APPEAL NO. 92601

On September 23, October 6, and October 9, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the date of any back injury suffered by the claimant was prior to (date of injury), that the claimant failed to prove that her back injury arose out of and in the course and scope of her employment with her employer, and that the claimant failed to give her employer timely notice of her alleged injury. The hearing officer further determined that the claimant was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Appellant, hereafter the claimant, contends that the date of injury as determined by the hearing officer is incorrect and that the correct date of injury is (date). Respondent, hereafter the carrier, responds that the findings of the hearing officer are supported by sufficient evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

From sometime in 1989 until May 28, 1992, the claimant worked as a crew leader in the employer's fast food restaurant. On June 22, 1992, she filed a written claim for compensation with the Commission stating that on (date), she injured her lower back in "daily activities such as lifting, wearing headphone, etc." On August 3, 1992 she filed an amended claim for compensation with the Commission stating that on (date), she injured her lower back in "daily activities - shorthanded during month of May. Lifting stock items & putting them away." At the hearing, the claimant testified that from (date of injury) through the month of (month year) she had to work extra hours at work, in some weeks working 16 to 20 hours of overtime, and that on Mondays and Thursdays the employer received "shipments" that she had to "put up." She said that the cases received in the shipments are "pretty heavy." No other description was given of the size or weight of the cases, the number of cases, the amount of time spent in putting up the cases, or the physical activity involved in that task.

The claimant further testified that "a few weeks later" she started to feel pain and that she told her manager that her back was hurting and that she believed that "it" was because of the extra hours she had been working and that "it had to have been having to put up all the stuff all the time."

(AA), a coworker, testified that the claimant was responsible for "putting up merchandise" two mornings each week. This witness said that the claimant stated to her on an unspecified date that her back was hurting from all the hours she worked.

Medical records showed that (Dr. R), D.C., treated the claimant from May 28, 1992 to at least September 17, 1992. He diagnosed an "acute traumatic lumbar/sacroiliac

strain." In a July 29, 1992 report, (Dr. R) wrote that "[b]ased upon the patient's subjective complaints, current complaints, physical examination findings, radiographic findings and treatment response, it is my opinion that this injury is consistent with the type of accident that [the claimant] has reported." There is no indication in that medical report of the type of accident the claimant reported, but in a May 28, 1992 report of patient case history the claimant, when asked to describe the circumstances of the injury, wrote that "I believe standing alot and lifting heavy objects."

The claimant's manager testified that sometime around (date), the claimant mentioned to him that she had felt "uncomfortable" at work the day before and that she could not sleep, but he said the claimant did not say her problems were work-related. He further testified that on May 25, 1992, the claimant called in sick and said she was going to see a doctor but did not tell him "it" was work-related. The manager said that he first learned that the claimant was claiming a work-related injury around June 10th when he was informed of that by (GG), who is a workers' compensation analyst for the employer. (GG) testified that the claimant called her on June 12th and told her that she wanted to file a workers' compensation claim for a back injury which was due to "working too many hours." (AE), the employer's case service representative, testified that she had reviewed the claimant's time records and found that the claimant had not worked 16 to 20 hours of overtime in any one week during the period April 6 through May 25, 1992. Her testimony revealed that the claimant had worked approximately 45 hours of overtime in an eight week period ending May 25, 1992. (BP), an insurance data analyst for the employer, testified from her telephone log, which was in evidence, that (Ch), who is (Dr. R's) office manager, called the employer on (date of injury) and inquired as to the status of the claimant's group health insurance, and that (Ch) made the same inquiry of the employer on May 28th and June 2nd. (Ms. P) further testified that the claimant inquired about the status of her group health insurance coverage on June 10th. (Ms. P) said that she told (Ch) and the claimant that the claimant had not enrolled in the employer's group health insurance plan and was, therefore, not covered by health insurance. As previously noted, (Ms. G) said that the claimant reported her back injury as a workers' compensation claim two days later, on June 12th. In a letter dated October 5, 1992, (CR) stated that the claimant was initially seen in (Dr. R's) office on May 28, 1992 for low back pain and that she, (CR), first called the employer to inquire about the claimant's health insurance coverage on June 3, 1992.

The issues at the hearing were whether the claimant injured her back in the course and scope of her employment, and if so, what was the date of her injury, and whether the claimant gave timely notice of her injury to her employer. Clearly, the claimant in this case was claiming a repetitive trauma injury. A "repetitive trauma injury" means damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment. Article 8308-1.03(39). In Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.), the court said that in order to recover for a repetitive trauma injury one must not only prove that repetitious, physically traumatic activities occurred on the job, but must also prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must

be inherent in that type of employment as compared with employment generally. In a contested case hearing held under Article 6 of the 1989 Act, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e). It has been stated that the fact finder may believe that the employee had an injury, but disbelieve the employee's testimony that he was injured at work. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936, 939 (Tex. Civ. App.-Texarkana 1961, no writ). Considering the distinct lack of evidence on the type, nature and frequency of work activities that were alleged to have caused an injury to the claimant, we conclude, after review of the record, that the hearing officer's determination that the claimant failed to prove that her back injury arose out of and in the course and scope of her employment is not against the great weight and preponderance of the evidence. We find no reversible error in the hearing officer failing to find that the "correct date" of injury was (date) as alleged by claimant in her appeal.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge