APPEAL NO. 92587

On September 30, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the respondent (claimant below) sustained an injury within the course and scope of her employment and ordered the provisions of applicable benefits pursuant to the Texas Workers' Compensation Act (TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*.) (Vernon Supp. 1991) (1989 Act). On appeal, Planet Insurance Company (carrier) disputes certain findings of fact, conclusions of law, and the hearing officer's decision and order. Claimant files a response requesting the hearing officer's decision be upheld.

DECISION

We do not find merit in the contentions urged by the carrier. The evidence being sufficient to support the findings and conclusions of the hearing officer, the decision is affirmed.

The issues framed at the contested case hearing (CCH) were:

1.Whether Claimant's back injury is related to her compensable hernia injury of (date of injury); and

2.Whether Claimant suffers disability due to her injury of (date of injury).

The facts, as found by the hearing officer and supported by the evidence, were that claimant was employed by (employer) as a cook. On (date of injury), claimant had prepared the noon meal, loaded it on a warming cart and was pushing the cart up a ramp into a van when she experienced a sharp pain in her stomach and a light pain in her back and leg. Claimant continued to work and helped unload and serve the food at the high school where it was being delivered. Claimant testified she reported the injury to her supervisor as claimant was leaving for the day. Claimant discussed the matter with her supervisor the next day and was told to go to the doctor. Claimant went to her family physician, (Dr. S), who in turn referred her to (Dr. F) as Dr. S suspected a hernia. Dr. F confirmed the hernia and surgically repaired the hernia on September 16, 1991. Dr. F tentatively released claimant for light duty on or around October 16, 1991 and referred claimant back to Dr. S for her back complaints. Dr. S diagnosed claimant as having a lumbar strain and recommended a CAT scan to rule out a herniated disc. Although Dr. S's original note of 09/03/91 does not mention a back complaint, subsequent notes of 10/31/91 do refer to the back problems and, by letter report dated March 16, 1992, stated claimant ". . . did tell me about her back pain but I failed to document this in my note on her initial visit of 9/3/91." Carrier has accepted the hernia injury as a compensable injury but is denying the back injury. The issues at the CCH were as previously noted. The hearing officer in part found:

Findings of Fact

7.Claimant injured her back on (date), at the same time her hernia occurred, and while working for Employer.

8.The back injury did not become readily apparent until after Claimant's hernia was surgically repaired and she was recovering from that surgery.

10.Any failure to specifically notify Employer of the back injury until after the hernia was repaired was reasonable in view of the fact that the symptoms of the back injury may have been masked somewhat by the initial primary concern with the hernia condition and the discomfort it caused.

11.Claimant notified [Dr. S], her family physician and the treating physician for her back injury, of her back and leg pain at the same time she complained of her abdominal pain on September 3, 1991.

and concluded:

Conclusions of Law

3.Claimant injured her back in the course and scope of her employment on (date of injury), at the same time that she suffered a hernia injury (Article 8308-3.01).

5.Good cause exists for failure on Claimant's part to give notice to Employer in a timely manner (Article 8308-5.02(2)).

Claimant, (claimant), injured her back in the course and scope of her employment on (date of injury), and has been off work due to that injury since November 21, 1991. Therefore, she is entitled to benefits under the Texas Workers' Compensation Act for the claimed injury.

The carrier contests the above cited findings and conclusions. The carrier's first alleged error is that Finding of Fact No. 8 and Finding of Fact No. 11 are inconsistent, arguing "if the pain was `masked', then she did not complain about it on September 3, 1991." Carrier argues that the first time claimant complained about her back to Dr. S was on October 31, 1991, Dr. S's March 16, 1992 letter notwithstanding. The findings are not glaringly inconsistent and could certainly be read together as meaning the hernia pain was more severe and of more immediate concern than the lesser back pains which came to the fore after the hernia operation. One could also read "masked" to mean less intense, not completely hidden. The findings are not so incompatible as to constitute error.

Carrier next argues that "[Dr. F] never mentioned any back injury, and he released her to return to work after the hernia surgery, again not mentioning the back injury." This

is factually not exactly correct. Citing the last sentence of Dr. F's note dated 10-28-91 (Carrier's Exhibit A). "She [claimant] has an appointment to see her family doctor, [Dr. S] this coming Friday for her back problem." Obviously, claimant had complained to Dr. F about her back and the cited note is consistent with claimant's testimony that Dr. F only treated her for the hernia repair and referred her back to her family doctor for her back complaints. Carrier's argument is not well taken on this point.

Carrier also argues Finding of Fact No. 9 which states claimant specifically notified the employer in late October or early November of her back injury and this is in conflict with Finding of Fact No. 11, quoted above. The findings are not necessarily in conflict. Finding of Fact No. 9 says claimant specifically notified employer in October/November of her back injury. Finding of Fact No. 11 says claimant complained of back and leg pain when she saw Dr. S on September 3, 1991. If the hearing officer believed the testimony of claimant and Dr. S, which he apparently did, there is no conflict; claimant complained to Dr. S of back pains on September 3rd and specifically reported the back problems to employer in late October, early November after discussing the problem with the doctors. Carrier argues that if claimant promptly complained about her back to the doctors, then there was no good cause for not reporting it to the employer and therefore Conclusion of Law No. 5 contradicts itself. It is clear to us from the record, and the hearing officer's findings and conclusions, that the hearing officer found that claimant complained of both abdominal pain and back/leg pain to Dr. S on September 3, 1991. Because the abdominal pain was worse, and a hernia was suspected, it was treated first. Subsequently after the hernia had been treated, the back/leg pain came up and good cause existed for the delay in reporting the back condition until late October or early November. *See* Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992 which held that the hearing officer did not abuse his discretion in finding the claimant failed to appreciate the seriousness of the injury and there was good cause for delay in notification. Article 8308-6.34(e) makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. The hearing officer clearly believed the claimant's version as supported by Dr. S. We have carefully reviewed the evidence and, viewing the hearing officer's decision from the four corners of the record, we cannot conclude that his findings, conclusions and decision on this issue was an abuse of discretion.

The carrier complains that its "Exhibit D shows that an agreement was reached that [Dr. S] would review the medicals of the [claimant's] previous back injury . . ." Actually, Carrier's Exhibit D is a letter to the Texas Workers' Compensation Commission's (Commission) disability determination officer (DDO) and signed by the parties and the DDO, which states "[t]he employee's attorney will contact [Dr. S], and will have [Dr. S] review the medical records of the employee's previous injury . . ." This was apparently not done. Although the hearing officer has a duty to make a full and accurate record, his failure to require the treating doctor to provide additional reports which specifically address and evaluate the claimant's previous back problems is not prejudicial error. It is further noted that carrier only peripherally raises this issue at the CCH by submitting several exhibits discussing and requesting such an evaluation without comment other than to identify the

exhibits.

The carrier also asserts "[f]urthermore, [Dr. C] was appointed by the Commission to see the [claimant] and there are no reports from [Dr. C], the doctor whose opinion should carry presumptive weight in this case." We find no order, or evidence, other than carrier's brief, to suggest that a designated doctor was appointed or how a Dr. C is involved. In reviewing the testimony presented at the CCH, we find no mention of Dr. C or of a designated doctor. As the issue was not raised at the CCH, we will not rule on it now.

In its closing argument, and cited by the benefit review officer, carrier cites as authority for its position Texas Workers' Compensation Commission Appeal No. 92160, decided June 8, 1992. That case has distinct similarities to the instant case. In both cases there is basically no dispute that an incident resulted in an injury and the immediate manifestation of the incident was a hernia, with subsequent leg, hip and back pain. The medical reports and situation are somewhat different and Appeal No. 92160, *supra*, does not use language of the hernia masking the back injury as does claimant in the instant case. Nevertheless, the Appeals Panel in Appeal No. 92160, *supra*, found that the hearing officer judges the weight and credibility of the evidence and, as such, believed ". . . that the back injury could have been involved with other injuries of the same time, although not immediately recognized . . ." citing case authority. There have been other cases where there is a compensable incident, immediate manifestation of one injury and a later claim for a subsequently discovered injury which arose out of the same initial incident. *See* Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992.

Without specifically saying as much, carrier is appealing on the basis of insufficiency of the evidence. As we have noted throughout, the hearing officer is the sole judge of the weight and credibility of the evidence. We will not substitute our judgment for that of the fact finder where, as here, the challenged determination is supported by sufficient evidence and is not against the great weight and preponderance of the evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The hearing officer's decision is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge