APPEAL NO. 92457

On August 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The hearing officer determined that the claimant, (claimant), who is the appellant, failed to give her employer notice of injury not later than 30 days after the date of the injury, or after the date on which she knew an injury was related to the accident, and that she further did not show good cause for failure to give such notice. The appellant contended that she was injured in an automobile accident on (date of injury), while acting within the course and scope of her employment for (employer). The hearing officer found that her first report of an injury to a supervisor of the employer was given April 2, 1992.

Appellant asks for reconsideration by the Appeals Panel, based upon the fact that the employer knew that an accident had occurred on (date of injury), and that the vehicle was driven by a person in a supervisory capacity. Appellant further argues that there was uncontroverted evidence of a conversation within 30 days between the driver and the appellant that the driver was going to see a doctor for headaches related to the accident and "so was she." The appellant points out that the consequence of the hearing officer's decision imperils claims for internal injuries that would not be manifested until more than 30 days following the accident, and that the decision essentially requires injured employees to have medical knowledge. The respondent replies that the appellant herself testified that she realized two days after the accident that she was injured, and that the supervisors, to whom she contends she reported such injury, deny that an injury was reported. The respondent notes other evidence that it contends supports the hearing officer's decision.

DECISION

After reviewing the record, we affirm the determination of the hearing officer.

The appellant worked for the employer, a highway construction contractor, primarily as a flag person and ticket writer. In (month year), she was transferred for two to three weeks to a surveying crew. On (date of injury), while traveling from one job site to another in the company pickup truck, of "extended cab" design, she was involved in an accident. The pickup was struck on the rear bumper by another driver who failed to yield at a "turnaround" in the road. Appellant sat between coworkers (Mr. JR) and (Mr. T); all three were wearing seat belts but she alone did not have a shoulder belt. The truck was driven by Mr. JR, who she regarded as her immediate supervisor on this crew. She stated he drove up on a curb to avoid other cars and stopped abruptly to avoid hitting a fire hydrant. A police report was made. The police report taken of the accident indicates that there were no personal injuries reported. There was little damage to the vehicle. She felt that she hadn't been injured at the time, but within two days she had headaches and felt soreness in her shoulder area, her buttocks, back, and leg. Appellant stated that she mentioned this to Mr. JR, who also complained he was having pain and was going to see a doctor. She told him if he was going to go, she would too. However, appellant testified that it was not until the end of March that she consulted a doctor for her injury. Appellant attributed the delay to her need to stay on the job and work, and that she went when her job was "rained out."

Thereafter, she formally reported her injury to the project manager, (Mr. S), in early April, after she had been to the drugstore and was not able to get prescriptions authorized. She stated that Mr. S seemed not to know about the accident at all.

Appellant stated that the official supervisor of the crew was Mr. JR's father, (Mr. SR). She thought that she also told him about the injury later in the week, and that he referred her back to Mr. JR. Appellant stated that she was aware of the employer's policy for reporting on-the-job injuries.

Under cross-examination, appellant acknowledged that she went to see (Dr. H) on February 24, 1992, for an elbow and arm that had been injured in a previous work-related injury. This appointment had been arranged two weeks in advance. She stated that Dr. H was referred by employer's previous insurance carrier, who was not the respondent, and that she tried to mention her accident-related injuries but he advised that she discuss this in another appointment. Dr. H referred her to another doctor, (Dr. Mc), for further treatment on her arm. Medical records put into evidence by respondent show that appellant was treated for her elbow and arm on February 24 and April 1, 1992. The reports do not mention the accident, or injuries she says occurred on (date of injury). Appellant stated that she is not presently seeking medical treatment for her injuries because she does not have insurance or a job.

(Ms. J), who was in charge of employee benefits programs for the employer, recalled denying authorization for a pharmacy bill for appellant at the end of March or first of April. She stated that the first she knew of the accident was in April when contacted by the auto insurance company for the other driver. She tendered the employer's report of injury, dated April 10, 1992, but indicated that the company would have been officially notified about the injury a few days before this. Ms. J indicated that internal company reports of accidents were required only if there was personal injury or substantial property damage, which was not the case here.

Mr. JR testified that appellant was a good worker whose performance did not decline following the accident. He denied that he was told about the injury prior to finding out about it in early April, when he was contacted by Mr. S to file an accident report. He stated that he did not file a report when the accident occurred because damage amounted only to a slight bending of the truck bumper, with no personal injuries. Mr. JR recalled a conversation with appellant a week after the accident when he complained to her of headaches and said he was going to see a doctor, but he denied that he connected these headaches to the accident. He recalled that appellant said she would see a doctor too, if he went. He stated that she never complained about pain or problems with her back, leg, or buttocks.

Mr. JR knew that appellant went to a doctor soon after the accident but understood that this related to a previous elbow injury. Mr. JR denied that she ever told him she thought she was injured in the accident, and denied actual knowledge of her injury. He stated that if she did, he would have told her to go to a doctor. Mr. JR considered that he was in charge

of the survey crew. He said that he reported the accident to Mr. SR after it happened. Mr. JR stated that the diagram on the police report is not entirely accurate in that the other driver made contact at an angle more perpendicular to the truck than the more straight-on angle shown. He denied that he stopped abruptly when he drove up on the sidewalk.

Mr. SR denied that appellant ever told him she was injured in the accident, and said he found out the first time in April 1992. He stated that he was the supervisor of the survey crew, but designated Mr. JR as the on-site person in charge. He stated that company policy required prompt reporting of all on-the-job injuries and that he felt that appellant was aware of the policy. He said that he told Mr. S about the truck accident on the afternoon of (date of injury).

Mr. S was the employer's project superintendent, and said he had temporarily loaned appellant to Mr. SR. He agreed that Mr. JR would have been in charge of the three-person crew involved in the accident. He stated that the first he heard of the accident was when appellant called him at home on April 2, 1992, to ask why a prescribed painkiller was not authorized by employer. He agreed that she was a good employee. When appellant was transferred back to Mr. S, he observed no problems with her activities, nor did she complain about physical problems.

The hearing officer is the sole judge of the relevance and materiality, as well as the weight and credibility of the evidence offered in a contested case hearing. 1989 Act, Art. 8308-6.34(e). The trier of fact may disbelieve a portion of the evidence and believe other parts. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A notice of an injury must provide the employer with information about the general nature, not the exact nature, of the injury as well as the fact that it is related to the job. Texas Employers Insurance Ass'n v. Mathes, 771 S.W.2d 225, 228 (Tex. App.-El Paso 1989, writ denied). If an employer has actual knowledge of an injury, the notice requirement is obviated. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). The observation of an accident combined with the subsequent slow-down of activities by an employee may provide evidence from which a jury could infer the knowledge of an employer that a worker was injured. Miller v. Texas Employers' Insurance Ass'n, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The appellant was aware that she had general pain in certain areas of her body within two days that she connected to the accident. The hearing officer, in his statement of the evidence, apparently accepted appellant's contention that Mr. JR was her supervisor; we agree that he was a person, under the facts of this case, to whom a valid notice could have been given under Art. 8308-5.01(c). Contrary to what appellant asserts on appeal, the hearing officer's decision does not require that appellant meet a medical knowledge

standard, because the information she generally knew on the second day would have been enough, under the law, to give notice to the employer. But given the disputed evidence as to whether Mr. JR or Mr. SR were told that she was injured, Mr. JR's observation that her subsequent performance was not impaired, as well as her receipt of medical treatment for another injury throughout the "notice" period, there is sufficient evidence to support the hearing officer's determination that she did not give timely notice. As to appellant's implied contention that knowledge of the accident alone should constitute knowledge of injury on the employer's part, we note that the Miller case, cited above, indicates that observation of an accident does not, as a matter of law, equate to notice of a compensable injury, and that notice is generally a matter for the trier of fact.

There being sufficient evidence to support the decision of the hearing officer, we affirm her decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge