APPEAL NO. 92430

A contested case hearing was held on July 17, 1992, in (city), Texas, (hearing officer) presiding. The two issues from the benefit review conference were as follows: 1. whether claimant (respondent herein) suffered an injury to his back on (date of injury) during the course and scope of his employment with (employer), and 2. whether employer's workers' compensation insurance carrier (appellant herein) is excused from liability under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.02 (Vernon Supp. 1992) (1989 Act) because respondent failed to notify his employer of his alleged (date of injury) injury within the time limits of Article 8308-5.01. The hearing officer held that the respondent suffered a compensable injury on (date of injury), and that he notified his employer within 30 days.

In its request for review appellant contends the evidence does not support the hearing officer's decision. Respondent disagrees, and asks that we affirm the decision below.

DECISION

We affirm the decision and order of the hearing officer.

Respondent, a mechanic, testified at the hearing that he had worked for (employer) for 19 years. On Thursday, (date of injury), he said that shortly after he arrived at work at 4:00 a.m. he was told by a dispatcher to loosen a stuck rear door of a trailer. He said that as he lifted the door he felt something in his back and a stinging and burning in his left hip. He continued to work the remainder of his shift, and did not mention an injury to anyone. By the time he got home he said he couldn't raise his left leg and got out of his car with difficulty. The next day he was still hurting and stiff, and on the following Monday he called for a doctor's appointment. On Sunday night respondent said he called employer and told the person who answered the telephone to leave a note for the shop foreman, Joe Torres (Mr. T), that he was hurting down his left leg and he would not be at work on Monday.

Respondent said he called Mr. T on Monday and told him his left leg was hurting and that he had to go and find out about it. In response to a question on direct examination, he said he told Mr. T he had a pain in his leg when he was working on the door "that morning," meaning the morning of (date of injury). When asked whether he told Mr. T about a back injury, he indicated he didn't know and that the pain "was all down this side," indicating an area from just above his waist down the length of his leg. Later, in response to a question as to whether he told Mr. T that the pain occurred after lifting the trailer door, he said he didn't remember telling Mr. T that day, but that he told Mr. T what his symptoms were. Respondent said he had told Mr. T in the past--about 6 to 8 months before, when had to take off work to see (Dr. Mu)--that he had varicose veins.

Respondent said he thought his condition would improve if he took time off his job, and so he told Mr. T he was going to take two weeks off. He said he thought he talked to

Mr. T in early April. After that two weeks, he took further time off because he said he had stopped taking medication and was in pain.

Respondent said the next time he spoke to Mr. T was when he came into employer's shop in April or May and told him that Dr. Mu had found nothing wrong, but that Dr.O had said he had a strained muscle in his back. At that time he said he told Mr. T he would be back at work soon. However, he said at that time he was taking pain pills and not hurting too badly, but when he stopped taking the pills his pain increased. He said he went back to the shop in April or May and talked to Mr. T when he "barely could walk." At that time he said he told Mr. T that he hurt himself while working on a trailer. He said he has not been back to work since (date of injury). He said no doctor has released him to work, but he said he still has problems from a torn knee ligament he apparently suffered at home.

Respondent went to see Dr. Mu, the doctor who had treated him for varicose veins because he thought his problems might be due to some sort of blockage. Dr. Mu examined respondent and told him he had no problems with his veins, and sent him to (Dr. O) because, appellant said, Dr. Mu thought respondent might have something wrong with his back. He said Dr. O examined him and took x-rays and gave him pain pills, heat and electroshock therapy on his back, and referred him to (Dr. Mo) , who sent him to (Dr. McG). Following a myelogram, Dr. McG diagnosed a ruptured disk in respondent's back and performed surgery. Respondent denied that he had ever been diagnosed with high blood pressure, nor that he was on any medication for this condition. He said he had been prescribed mild hypertension medication a few years before because of a nervous problem. He also said he had not suffered from the same type of back pain prior to (date of injury).

On cross-examination respondent acknowledged he has filed more than 20 workers' compensation claims in the past, and that he is aware of the procedure which must be used in reporting an injury. One of the claims, dated February 17, 1987, was for a back injury. He said he remembered having a CAT scan in the course of that injury, but said he did not remember whether that injury was diagnosed as a herniated disk at the same location as the present injury. He said he had called the hospital, but they would not give him the results of that CAT scan. He also said he had a back injury in June of 1990 for which he had not been compensated. A notice of injury and claim for compensation, signed by respondent and dated July 18, 1991, was made part of the record. Respondent said he was completely healed from the earlier back injury before (date of injury), and he said he did not know why he had filed the claim in July 1991.

An "Office Vascular Consultation" signed by Dr. Mu and dated (date), was entered into evidence at the hearing. This report said in part:

> [Respondent] has positive history for hypertension . . . The patient states ‘black spots’ appearing in his right lower extremity with localized pain in the area. He has also been experiencing pain along his ‘veins’ in both lower extremities starting at the thighs and going all the way down . . . The patient also states bilateral

> calf pain after walking three blocks which goes away and allows him to walk additional three blocks. The patient states that his work requires a lot of walking and it does not bother him.

Dr. Mu's impression included the following:

> I have reassured the patient that there is no danger to his lower extremities (which he was worried about the most). I feel that continuation of the conservative treatment for his venous disease is in order . . . I have also emphasized to the patient to (sic) the importance of no smoking and good control of his blood pressure. If he wishes, I will refer him for regular blood pressure management.

When asked about the date of Dr. Mu's report, respondent said the (date) date was not true. He said he went to Dr. Mu because he had seen him before for varicose veins, and he wanted to know why his legs hurt. The last time he had seen Dr. Mu before (date of injury), he said, was five years ago.

Also in the record was a June 2, 1992, medical report signed by Dr. O. This report said in part:

> [Respondent] is a patient that presented to my office on 4-16-91 complaining of lower back pain, mostly on the left side. He recalls being unable to get out of bed nor being able to straighten out his back as of 4-14-91 . . . an MRI of the lumbar spine . . . revealed a disc prolapse at L5-S1 with evidence of mild pressure effect on the nerve roots . . . Because his job as a diesel mechanic did require him to be on his feet for prolonged periods of time and also to do heavy lifting, its (sic) quite possible that the disc herniation was a result of his occupational duties.

When respondent was asked on cross-examination whether Dr. O thought the accident occurred in April 1991, he said he possibly could have, but that he was hurt before he saw Dr. O.

A November 22, 1991 letter from Dr. Mo said he initially examined respondent on May 17, 1991. The letter further states:

> [Respondent] is employed as a diesel mechanic and states his work is very heavy. He states he noted the gradual onset of lower back pain while working and doing a lot of lifting. His pain became so severe that he took off from work two months prior to his visit but his pain increased and he subsequently experienced the onset of pain in his left lower extremity . . . At the time of his initial examination, he complained of lower back and left lower extremity pain with extension down the left lower extremity to the knee. This was

aggravated by prolonged standing, walking, and sitting and stooping, bending and lifting . . .

Dr. Mo's report further diagnosed a herniated disk at L5-S1 and recommended a laminectomy with removal of the herniated intervertebral disk.

Also part of the record was an unsworn, written statement from Mr. T. He stated that the last day respondent worked, (date), he said he was sick due to high blood pressure. Mr. T's statement said respondent called in the following Monday, asking for a week's vacation beginning March 25th. He said respondent called in the following Friday asking for an additional week because he had been seeing a doctor for his painful varicose veins. On April 4th he called saying he wanted an additional two weeks off to rest his legs. He said at no time did respondent mention a back problem. On April 19th he said respondent came into the shop and said he felt fine but was going to take one more week off. The week ending May 11, 1991, respondent brought in a doctor's slip indicating he had a disk problem. Nothing in Mr. T's statement indicated any injury or condition of respondent was the result of a work-related injury. Respondent said he had seen Mr. T's statement, and that it was "miscalculated."

The claimant in a workers' compensation case has the burden to establish that an injury occurred within the course and scope of his employment. Parker v. Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969). For an accident or injury to be compensable there must be an undesigned, untoward event traceable to a definite time and place involving a risk of the employment. Hartford Accident and Indemnity Company v. Olson, 466 S.W.2d 373 (Tex. 1971). An accident does not have to be witnessed to be compensable, and a claimant's testimony along can establish the occurrence of an injury. Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989). The Act further provides that the hearing officer is the sole judge of the relevance and materiality of the evidence offered at a contested case hearing and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). Moreover, the hearing officer may resolve conflicts and inconsistencies in testimony. Texas Employer Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App. - Texarkana 1989, no writ). While the respondent's statements in this case were sometimes inconsistent with the medical evidence, we find there was sufficient evidence upon which the hearing officer could base his decision that respondent suffered a compensable injury in the course and scope of his employment. This panel may not substitute its judgment for that of the hearing officer unless the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be manifestly unjust. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Turning to the issue of notice, the 1989 Act requires that the injured employee or a person acting on his behalf notify the employer of an injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. Article 8308-5.01(a). An employee's failure to so notify relieves the employer and its insurance carrier of liability unless the employer or a person eligible to receive notification or the carrier has actual knowledge; the Texas Workers' Compensation Commission determines that good cause exists for failure to give notice in a timely manner; or the employer or insurance carrier does not contest the claim. Article 8308-5.02. While

the employer need only be informed of the general nature of the injury, it must also be put on notice that the injury was work related to give the insurer an opportunity to immediately investigate the facts surrounding an injury. This purpose can be fulfilled without the need of any particular form or manner of notice. DeAnda v. Home Ins. Co., 618 S.W.2d 529 (Tex. 1980).

The hearing officer made Finding of Fact 9 as follows:

9.Within 30 days after (date of injury) [respondent] left a telephone message with [Mr. T] and also told [Mr. T] in person that he suffered an injury on (date of injury) while at work.

We hold the first part of this finding to be unsupported by any record evidence; the tape of the proceedings below shows only that the respondent left a message for Mr. T, via an unnamed person, that he "had leg problems" and was going to "find out about it." This is not sufficient to put the employer on notice that an injury occurred on the job, *see* DeAnda, *supra*.

With regard to the second part of Finding of Fact No. 9, the evidence was controverted by the statement of Mr. T, which says respondent only mentioned problems with high blood pressure and varicose veins, and does not say that respondent said that any of his physical problems were job related. On direct testimony, respondent stated as follows:

Q:When you told him [Mr. T] about this pain in your leg . . . on that Monday when you testified, did you mention that you had experienced this pain upon lifting that trailer door back on Friday?
A:I told him I had pain in my leg that morning when I was working on that door that morning, he's got the work order there . . . and I told him that.

Q:When you say that morning, are you referring to the morning of (date of injury)?
A:Right.

* * * * *

Q:Did you tell [Mr. T] that pain occurred after lifting the trailer door, when you talked to him on Monday, the following Monday?
A:I don't remember telling him that date. I told him what my symptom was.

* * * * *

Q:When did you return to the shop at [employer]?
A:I can't remember, I didn't write down the dates, but I know I went out there and I talked to [Mr. T] . . .

Q:Do you remember what month it was?
A:. . . May, April or May. April . . .

* * * * *

Q:At that time, when you were talking to [Mr. T], did you tell him that the sprain in your back was related to the injury you told us about occurring on (date of injury)?
A:Right. I said . . . I know I hurt myself I said because when I worked on that trailer door on (date of injury) . . . I felt that sting in my back, and I said, I hurt myself repairing that door . . .

* * * * *

Q:When was the next time that you visited [employer] to talk to anyone after the time you'd gone in April?
A:Well, [Mr. T] called me at home, and said I need you to come out here and fill out an accident report.

Q:Do you remember when that phone call occurred?
A:A month after that--weeks after that, about the 19th or something like that. Of March, April, something like that.

We find that this testimony, tenuous as it is, provided sufficient evidence for the hearing officer to make the finding contained in the second part of Finding of Fact No. 9. As stated before, the hearing officer can resolve inconsistencies within and between witness's testimony. As also stated, the hearing officer is the sole judge of a witness's credibility; where sufficient evidence exists to support his decision, it will not be overturned, even in a situation, as here, where reasonable minds could differ.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Joe Sebesta

Appeals Judge

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Philip F. O'Neill
Appeals Judge