APPEAL NO. 92411

A contested case hearing was held in (city), Texas, on June 25, 1992, (hearing officer) presiding, to consider the two disputed issues unresolved from the benefit review conference, namely, whether appellant received a back injury in the course and scope of his employment on (date of injury), and whether he gave his employer timely notice of such injury. The hearing officer determined both disputed issues adversely to appellant. In his timely request for review, appellant states that he disagrees with the hearing officer's decision and asks us to reverse it. He asserts that he didn't have severe pain for over a month after straining his back on (date of injury) and that the doctor's records don't reflect a (date of injury) injury because he wasn't thinking of that date when he first visited the doctor. Appellant also complains of not being able to cross-examine the three written, signed, and sworn statements of employer's supervisory personnel introduced by respondent, and of being limited in his efforts to challenge employer's safety procedures, to show that employer didn't report his 1991 earnings to the Social Security Administration, and to show employer's change in workers' compensation insurance carriers. In its response, respondent asserts that appellant's request for review was untimely, addresses appellant's complaints on appeal, and urges our affirmance.

DECISION

Finding no reversible error and the evidence sufficient to support the hearing officer's findings and conclusions, we affirm the decision below.

It is appropriate at this point to discuss respondent's contention that appellant's request for review was untimely. The hearing officer's decision was forwarded to appellant by letter dated July 22, 1992 from the Hearings & Review Division of the Texas Workers' Compensation Commission (Commission). Appellant's request for review was mailed on August 10, 1992, and was received by the Commission on August 12, 1992. Thus, the appeal was timely under TEX. REV. CIV. STAT. ANN. art. 8308-6.41(a) (1989 Act) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §143.3 (TWCC Rules). *See* Texas Workers' Compensation Commission Appeal No. 92016 (Docket No. redacted) decided February 28, 1992.

The hearing officer accurately summarized the evidence adduced at the hearing, appellant has no complaint with that summary, and we adopt and incorporate it. Succinctly, appellant sustained a back injury in 1986 while working for a former employer and underwent lumbar laminectomies in May and July 1987. He received weekly income benefits from (Aetna), the former employer's workers' compensation insurance carrier, for over a year. In 1988, appellant said he was determined to be disabled to the extent he could not perform manual labor and heavy lifting and he received a settlement of $38,700.00 from Aetna. On (date of injury), while assisting two coworkers in the manual hoisting of a very heavy aluminum cable tray for his employer, he strained his back when he was required to hold one end of the tray up with a rope for about four or five minutes. He said he and the two others laughed and were boisterous as a mechanism for coping with their very strenuous efforts to manually hoist the tray some 20 feet into the air and onto support beams.

When the foreman and safety man came out to quiet them down, appellant stated, "this [the effort to hold the tray up with the rope] is killing my back." Two coworkers testified to the same effect. Appellant testified his making that statement was his only communication with a supervisor about his back injury. He said he felt strain in his back for twenty to thirty minutes afterwards, but did not experience pain until several weeks later when his back and legs began to hurt. By that time, he had commenced a job with still another employer.

On December 9, 1991, appellant visited (Dr. J), who had performed the July 1987 laminectomy, and (Dr. J) wrote Aetna on December 11th reporting that appellant had recurrent bilateral L5 sciatica and required an MRI and EMG of his back and legs. This report said that appellant has had back pain since his initial surgery but that the pain in both legs began approximately one month earlier. (Dr. J) performed appellant's third laminectomy on January 21, 1992. Appellant testified that at that point he realized his back had been injured by the strain he endured on (date of injury). However, he said he did not then contact employer about the injury, and he filed his claim in late February, 1992. Aetna paid for the January 21st operation (and for a fourth laminectomy performed on May 7, 1992). Appellant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on February 16, 1992, which indicated he strained his lower back during the first or second week of (month year) while lifting a cable tray by rope and hand. The Employer's First Report of Injury or Illness (TWCC-1), signed on March 10, 1992, stated that employer was notified when appellant called the office on March 5, 1992. (Dr. J) wrote Aetna on March 25, 1992 advising that the pain in appellant's back and right leg and hip was worse, and he mentioned the prospect of future surgery. (Dr. J) then related the following: "[t]he patient now tells me that a great deal re-occurred when he was putting a cable up on (date of injury). I told him that this was possible that this may have cause (sic) his injury. I am not sure how this will affect his workman's compensation." Appellant conceded he was not aware of any other medical evidence relating his back problems to the claimed injury.

Appellant had the burden of proving by a preponderance of the evidence that he injured his back in the course and scope of his employment on (date). *See* Texas Workers' Compensation Commission Appeal No. 92060 (Docket No. redacted) decided April 1, 1992. Appellant further had to establish that he notified employer of his injury not later than 30 days after the date on which the injury occurred (Article 8308-5.01(a)), or that his failure to do so fell within one of the exceptions in Article 8308-5.02. Whether appellant sustained a compensable injury on (date of injury) and timely reported it to employer were questions of fact to be resolved by the hearing officer. Texas Workers' Compensation Commission Appeal No. 92239 (Docket No. redacted) decided July 22, 1992. The hearing officer's factual findings included the following:

> Neither claimant's medical record nor the sequence of events support a finding that claimant's work activities caused or contributed to the injury or condition diagnosed by his treating physician (Dr. J) as bilateral sciatica on May 13, 1992.

The preponderance of the evidence did not establish that claimant's holding onto a rope attached to the cable tray for five minutes on (date of injury) caused the injury or condition for which he underwent two laminectomies or a fusion in January, 1992 and May, 1992.

Claimant's statement to employer on (date of injury) that "this is killing my back" with no additional communication or information provided to employer until March 5, 1992 did not give employer the required notice of a work-related injury.

The preponderance of the evidence does not establish good cause for claimant's failure to notify employer of a work-related injury until March 5, 1992.

Based upon these and certain other findings, the hearing officer concluded that appellant did not receive a compensable injury on (date of injury) and did not provide the employer with timely notice. Pursuant to Article 8308-6.34(e), 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. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). We may not substitute our judgment for that of the hearing officer where, as here, there is sufficient evidence to support the findings. Texas Employers Insurance Association v. Alcantara, 764 S.W. 2d 865, 868 (Tex. App. - Texarkana 1989, no writ). The findings and conclusions 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 hearing officer admitted, over appellant's hearsay objections, the written, signed, sworn statements of employer's safety coordinator, electrical superintendent, and electrical foreman, all to the effect that they had no knowledge of appellant's having sustained or reported an on the job injury on (date of injury). Article 8308-6.34 (1989 Act) provides that conformity to the legal rules of evidence is not necessary, and it authorizes the hearing officer to permit the use of summary procedures including witness statements, and to accept written statements signed by witnesses. We find no merit to appellant's contentions in this regard. Further, we have carefully reviewed the record concerning appellant's efforts to develop information on employer's reporting of his earnings, and on employer's injury reporting procedures. We are satisfied the hearing officer did not abuse her discretion in her rulings respecting the relevance of such matters.

Finding no reversible error and sufficient evidence to support the findings and conclusions, the hearing officer's decision is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge