APPEAL NO. 92574

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act). TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On September 17, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She held that appellant, claimant herein, did not give timely notice of a back injury alleged to have occurred on (date of injury) and ordered that no benefits be paid. Claimant asserts that the company bookkeeper, a management employee, to whom claimant reported, failed to record the report she received. Respondent, carrier herein, made no response.

DECISION

Finding that the decision is sufficiently supported by the evidence, we affirm.

Claimant worked for employer, a chemical company, over twenty years. It was not completely clear why claimant left the company, but there was testimony that he had tried on several occasions to pass a hazardous truck driving test and failed. The supervisor, Mr. F, testified that claimant took two weeks of vacation in April 1992 at which time he was going to take the test again. Claimant failed it and never returned. In his testimony, (through an interpreter), claimant referred to being laid off in April 1992. While the issue is stated to be whether claimant gave adequate notice of a back injury of (date of injury), the record of hearing indicates two other injuries were also addressed, and a finding of fact states that claimant did not give proper notice on each of three alleged injuries.

Claimant testified that he injured himself in July 1991 when several gallons of muriatic acid spilled on the job and some got on him. Others saw this, including the supervisor, so claimant said there was no need to tell anyone. Claimant said he next injured his thumb "on the steering wheel" in late November 1991. He testified that he told the bookkeeper, Ms. H, in January about the thumb. Finally, claimant said that he hurt his back on (date of injury), when he jumped back and hit his back against a wall to avoid being hit by a barrel. He testified that on (date of injury), "he reported it and Ms. H said "yeah, o.k." or words to that effect. Claimant acknowledged that he did not see a doctor for any injury until he stopped working in April 1992.

Mr. F testified that the muriatic acid spill got some acid on him too. He said this acid is not dangerous in the same category as is, for instance, sulphuric acid. In July, Mr. F said that he and others simply washed any acid off and there was no injury. Mr. F said that claimant showed him a knot on his thumb, saying that it had happened two to three months before. Mr. F said he observed to claimant that if it is like the knot he has, it is arthritis. Ms. H said that claimant told her of the thumb "at the end of the year"; she said claimant also said that it happened on a steering wheel, that he was getting a second knot on his thumb, and that it happened "a long time ago." She said that after Mr. F said that the thumb could be arthritic, claimant left the office and did not come back so she made no report on it.

Ms. H further testified that she worked for employer over 30 years and that if a person reports an accident, she sends that person to the doctor and fills out a report. In answer to a question, Ms. H said that claimant did not say the steering wheel to which he ascribed injury was that of a truck while at work. (Ms. H's testimony did not focus on this omission, but rather on the length and vagueness of the time period between occurrence and report--while she related that it was Mr. F that commented about arthritis, she did not indicate that she saw anything about the thumb to indicate trauma as opposed to a process such as arthritis.) Her testimony that she heard of the thumb problem at the end of the year could have supported the hearing officer if she had found that timely notice of a thumb injury was given. The claimant's own testimony that he reported the thumb in January provides sufficient basis for the hearing officer to find that this notice was insufficient. (We note that with no issue as to a thumb injury, the hearing officer did not have to allow any evidence in regard to notification of it; however, since the parties litigated notice of the thumb, a finding on that question was appropriate.)

The claimant's assertion that the acid spill in July spoke for itself since the supervisor saw it happen is belied by claimant's own admission that he had no pain from it until March of the following year. In cases where actual knowledge is allowed instead of notice by the claimant, observable injury is involved. In Miller v. Texas Employers Ins. Ass'n, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.), the court said actual notice was a factual question for the jury when a man was seen to fall from a truck and did not say anything was wrong but was observed to slow his pace of work within the 30 day period for notice. In addition to the claimant's own account, the supervisor said that claimant had no problem with the work until the time he did not return in April. As in the notice regarding the thumb, time of notice of the acid spill was not an issue, but a finding was appropriate since the matter was allowed to be litigated. The finding that notice was not timely was for the hearing officer to decide and was based on sufficient evidence of record.

Ms. H testified that the first she heard of a back injury, other than one several years before, was after claimant quit coming to work in April. Her testimony is therefore in conflict with that of the claimant. However, the record reflects that the claimant, through the interpreter, when asked to say what he told Ms. H about the back injury, replied, "he just says he reported and she said yeah, o.k." or words to that effect. The carrier argues that claimant only said that his back hurt. Ms. H's recall of no report of a back injury is understandable if claimant just said his back hurt. Claimant did not say that he provided certain details of the event that would indicate a relationship to the job. He did not stay after saying what he said or attempt to make sure that Ms. H understood the seriousness of what he was reporting. While we do not say that claimant had a duty to fill in every blank for a supervisor or management employee to whom he reported an injury, we do believe that his lack of testimony as to any detail is not inconsistent with Ms. H's inability to recall anything about a report of back injury. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. She could consider Ms. H as more believable than claimant, who is an interested witness. She could consider

that claimant did not report the back injury to a doctor until months later, even though he said he knew he was injured on (date of injury) and reported it on (date).

The decision that claimant did not give timely notice of the (date of injury) injury to his back is not against the great weight and preponderance of the evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge