APPEAL NO. 92597

A contested case hearing was held in (city), Texas, on October 5, 1992, (hearing officer) presiding, to determine whether appellant (claimant) sustained an injury to her left shoulder while in the course and scope of her employment with (employer) on (date of injury), whether she timely reported such injury to employer, and whether she timely filed her claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year after (date of injury). The hearing officer determined these disputed issues adversely to claimant who challenges the sufficiency of the evidence to support the pertinent findings and conclusions. The respondent (carrier) contends the evidence is sufficient to support the hearing officer's determinations and urges our affirmance.

DECISION

Finding the evidence sufficient to support the hearing officer's findings and conclusions, the decision is affirmed.

Claimant, a 16-year employee of employer, testified that on (date of injury), while loading a bundle of 25 cardboard boxes into the packaging machine she operated, she looked up and felt pain in her neck, shoulder, and back on the left side. Because her supervisor was away, she sought out and told (Ms. T), the senior operator, about the incident. Claimant, who was educated in (country) and for whom the English language was obviously not her native tongue, said she did not tell Ms. T that her pain was on her right or her left side but did point to her left shoulder when describing the pain. Ms. T testified that in describing her pain claimant put her left hand up to the base of her neck and right shoulder and held it there for a little while. Ms. T went to claimant's machine with her, had claimant describe the incident, and immediately wrote a report. This report stated that the pain was in claimant's neck and down her shoulder and back on the right side. Ms. T then read the report back to claimant and asked claimant if she understood it and if it was correct. Claimant responded in the affirmative. A short time later Ms. T called claimant into the nearby office, had claimant read the report, and then asked her to sign it, which claimant did. Ms. T said claimant declined an offer to go to a hospital but did accept two Tylenol pills and returned to her work. A short time later, Ms. T remembered she had forgotten to advise claimant to notify (HB), a supervisor, should she go to a doctor or emergency room over the weekend. Ms. T added that advice to the written report and asked claimant to read and sign it, which she did. Ms. T said she took pains to accurately describe the incident and to ensure claimant understood and agreed with the report because she felt claimant had some limitations with the English language, and because she was fairly new to her supervisory duties, although a 13-year employee, and wanted to be sure she accurately documented the incident.

Claimant insisted Ms. T erroneously wrote that the pain was on the right side rather than the left, and surmised that Ms. T mistook the side of her injury because Ms. T was facing claimant when the latter described the incident and pointed to her left shoulder. Ms.

T, on the other hand, insisted claimant had touched and held her right neck and shoulder area. Claimant said that when Ms. T read the report to her she was distracted and preoccupied with the operation of her machine, concerned it might jam, and that when she shortly later read the report in the office she just glanced at it and signed it because she assumed Ms. T had written the report correctly and also because she was again preoccupied with her machine. Ms. T, on the other hand, testified that claimant voiced no indication of error when the report was read to her nor when reading it herself, and that she had another operator keeping an eye on claimant's machine while they were in the office.

After (date of injury), claimant saw a doctor for an infected finger on (date), February 4, and February 12, 1991, and the records of those visits do not mention any shoulder injury. On July 22, 1991, claimant saw her family doctor, (Dr. B), for a periodic diabetes checkup. Her left shoulder had been bothering her so she said she mentioned it to Dr. B who suggested she had bursitis. She said she did not indicate to Dr. B that her left shoulder pain related to an on-the-job injury. Dr. B's record of July 22, 1991, states that her chief complaint was pain in her left shoulder "which has been present since March," and his impression was left shoulder bursitis. Claimant said her left shoulder pain gradually became worse during the fall. By November and December she even needed help in dressing and she sought another appointment with Dr. B in December but could not be seen until January 16, 1992. On that date Dr. B changed her medication and prescribed physical therapy (PT). The PT records stated that claimant reported "that at the end of May she was lifting a box overhead when she felt a sharp pain in her left shoulder going to her breast bone and upper neck." Claimant testified that neither the medications nor PT provided relief. Dr. B's records of claimant's February 4, 1992 visit indicate an x-ray was normal, and his impression was "left shoulder pain of uncertain cause."

Dr. B referred claimant to (Dr. K) in orthopedic surgery whose record of February 7, 1992 stated the following: "[Claimant] has had left shoulder pain related to an injury for nearly a year now; seems to be getting worse." Dr. K noted that the PT, medications, and injections have not helped much, and a Magnetic Resonance Imaging (MRI) test showed diffuse tendinitis and a possible small rotator cuff tear. In March 1992, claimant was referred to (Dr. H) whose record of March 30, 1992 states as follows: "[Claimant] has a long history of LEFT shoulder pain. She hurt it in (month year). She was doing some overhead activity at [employer]." On May 13, 1992, Dr. H performed an arthroscopic subacromial decompression and his postoperative diagnosis was "impingement syndrome left shoulder." Dr. H wrote a letter dated May 22, 1992, to the Texas Workers' Compensation Commission (Commission) stating that claimant had asked him to write the letter to explain her recent surgery. The letter stated she had complained of pain in her left shoulder following an on-the-job injury; that he thought this an aggravation of a preexisting condition and certainly the one that gave her all of her symptoms. Claimant said she had a successful recovery and returned to work on September 26, 1992.

Claimant's medical records also indicated she had problems with her right elbow, forearm, and wrist dating back to 1984 and she testified she obtained relief by wearing a splint. Her records also reveal that in July 1989 she saw a doctor for pain in the posterior

portion of her head as well as the right side of her neck extending around to her right shoulder. She had been a passenger in a car struck from behind. The diagnosis was cervical lumbar strain. Carrier argued that in view of claimant's right side medical history, she may very well have complained to Ms. T on (date of injury), of pain in her right neck and shoulder area.

Claimant testified that when she visited Dr. B on February 4, 1992, he took her off work and referred her to Dr. K. The next day, she and her husband came to employer, and gave the work excuse to the safety manager who said he would obtain the report written by Ms. T and take care of the paperwork. Subsequent to her immediate report of her injury to Ms. T, this contact with the safety manager was claimant's first injury report to employer and she said the safety manager left her with the impression he would take care of everything and that there was nothing more she was required to do. She said she later received a document from the carrier denying her claim as untimely and that she and her husband were given a claim form to fill out and file. Carrier introduced the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) completed by claimant's husband, signed by them on March 18th, and received by the Commission on March 20, 1992. This form stated claimant's date of injury as "(date of injury)" and described the accident as "lifting boxes into a set up machine." Claimant said she did not file a claim before March 1992 because she was unfamiliar with workers' compensation claims procedures and did not know what to do. Claimant's husband, himself a supervisor and longtime employee of employer, testified and largely corroborated claimant's testimony. He said they received carrier's denial in March 1992 and took it to employer's safety manager, (JT), and they obtained the claim form which they completed and mailed back. He said he did not know what they [claim forms] were and that they did not earlier file a claim form because they did not know they were required to do so.

Claimant argued that she injured her left shoulder on (date of injury), and that Ms. T erred in describing the injury as one to the right shoulder. The Commission's ombudsman, who assisted claimant at the hearing with documents and witness examinations, contended in argument after the close of the evidence that Ms. T's written report proved that claimant had timely notified employer of her injury. The ombudsman also urged that claimant's lack of familiarity with workers' compensation claims procedures amounted to good cause for her failing to timely file her claim.

The hearing officer found that claimant notified Ms. T on (date of injury), of her contention that she sustained a right rather than left shoulder injury; that claimant's medical history and records indicated her subjective symptoms for left shoulder pain commenced in May 1991; that claimant did not suffer a left shoulder injury on (date of injury); that neither employer nor carrier were aware claimant was contending she sustained a job-related injury to her left shoulder until after March 20, 1992; and that she filed her claim with the Commission on March 20, 1992, more than one year after the date she contended she injured her left shoulder. Based on these findings, the hearing officer, in sum, concluded that claimant did not sustain a compensable injury to her left shoulder on (date of injury), did not timely notify employer of such injury, and did not timely file a claim for such injury with

the Commission.

Claimant had the burden to prove by a preponderance of the evidence that she sustained a compensable injury to her left shoulder on (date of injury), that she notified employer of such injury not later than the 30th day after the date the injury occurred (Article 8308-5.01(a)), and that she filed her claim for compensation with the Commission not later than one year after the date the injury occurred (Article 8308-5.01(b)). These disputed issues presented fact questions for the hearing officer to resolve as the trier of fact. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of the weight and credibility it is to be given. As the trier of fact, it was for the hearing officer to resolve the conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe all, part, or none of the testimony of any one witness, including claimant, and may give credence to testimony even where there are no discrepancies. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo, 1977, writ ref'd n.r.e.). "In reviewing a case, the Appeals Panel should not set aside the decision of the hearing officer because the hearing officer may have drawn inferences and conclusions different than those the Appeals Panel deem most reasonable, even though the record contains evidence of or gives equal support to inconsistent inferences." Texas Workers' Compensation Commission Decision No. 91013, decided September 13, 1991.

Even if the hearing officer had determined, based on the conflicting evidence, that claimant did injure her left shoulder on (date of injury), and did timely report it that day to employer, there was no conflict in the evidence concerning her untimely filing of her claim on March 20, 1992, a date clearly more than one year after the injury date. Article 8308-5.03 provides relief for the untimely filing of a claim upon a showing of good cause. Claimant, a 16-year employee who testified to attending frequent safety meetings, said she did not read posters at work, was unaware of workers' compensation claims procedures and requirements, and had understood that employer's safety manager, whom she and her husband talked to on February 5, 1992, was "going to take care of everything." February 5, 1992 was a date more than one year after the injury date. Claimant's husband, a 15-year employee and supervisor, testified that he too was unfamiliar with claims procedures and requirements. The determination of good cause was for the hearing officer. He found that claimant did not have good cause for failing to timely file her claim and we cannot say such finding was an abuse of the hearing officer's discretion.

We will not substitute our judgment for that of the hearing officer where, as here, the findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ.). The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re Kings' Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge