APPEAL NO. 92589

On August 12, 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, sustained an aggravation of a repetitive trauma back injury in the course and scope of employment as a pipefitter by (employer), with the date of injury determined to be (date of injury). The hearing officer determined that the claimant had not made an election of remedies by receiving other insurance benefits for the injury. The hearing officer determined, however, that the claimant failed to give timely notice to his employer of his injury, as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.01 (Vernon's Supp. 1992) (1989 Act), and thus the carrier was discharged from liability for compensation. The hearing officer determined that the claimant was prevented from obtaining and retaining employment at wages equivalent to his preinjury wage because of the injury, but determined that "disability" did not exist, as defined in art. 8308-1.03(16), because the underlying injury was not one for which compensation was payable as a result of lack of timely notice.

The claimant has retained an attorney for purposes of appeal, who has filed a broad appeal that disputes every finding and conclusion of the hearing officer, alleging unspecified constitutional and statutory violations, unfair conduct of the hearing, and abuses of discretion by the hearing officer. The carrier responds that there is sufficient evidence to support the determinations of the hearing officer.

DECISION

After reviewing the record, we reverse the determination of the hearing officer that notice of injury was not timely given, and remand for further development and consideration of evidence related to the date that the claimant knew or should have known that he had an aggravated repetitive trauma injury, and if necessary, whether there was good cause for failure to report the injury prior to July 3, 1991, and, if required by determination of the notice issue, for consideration of the period of disability sustained by the claimant.

The claimant, a 52 year old man, had been employed for 30 years by the employer, and worked as a pipefitter for most of that time. In the fall 1986, claimant began to experience lower back and related right leg pain. He stated that he was told he had a pinched nerve in his back, and that his actions on the job had been wearing out the pads between his bone. The claimant identified his doctors as (Dr. D), and (Dr. M). There was conflicting testimony from claimant as to his understanding in 1986 of the effect of work on his back. He stated that he did not realize, and Dr. M did not tell him in 1986, that it was work-related. The claimant affirmed that if he had understood that work caused his back pain, he wouldn't have kept doing the same thing. He stated that he thought Dr. M may have told him in 1986 that he had a herniated disc, but he was not sure. A statement given by claimant to the adjuster for the carrier on January 27, 1992, states that Dr. M told him in October 1986 that he had a ruptured disc and that the doctor preferred not to operate on a man as young as him. The claimant said that although he said this, this isn't what he meant,

and that he cannot recall whether Dr. M told him before that he had a ruptured disc. His written responses to this statement assert that he did not realize that his condition was work-related until July or August of 1991. Claimant testified that Dr. M recommended against surgery in 1986 and that he controlled his pain and discomfort through medication.

On July 3, 1991, the claimant had emergency back surgery for a herniated disc. He said that he could not recall any specific incident where he had picked up anything and his back snapped. Rather, he recalled that, in (month year), he started out fine in the morning and would begin to experience pain to the point where he was limping. He stated that his last day of work prior to eventual surgery was (date). He consulted Dr. D on (date), who prescribed medication and bed rest as he had done in the past. Claimant said that Dr. D subsequently took "x-rays", found a rupture, and sent him to Dr. M for a second opinion. Dr. M saw him July 1st, hospitalized him July 2nd for a myelogram, and after this told him that the blockage in his back was so bad that he required immediate surgery. The claimant said that for the first time, Dr. M made clear to him that his back condition was caused by his work as a pipefitter. The claimant and his wife both testified that the night of the surgery, July 3, 1991, the claimant spoke on the telephone to (Mr. A), a supervisor for the employer, who was also a friend. They stated that claimant told Mr. A that the back surgery was related to work, and that claimant might have to go on workers' compensation. Claimant's wife stated that she particularly recalled this because when the doctor told them the injury was work-related, it was like their world came to an end.

There are no actual medical notes in the record from 1986, although there are later references back to 1986 in the records submitted. Regarding claimant's back, Dr. D's notes from December 21, 1987 state that claimant had some flare-up of his right sciatica. He was kept off work at that time. This condition was declared resolved by Dr. D, after treatment, in the note of January 1, 1988. In February of that same year, Dr. D states that it sounds like claimant had some foraminal narrowing which "every now and then pinches a nerve." On (date), Dr. D records that he treated claimant for right sciatica and took him off work, with a follow-up appointment scheduled for a week later. On May 30th, Dr. D ordered a magnetic resonance imaging (MRI) scan and physical therapy evaluation for a possible TENs unit. Dr. D's notes indicate on June 6, 1991, he had the MRI results, which showed spinal stenosis with a possible ruptured disc at L5-S1 level. These notes indicate that the disc problem was discussed with claimant along with a recommendation for a second opinion from a surgeon. Thereafter, the notes indicate that claimant had a July 1st appointment with Dr. M.

Dr. M's notes for claimant's surgery reflect that claimant had prior back pain in 1986 and "was told at that time" that he had swelling of the disc which was pinching a nerve. A memo from Dr. M dated August 29, 1991, directed "[t]o whom it may concern" states that "[Claimant's] occupation as a pipefitter over the last 29 years has contributed to his lumbar disc disease and ultimately to his lumbar disc herniation on which he had surgery on July 3, 1991." This memo sets forth restrictions under a release to light duty work effective September 16, 1991. The claimant said he got this memo at the direction of (Mr. RA)

(whose own testimony revealed that he was employer's "prevention supervisor," charged with workers' compensation responsibility). The claimant said that this memo from Dr. M was the first time he was informed that this could relate to his 1986 back problems.

Claimant stated that after July 3rd, he next informed other persons for employer about his work-related injury. These people were identified as (Mr. N), and (Ms. B) (the occupational health nurse). He said he asked about workers' compensation because he was under the impression he had to have it to qualify for the employer's light duty work. The claimant said that Mr. RA suggested that he draw sickness and accident insurance benefits rather than workers' compensation. In any case, the claimant filed claims for sickness and accident insurance benefits for his back (on June 25, 1991 and September 15, 1991), in which it was indicated that the condition did not arise out of employment. The claimant testified that he worked light duty for the employer from September 16, 1991 through January 24, 1992, for slightly fewer hours but a higher hourly rate of pay, but then was terminated from the job for unknown reasons. Claimant stated that he last saw his own physician in November 1991, although he was examined by the doctor for the carrier in April 1992. (Medical bills from Dr. M reflect three treatment dates at the end of January 1992). The claimant indicated during the hearing (while questioning another witness) that he was not aware of a 30-day reporting requirement.

Mr. A testified and agreed that he spoke with claimant at the hospital. He repeatedly stated that he could not recall specifically events over a year past by the time of the hearing, and he did not remember claimant telling him that his back was work related. He said that he believed he would have acted on information from claimant about a work-related injury. However, he stressed that he could not recall the conversation and it had been a hectic day that day, and further indicated on cross examination that he would have acted on information "if it had been brought to my attention, and where my attention span was that day . . ." Mr. N, Ms. B, and Mr. RA stated that their first awareness that claimant had a work-related back injury was sometime in late August, 1991, although the actual date was not recalled. Ms. B stated that claimant had with him the August 29th memo from Dr. M. It was the carrier's position that late August 1991 was the first time that the employer was actually given notice. Notwithstanding this, the record indicates that the employer's first report of injury was not filed until January 23, 1992. Mr. RA, in his testimony, said that "[claimant] seemed to indicate to me that he didn't feel like it was job related . . . but the doctor kind of put it in his mind that it was job related." Mr. RA, under cross-examination about Dr. M's memo, said that the release didn't say either way whether the injury was job related. He further indicated that such a release would cause him to ask the employee "do you feel like you're suffering from an occupational injury or not."

The date of injury listed on the claim was (date of injury). However, claimant testified repeatedly, and stated in closing argument, that he could recall no specific incident causing an injury. A January 27, 1992 statement given by claimant to the carrier's adjuster indicates that the claimant's recollection was that his last day of work prior to surgery was (date of injury). However, at the hearing, the claimant indicated his last date was May 17, 1992.

The claims he filed for sickness and accident insurance indicate that he was off work beginning May 19th.

I.

As the appeal vehemently attacks some procedural aspects of the hearing, we will review the record on these matters. Three of the issues considered at the hearing, on occurrence of an injury, on notice, and on election of remedies, had been reported as unresolved after the benefit review conference. The benefit review officer issued an interlocutory order directing the insurance carrier to pay temporary income benefits,pending the hearing. In response to the benefit review officer's report, the carrier requested that the additional issue of disability be added to the hearing, and, in accordance with Rule 142.7, the hearing officer agreed to add this issue by written order dated June 16, 1992. At the beginning of the hearing, both parties affirmed their understanding that these were the issues to be heard.[1] Consequently, the assertion in the appeal that the hearing officer has "misrepresented" the issues is without foundation.

The appeal also contends that it was "unlawful," with no supporting citation, for the hearing officer to admit Carrier's Exhibit No. 5 (the January 27, 1992 statement to the adjuster), and further contends that it was not given to the claimant prior to the hearing. At the end of the hearing, the exhibits not admitted at that time, including Carrier's Exhibit No. 5, were taken up by the hearing officer. She gave the claimant all of the carrier's exhibits, and asked him to tell her of any reason why any of them should not be admitted. Then, the carrier presented each exhibit in turn, and each was ruled on separately. The copy of Carrier's Exhibit No. 5 that is in the record was certified as a true transcription on August 12th, the date of the hearing. However, the claimant filed, at the hearing, letters he wrote to "clarify the recorded statement summary taken . . . on January 27, 1992." In addition, he did not tell the hearing officer that he had not received the statement, and not only failed to object to its admission but affirmatively told the hearing officer that "Exhibit Number 5 is okay." Receipt of evidence in such form is permissible under Art. 8308-6.34(b). The claimant's contention regarding Exhibit No. 5 is rejected.

With regard to the contention that the employer's representative inappropriately provided information about testimony to other witnesses, we note that all witnesses were put under the sequestration rule (except claimant's wife) and cautioned by the hearing officer not to talk about their testimony with other witnesses. There is not a scintilla of indication that the employer's representative at the hearing acted contrary to the invocation of "the rule."

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[1] Although the carrier also offered proof regarding a contention that the claimant had reached maximum medical improvement, this was not an issue from either the benefit review conference or added by express agreement of the parties or the hearing officer, and properly was not addressed in the hearing officer's decision.

II.

The appeal disputes every finding and conclusion of the hearing officer. However, we would note that the hearing officer ruled favorably to the claimant on the issue of occurrence of an injury in 1991, and also on the issue relating to election of remedies. Further, the hearing officer ruled favorably that claimant's injury resulted in diminished wages (although she did not decide that he therefore had disability, because no compensation was payable for the injury as a result of her decision by virtue of the way the 1989 Act defines "disability"). We expect that claimant does not seek reversal of the findings that went in his favor, and therefore conclude that claimant disputes the hearing officer's findings and conclusions relating to timely notice. The essential findings are :

Finding of Fact No. 6. Claimant knew or should have known that his underlying repetitive trauma back injury was work-related in 1986.

Finding of Fact No. 7. Claimant knew or should have known that his aggravation of his underlying repetitive trauma back injury was work-related on (date of injury).

Finding of Fact No. 8. Claimant did not notify his employer of the work-related nature of his injury prior to July 3, 1991.

We would also note that Finding of Fact No. 11 also states with respect to election of remedies that claimant sought benefits from non-workers' compensation insurance because "he was unaware that it was not the proper course of conduct under the circumstances which then existed."

Although the hearing officer notes in her discussion of the evidence that the claimant reported his injury to his employer "either in early July or late August," Finding of Fact No. 8 above, in our opinion, resolves this impliedly in favor of July 3, 1991, thus giving more weight to the claimant's, rather than Mr. A's, testimony. The evidence sufficiently supports such implied finding. Moreover, her findings relating to the election of remedies issue certainly allude to the fact that the claimant, at the time he filed his first

safety and accident insurance claims in June 1991, was still confused about the cause of his back condition.

The threshold issue in this case, as we see it, is whether one can be charged with knowledge of an aggravated compensable injury simply because one understands a preexisting condition to be related to employment. Most of the testimonial evidence and medical evidence, taken together, indicates that claimant's known condition prior to sometime in 1991 was that he had a pinched nerve and sciatica. While his statement to the adjuster indicates that he was informed in 1986 that he had a herniated disc, claimant explained that this was in retrospect and that he could not recall if Dr. M so informed him. The medical records from Dr. D and Dr. M indicate that the first objective diagnosis of herniated disc that led to emergency surgery was made by an MRI on June 1, 1991, which was discussed with claimant by Dr. D on June 6th. Other than the fact that (date of injury) was initially noted as the date of injury, which one can infer related to the claimant's erroneous recollection of his last day of work prior to surgery, there is no objective evidence in the record to indicate why claimant should have known, on that date as opposed to any other, that he had a herniated disc that was work related. Therefore, under the record herein, this finding is against the great weight and preponderance of the evidence.

Aggravation of an occupational disease is compensable as an injury in its own right when a subsequent exposure to the hazards of the disease contributes to its severity. Aetna Casualty & Surety Co. v. Luker, 511 S.W.2d 587 (Tex. Civ. App.- Houston [14th Dist.] 1974, writ ref'd n.r.e.). Under the previous workers' compensation statute, notice of an occupational disease had to be given within thirty days after the "first distinct manifestation" of the disease, which is, in essence, comparable to the date the claimant "knew or should have known" he had the disease. *See* Travelers Insurance Co. v. Miller, 390 S.W.2d 284 (Tex. Civ. App.- El Paso 1965, no writ). That court in Miller noted that:

> A distinct manifestation of an occupational disease, therefore, denotes that its existence is clearly evident. It should be clear to the claimant before loss of his right to compensation is denied for failure by him, or someone in his behalf, to take positive action within the time period prescribed. We think that the statute means that the manifestation must be distinct to the claimant, reasonably sufficient to cause him to believe he has an occupational disease. *Id.* at p. 288.

It has been further noted that the first symptom of an occupational disease does not translate necessarily to the first distinct manifestation of that disease, and that a standard similar to that used to analyze the existence of good cause is appropriate. Commercial Insurance Co. of Newark, N.J. v. Smith, 596 S.W.2d 661 (Tex. Civ. App.- Fort Worth 1980, writ ref'd n.r.e.). The court in that case noted that there could be occupational diseases whose first manifestation could consist of a period of months, as opposed to a date certain as in an accidental injury, that the legislature provided a flexible time for determining the date of injury of occupational disease, and that the trier of fact should consider when the

claimant, as a reasonable person, recognized the nature, seriousness, and work-related nature of his disease. *Id.* at p. 665. Consequently, we do not agree with the hearing officer, under the facts developed in this case, that claimant's awareness of a work-related connection to his 1986 ailment necessarily meant that he "knew or should have known" (date of injury), of his aggravated injury, the work-related herniated disc.

We further hold, under the facts of this case and the claimant's assertions that he informed his employer as soon as he knew he had a work-related injury, claimant raised a fact issue as to "good cause," and that application of the "good cause" exception, Article 8308-5.02(2), was subsumed within the issue of notice. *See* Texas Workers' Compensation Commission Appeal No. 92386 (decided September 8, 1992). Thus, if the hearing officer, on remand, nevertheless finds that claimant knew or should have known that he had an occupational disease more than thirty days before July 3, 1991, then evidence of whether claimant had good cause for failure to report should be considered. We would note that a claimant's failure to appreciate the seriousness of an injury, living with pain such as a pinched nerve in the back, can constitute good cause for failure to report an injury within thirty days if the belief was reasonable prudent under the circumstances. Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 (Tex. Civ. App.- Houston 1964, writ ref'd n.r.e.); *see also* Travelers Insurance Co. v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.- Tyler 1973, writ ref'd n.r.e.).

III.

If the issues of notice or good cause are resolved favorably to claimant, the hearing officer will have to decide the issue of disability. Disability under the 1989 Act is not defined solely in terms of physical impairment, but means "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Article 8308-1.03(16). It need not immediately follow an injury to be compensable.[2] Ordinarily, the existence of disability is a question for the finder of fact, and may be resolved inferentially. Director, State Employees Workers' Compensation Division v. Wade, 788 S.W.2d 131 (Tex. App.- Beaumont 1990, writ dism'd). The hearing officer has already found that there is a causal connection between the claimant's injury and diminished wages; the primary reason for not holding that the claimant had "disability" had to do with the fact that the injury in question was determined not to be one for which compensation would be paid, due to the hearing officer's resolution of the notice issue.

For the reasons set forth above, this case is reversed and remanded back to the hearing officer. In so doing, we emphasize that we are not finding that the hearing officer abused her discretion, as charged in the appeal. We regard appeals which disparage the fairness of the hearing officer or the integrity of the opposing party, with no support for same

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[2] Article 8308-4.22(b); also Texas Workers' Compensation Commission Appeal No. 92399, decided September 21, 1992.

in the record, as generally unpersuasive. Our review of the record and the law regarding notice of occupational diseases, as well as our opinion that evidence on good cause should be developed and considered as part of adjudication of this case, leads us to conclude that a reversal and remand is appropriate here.

Pending a decision on remand, as well as any further appeal of that decision which may be made to the Appeals Panel, a final decision is not rendered in this case for purposes of judicial review.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Lynda Nesenholtz
Appeals Judge

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Thomas A. Knapp
Appeals Judge