APPEAL NO. 92462

This appeal arises under the Texas Workers' Compensation Act, TEX. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on July 9, 1992 at (city), Texas, before (hearing officer). The unresolved issues from the benefit review conference were as follows: whether the claimant (respondent herein) gave timely notice of an alleged on-the-job injury to her employer, (employer), and whether the insurance carrier (appellant herein) filed timely controversion of this claim with the Texas Workers' Compensation Commission (Commission). At the hearing, appellant moved to add the issue of whether respondent suffered a compensable injury in the course and scope of her employment; however, the hearing officer did not find good cause to add this issue.

The hearing officer held that respondent suffered an injury to her back on (date of injury); that on (date), she informed her immediate supervisor that she had fallen from a chair while working and that she needed medical attention; and that she gave timely notice of an on-the-job injury to her employer pursuant to Article 8308-5.01. The hearing officer also held that the appellant's notice of controversion of respondent's claim was timely, pursuant to Article 8308-5.21.

Appellant contends that the hearing officer's finding that respondent gave timely notice of her injury is contrary to the great weight and preponderance of the evidence so as to be manifestly unjust. Appellant also argues that the hearing officer erred in refusing to determine if the respondent was injured in the course and scope of her employment. Respondent replies that appellant did not timely dispute the occurrence of the injury, and argues that the evidence supports the hearing officer's decision.

DECISION

We affirm the decision and order of the hearing officer.

Respondent was employed by (employer) as a cashier at the (CF) facility; her employment required her to work in a booth in an open parking lot. The booth contained a tall chair which was on rollers. Respondent testified that on (date of injury) the chair slipped, causing her to fall and hit a small bench. There were no witnesses to the accident. She said the next day when she had pain in her neck and back she told her supervisor, (Mr. M), that she had fallen from the chair and asked him, "Do I have to wait for my insurance to go to the hospital?" He said she needed to work full time to have insurance. Respondent, an Ethiopian national who has lived in this country for ten and one-half years, testified that at the time she knew nothing about workers' compensation laws. She said she also told Mr. M that he needed to change her chair, but that he paid no attention to her. Three or four days later she asked him again to change her chair, and she said she told him her back was hurting. She also requested, and was granted, permission to work full time so that she could get health insurance. She said she missed one day of work because of her injury.

In November respondent's employer transferred her to a booth at another location, the (D) facility, which was very cold and was painful to her. When she went to a lawyer to see what she could do, she found out about workers' compensation; thereafter she filed an accident report with employer and saw a doctor. An initial medical report filed by (Dr. E) shows that respondent was first seen on November 18. His clinical assessment included "muscle spasm neck (cervical) and shoulder," and "acute lumbar pain." Dr. E referred respondent to another doctor for x-rays and a CT scan. Medical records dated in early December and admitted into evidence show normal CTs of the thoracic and lumbrosacral spine.

A signed and notarized transcription of a telephone conversation between an adjuster for appellant and Mr. M was admitted into evidence over objection. In that statement, Mr. M said respondent first notified him in late October that she fell out of her chair because it was broken. He said he did not know she had been injured until mid-November; that before that time nothing appeared to be wrong and that respondent was basically worried about getting her chair fixed. Also admitted into evidence over objection was an unsigned, unsworn transcribed conversation between (Mr. Me), employer's area manager who supervised the (D) facility, and adjuster (Ms. B). Ms. B testified at the hearing that the transcription was a true and correct rendition of their conversation, and that based upon that conversation, she had denied respondent's claim for lack of timely notice. In the transcription, Mr. Me said respondent first informed him of an injury on November 21, which was the date he filled out the first report of injury. After he talked to respondent, he spoke with Mr. M, who said that respondent had spoken to him about her chair malfunctioning, but that Mr. M told him he did not find out that she was injured until late October.

(Mr. H), employer's director of operations, said employer lost its contract with the (CF) facility the last day of October, and that respondent was moved to the (D) facility on November 1 at a lower rate of pay. He said that booth was without electricity until about the middle of December, but that a portable heater had been put in on a date he could not remember.

Mr. H testified that he had personally trained Mr. M, and that Mr. M had been told that all injuries, regardless of how minor, were to be reported. Admitted into evidence was a copy of a card which all of employer's managers were required to carry, and which gave instructions to follow in the event of on-the-job injuries. When asked about the assertion in Mr. M's transcribed statement that appellant had reported to Mr. M in October that she had fallen out of her chair and needed to have it fixed, Mr. H said Mr. M did not report that fact to him, which would be contrary to company policy and inconsistent with the behavior he had observed in Mr. M.

While employer's employee handbook was not admitted into evidence, Mr. H testified that it informs employees that they are entitled to medical treatment for on-the-job injuries. Respondent's signed statement acknowledging receipt of the handbook was admitted into evidence. Mr. H also said the office where respondent was required daily to turn in her paperwork and where she picked up her paycheck had signs concerning workers'

compensation coverage.

Also made a part of the record was the Notice of Refused or Disputed Claim filed by appellant. The notice was dated November 28, 1991, and was stamped "Received December 16 1991 Texas Workers' Compensation Commission (city) Texas." Ms. B testified that her claim file indicated that the appellant first received notice of respondent's claim on November 22, when the employer's first notice of injury was telefaxed to appellant.

At the outset, appellant argues that the hearing officer's failure to consider the issue of injury in course and scope constitutes reversible error. Appellant argues that the hearing officer stated that no good cause existed to add this issue, but failed to make the necessary finding of fact as to good cause. Further, appellant argues that appellant's counsel stated that she had not received a copy of the benefit review officer's report as of the date of the hearing which, as a matter of law, constitutes good cause. Such error is reversible, appellant contends, because the evidence conclusively establishes respondent could not have been injured as she claims.

The record below indicates that appellant's counsel stated at the hearing that appellant's (city) office did not receive a copy of the benefit review conference report, and that "(Mr. L) in (city) probably did, but it has not been forwarded to me." Appellant's counsel stated she was not present at the benefit review conference. Respondent's counsel, who had been present at the conference, represented that the issue of injury was discussed only with reference to date of notice. No further information was supplied, nor any evidence adduced from any witness, concerning mailing or receipt of the report.

The hearing officer found no good cause existed to add this issue, pursuant to Tex. W.C. Comm. 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). Rule 142.7 implements Article 8308-6.31(a), which provides that issues not raised at a benefit review conference may not be considered at a contested case hearing except by consent of the parties or unless the Commission determines that good cause existed for not raising the issue at the earlier proceedings. We have previously held that good cause is a decision best left to the discretion of the hearing officer. *See* Texas Workers' Compensation Appeal No. 91009 (Docket No. redacted), decided September 4, 1991. At the hearing appellant's attorney did not state unequivocally that appellant had not received the benefit review conference report; rather, she conveyed the impression that it had gone to appellant's (city) representative, who had not forwarded it to her. Even if some clear doubt had been cast upon appellant's receipt of the report, that fact would not equate to good cause for not having raised the issue of injury at the benefit review conference. From the record below it does not appear that the issue was before the benefit review officer; appellant's notice of refused/disputed claim says "Carrier disputes this claim based on. (sic) D.O.I. (date of injury), Date of notice 10-28 [remainder cut off]. Claimant failed to report her injury to her employer with (sic) 30 days of occurrence and failed to seek medical attention until 11-18-91." Under these circumstances, we find that sufficient evidence existed to allow the hearing officer to find that no good cause existed to add the issue of compensable injury, and that the hearing officer did not abuse his discretion in so ruling.

Appellant's second point is that respondent wholly failed to meet her burden to prove she provided the notice to employer required by Article 8308-5.01, and that the hearing officer's finding to the contrary is so against the great weight and preponderance of the evidence to be manifestly wrong or unjust. Appellant says the only evidence in respondent's favor came from respondent, an interested witness whose testimony contained numerous inconsistencies and was contradicted by evidence to the contrary.

The 1989 Act requires that an injured employee or a person acting in his or her behalf notify the employer of an injury no later than the 30th day after the date the employee knew or should have known that the injury may be related to the employment (Article 8308-5.01(a)). 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 served without the need of any particular form or manner of notice. DeAnda v. Home Ins. C., 618 S.W.2d 529 (Tex. 1980).

The record in the case shows respondent testified, variously, that she told Mr. M shortly after the (date of injury) incident that she fell from her chair; that she needed insurance; that she was hurt; and that she needed to see a doctor. Her rendition of the words she used to Mr. M varied, as noted by appellant; in addition, it was contradicted by Mr. M's sworn statement. Even the uncontradicted testimony of an interested witness does nothing more than raise an issue of fact unless such testimony is clear, direct, and positive, and there are no circumstances in evidence tending to discredit or impeach such testimony. Anchor Casualty Co. v. Bowers, 393 S.W.2d 168 (Tex. 1965). However, the hearing officer is sole judge of the evidence in a case, Article 8308-6.34(e), and he may believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Where there is conflicting testimony, as here, he may believe one witness and disbelieve others. Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561 (Tex. 1952). We will set aside his decision only where it 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). A review of the record in this case does not lead us to this conclusion, as there was sufficient evidence to support the hearing officer's conclusion that the respondent timely notified her employer of an injury incurred on the job.

The decision and order of the hearing officer are 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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Joe Sebesta
Appeals Judge