and discussion. As we have previously noted, it is the hearing officer's responsibility to review the evidence and resolve any conflicts and inconsistencies. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Our review of the record shows numerous inconsistencies between and within the testimony of all the witnesses. Given this, and given the hearing officer's ability as fact finder to reconcile conflicts in evidence, we find that the hearing officer's decision to be supported by the evidence and not so against the great weight and preponderance of the evidence as to be manifestly unjust or unfair. 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:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge