APPEAL NO. 92569

On September 23, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the claimant failed to prove she had suffered a compensable injury to her back on (date of injury), failed to timely notify the employer of the injury, and failed to timely file a claim with the Texas Workers' Compensation Commission (Commission).

The claimant appealed alleging she had suffered an injury in the course and scope of her employment, that she had timely reported her injury, that good cause existed for the untimely notice of injury and alleging newly discovered evidence warranting a remand. Service Lloyds Insurance Company (carrier) filed a response requesting us to affirm the hearing officer. The appeal is considered under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

DECISION

Claimant's contentions are without merit and the hearing officer's decision is affirmed.

The hearing officer found, and the evidence supported, that claimant was employed as a sales manager-trainee by (employer) in employer's automobile dealership on (date of injury) and had been so employed for about one year. At approximately 8:30 a.m. on (date of injury) (although the date is disputed in a portion of claimant's appeal dealing with newly discovered evidence), claimant fell from a small stepladder while attempting to retrieve a money sack from behind a suspended ceiling tile. Claimant landed on her feet but scraped the underside of her arm, scratched her back and tore her skirt in the fall. The hearing officer found claimant suffered no back pain at the time. Claimant reported the fall to employer's president the day of the fall and to her immediate supervisor the following day. Exactly what was said is in dispute, but generally claimant's supervisor asked claimant if she was hurt and claimant replied "[n]o, I was so embarrassed." Claimant continued work and did not seek medical treatment for approximately two and one-half months when she saw (Dr. B), a chiropractor, on August 26, 1991 for a back manipulation. On October 2, 1991 claimant left the employer to go to another, better paying job at another car dealership. About a month later, claimant changed jobs and went to work for (D's) Detail. The job with (D's) involved a lot of sitting and, on November 13, 1991, claimant saw Dr. B again and received another back manipulation. Claimant was laid off from (D's) in late December 1991 because business was slow and, in January, drew unemployment benefits. Claimant next saw (Dr. L), a chiropractor, on March 12, 1992. Based on his examination and x-rays, Dr. L diagnosed claimant as having back pains, inflammation of the sciatic nerve, and a mildly bulged L5 disc. Both carrier and claimant appear to agree, as found by the hearing officer, that it was then that claimant felt she had actually been injured in the (date of injury) fall from the ladder. Although there is some dispute regarding what occurred next, the hearing officer found, and is supported by the evidence, that claimant called employer's president in early May 1992 requesting forms to file a claim. The employer mailed the claim forms to the claimant in early May 1992. Claimant completed the forms and mailed them

back to the employer on May 18, 1992. Employer typed the handwritten form, added a typed memo stating employer's position and mailed the form to the carrier. The carrier received the forms on June 2, 1992 and apparently filed the Employer's First Report of Injury with the Commission in (city), Texas. The Commission in turn mailed claimant an Employee's Notice of Injury and a blue pamphlet concerning claimant's rights. Claimant completed the Notice of Injury and filed it at the Commission's (city), Texas, field office on June 22, 1992. The evidence at the contested case hearing (CCH) disclosed that claimant had a history of back problems, to include two surgeries and attendant workers' compensation claims prior to (month) (year).

The hearing officer found against the claimant who was pro se at the hearing. Claimant subsequently obtained an attorney and appealed. As to the first issue, claimant alleges, and employer concedes, that the fall and minor injuries not involving medical care were reported to the employer on (date of injury) and (date). Although claimant alleges back pain was reported to claimant's supervisor, this was specifically denied by the supervisor who testified at the CCH. Whether there was anything more than the initial fall and claimant's "embarrassing" minor injuries on (date of injury), that is, whether claimant sustained an injury as defined by Article 8308-1.03(27), is a factual matter for the trier of fact. Injury is defined as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm . . ." Article 8308-1.03(27). The hearing officer is the sole judge of the evidence offered and of the weight and credibility of the evidence pursuant to Article 8308-6.34(e). The hearing officer found that "other than minor scrapes and scratches, claimant was not injured in the (date of injury) fall from the ladder" and concluded "[c]laimant did not suffer an injury within the course and scope of her employment with employer on (date of injury), and is therefore not entitled to workers' compensation benefits for this claim." There is sufficient evidence to support the hearing officer's finding and conclusion on this point.

As to the second issue of timely reporting of the injury, claimant refers to "Carrier's Exhibit #5 [as] direct proof that Appellant [claimant] reported her injury on the day following her fall." Carrier's Exhibit #5 is a statement from (Mr. M), claimant's supervisor, which states:

> (Ms. G) told me on Friday (date) that she had sliped (sic) off the small steplader (sic) we had in the store room where we keep the night deposit on Thursday when I was off work.
>
> (Ms. G) stated to me that she was ok and not hurt just embarrassed by her slipping of the lader (sic).
>
> (Ms. G) had commented to me months befor (sic) that her back brothered (sic) her when she lifed (sic) her baby up from the floor.

The first two paragraphs are virtually undisputed. The last paragraph was explained by (Mr. M) to mean that claimant had months earlier complained of back problems associated with lifting her baby. There is no evidence exactly when this statement was written but the statement is referenced in the employer's memo to the carrier, dated May 21, 1992. Somehow claimant interprets (Mr. M)' statement for the proposition claimant's back injury was reported and claimant ". . . fulfilled her duty of reporting the injuries that she received and Respondent [carrier] was in error by failing to make a report of these injuries." The interpretation of (Mr. M)' statement is within the province of the hearing officer pursuant to Article 8308-6.34(e), cited earlier, and we certainly will not say as a matter of law that the quoted statement constitutes notice to employer of a back injury. In the alternative, claimant argues that there is good cause for not reporting the injury within 30 days because claimant believed her back injury to be trivial "despite constant pain." Conceding that trivialization may in some circumstances constitute good cause, the hearing officer, as the trier of fact, found that "[c]laimant did not have a reasonable explanation or a good reason [good cause] for her failure to notify employer of her alleged injury of (date of injury) from early March of 1992 until early May of 1992." The nearly uncontroverted evidence was that claimant became aware that her back injury may be work-related when she saw Dr. L on March 12, 1992. Yet claimant did nothing until early May 1992 when she called employer's president and asked for claim forms. In Texas Casualty Insurance Company v. Beasley, 391 S.W.2d 33 (Tex. 1965) the court held that a workers' compensation claimant who took no steps to file his claim for total incapacity for two and one-half months after hospitalization ". . . did not exercise the degree of diligence in the filing of his claim . . ." The hearing officer's finding of fact, quoted above, and corresponding conclusion of law are sufficiently supported by the evidence.

As an exhibit in the hearing file there is an unsigned, unauthenticated note presumably by Dr. L's clerk that purported to state claimant ". . . had reported her injury on 3-23-92 . . ." That note was not admitted by the hearing officer on objection by the carrier. It is noted that the copy of that note submitted by claimant as part of claimant's brief and request for review has been altered by the addition of initials DB, (DB's) signature, with a date of "10-19-92," an office stamp of (Dr. L), D.C., and an additional notation "From (Ms. G), (city), TX." We will address for review only the note presented as an exhibit to the hearing officer. Recognizing that the rules of evidence do not strictly apply to workers' compensation proceedings, Article 8308-6.34(e) provides that the hearing officer not only is the sole judge of the weight and credibility of the evidence but also provides that "[t]he hearing officer may accept statements signed by a witness and shall accept all written reports signed by a health care provider." (Emphasis added.) The memo submitted was unsigned and was not a medical report and therefore was not required to be accepted. Had it been signed, the hearing officer would still have had discretion on whether or not to accept the statement. In that it was not signed, the hearing officer clearly did not abuse his discretion in refusing to admit the memo. Further, some information in the note was contradicted by claimant's own sworn testimony and other portions were disputed by employer's president. The hearing officer did not err in refusing to admit the memo.

Claimant also submits that carrier violated Article 8308-5.21 by failing to notify the claimant and Commission within seven days of receiving notice of injury that benefits would not be paid. That issue was not before the hearing officer at the CCH and no evidence was presented on the issue. Furthermore, the findings and conclusions of the hearing officer as upheld in this appeal moot the issue. Consequently, we will not rule on the point.

As to the third issue, that a claim for compensation was not filed within one year of the date of injury, claimant argues that when she called to get the claims forms she ". . . was told that everything else would be taken care of." The employer denies this and the hearing officer, as the trier of fact, gave it little or no weight in finding that claimant had not filed her claim "for her alleged back injury of (date of injury) until 06-22-92." Claimant also argues that on approximately June 9, 1992 she received "TWCC 21 PAYMENT OF COMPENSATION OR NOTICE OF REFUSED, DISPUTED CLAIM with the type of benefit marked `Certify benefits will be paid as accrued Ar. 8308-5.21'" leading claimant "to the belief . . . [by Appellant (claimant)] that her claim had been properly filed" and that this constitutes good cause. The hearing officer specifically found, as the trier of fact, that claimant did not have a reasonable excuse or a good reason for her failure to file a claim for compensation not later than one year after (date of injury). Carrier also points out, citing case authority, that ignorance of the filing requirement contained in the 1989 Act is not an excuse for failure to comply. The hearing officer is supported by the evidence in his conclusion on this point.

Finally claimant alleges, in the alternative, that claimant has "newly discovered evidence" which changes the date of this accident from (date of injury) to July 11, 1991. The basis of this "newly discovered evidence" is that claimant was hired on June 6, 1990 and ". . . when asked to give the date of the accident, the date (date of injury) came to mind because this is the date of hire." Carrier points out that the newly alleged date of injury is ". . . a date which, coincidentally, is less than one year prior to the date on which claimant file[d] her claim . . ." The newly discovered evidence apparently consists of the fact that (date of injury) and July 11, 1991 were both Thursdays and claimant was hired on June 6, 1990. In Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992, we discussed in some detail, citing case authority, what constitutes newly discovered evidence. Applying elements cited in that case, it is clear that claimant's allegations do not rise to the status of newly discovered evidence. It is noted that the (date of injury) date was the date claimant gave to the employer, the date testified to by claimant's supervisor, the date given to the doctors, and the date used by the carrier, Commission and investigators. Further, the claimant has apparently testified, under oath, on at least two occasions, at two different times, that her fall and injury occurred on (date of injury). Claimant's supervisor, in his testimony and in Carrier's Exhibit #5, earlier cited by claimant, stated that the injury was on (date of injury). This allegation of "newly discovered evidence" is not actually evidence but merely an allegation that claimant, for whatever reason, now alleges a new date of injury different from the date used throughout. Claimant's contention on this point

is totally without merit.

The hearing officer is the sole judge of the weight and credibility of the evidence. Because the claimant was an interested party in this case, her testimony only raises issues of fact for the hearing officer's determination. Viewed in its entirety, the evidence does not reveal the hearing officer's findings to be so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ). Furthermore, the hearing officer's findings and conclusions are largely supported by the claimant's own testimony.

The hearing officer's decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge