APPEAL NO. 92614

On October 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the claimant, (claimant), did not timely notify (employer), that he sustained an injury and that no good cause existed for the failure to timely notify the employer of the claimed injury. The hearing officer found no benefits were payable pursuant to the Texas Workers' Compensation Act (TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*.) (Vernon Supp. 1992) (1989 Act). Claimant appealed alleging certain findings of fact and conclusions of law were in error based on insufficiency of the evidence. Claimant also alleges he was denied due process because the employer had failed to comply with certain administrative requirements of the Texas Workers' Compensation Act (1989 Act). Respondent, carrier, filed a timely response.

DECISION

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

The claimant had filed two claims, for two separate dates of injury, with two docket numbers, and the hearing officer wrote two separate opinions. Claimant has combined his request for review of both the decisions in one document and, because the issue and the parties were the same with regard to both cases, the carrier has combined its responses into one document. However, because there were two decisions, two separate alleged dates of injury, and two docket numbers, we will address each case separately, as did the hearing officer.

This case involves an injury which occurred on or about (date of injury). On that date, claimant was employed as a meat selector for the employer when he was hit in the face by a meat carcass and suffered injuries to his face, teeth and dental work. Claimant asserts that he told (Ms. R) about his injury on (date of injury) and (date) and that he told (Ms. H) about his injury on (date). It is unclear from the testimony and evidence whether (Ms. R) and (Ms. H) were supervisory personnel. However, the uncontradicted evidence was that (Mr. W) was claimant's direct supervisor. To support his contentions, claimant submits a telephone log showing calls to the employer on the dates he allegedly reported the injury. The employer disputes these allegations and produced written affidavits from the individuals involved denying the calls were made to the named individuals or receiving any notification. The carrier's position is that the employer first received notification of the injury on May 22, 1992 when the claimant's supervisor, (Mr. W), was notified that medical bills for claimant's injury and treatment had been received in employer's office.

The issue framed at both the benefit review conference (BRC) and the contested case hearing (CCH) was:

Whether or not Claimant timely reported an injury to the Employer.

The hearing officer found in part:

Findings of Fact

5.On or before May 9, 1992, Claimant did not tell or otherwise notify anyone holding a supervisory or management position with Employer that he claimed an injury to his face.

6.Neither Employer nor any person in a supervisory or management position with Employer had actual knowledge of the injury claimed by Claimant on or before May 9, 1992.

7.In delaying reporting that he claimed an injury to his face in excess of thirty days from (date of injury), Claimant did not exercise the degree of diligence which an ordinary prudent person would have exercised under the same or similar circumstances.

and concluded that:

Conclusions of Law

2.Claimant did not timely report an injury to his face to Employer.

3.No good cause exists under the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. art. 8308-5.02 (Vernon Supp. Pamph. 1992), for Claimant (sic) failure to timely notify the Employer.

The claimant appealed the above quoted findings of fact and conclusions of law as being contrary to the evidence, citing transcriptions of a recorded statement of (Ms. R). The specific questions and answers claimant relies on are:

Q.Do you recall when uh (Mr. W) indicated to you that he had, that there had been some injuries?

A.. . . [u]h and he didn't say anything then like two weeks later Jim had come into the office. He doesn't come in very often and uh he said did you know that (claimant) got hurt? And I said no. And he says well he talked to somebody here. And I says, I asked everybody here and no one had heard anything like that.

Q.Do you recall what day he [Mr. W] came into the office?

A.No (J) here in and out all the time. I think it was you know like a couple of weeks after uh this had occurred cause I looked to see when the last time he had worked. You know cause that's what Jim was asking me is when's the last time (claimant) worked?

Q.Okay do you think he came in on, (Mr. W) came in in April or in May?

A.Uh I'd say early May or maybe the very end of April. I was on vacation for the last week of April a few days bits and pieces here but uh . . . And during the 15th, that's why (Ms. H) took that week I was on vacation. The 15th, 16th, and 17th, of that week.

Pursuant to Article 8308-5.01(a), an employee is required to notify the employer of an injury "not later than 30 days after the date on which the injury occurs." If an employee fails to notify the employer as required under Section 5.01(a), the employer and carrier are relieved of liability under the Act as provided in Article 8308-5.02. There are exceptions in Article 8308-5.02 if the employer or carrier have actual knowledge of the injury, Section 5.02(1), or if the Commission determines that good cause exists for failure to give notice in a timely manner, Section 5.02(2). Although claimant testified he called (Ms. R) about his injury on (date of injury) and (date), told (Ms. H) about the injury on (date), and submitted telephone logs showing calls to the employer's office on the days in question, it is still a fact determination for the trier of fact to determine the credibility of this evidence. The trier of fact must balance this evidence with statements from the parties involved denying receipt of those calls.

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 to the evidence. Article 8308-6.34(e). As the sole judge of the weight and credibility to be given to the evidence, when presented with conflicting evidence the hearing officer may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). Obviously, the hearing officer placed greater weight on the written statements of (Ms. R) and (Ms. H) where they unequivocally denied receiving the calls, than on the testimony of claimant. There is sufficient evidence to support the findings of the hearing officer.

Claimant, in his appeal, directs our attention to the transcription of certain questions and answers propounded to (Ms. R), quoted above, as proof that claimant had reported his injury and it was discussed by (Mr. W) and (Ms. R). As with the other testimony, this evidence was available to the hearing officer, who apparently either did not read the statements as claimant does, or does not assign them great weight. No date is given as to when the transcribed conversation took place. Claimant would have us believe it occurred on (date) or April 29, 1992, or perhaps May 5, 1992. In that claimant was not a party to the conversation, he had no way of knowing the date (Ms. R) was referring to. Further, in

response to (Mr. W) asking if (Ms. R) knew "that (claimant) got hurt," she replies "no, no one had heard anything like that." The transcription as a whole could lead one to believe that (Ms. R) learned of claimant's injury from (Mr. W), not from a call from the claimant. (Mr. W's) statement states that he did not learn of claimant's alleged injury until (date). A review of the statements and testimony supports the findings and conclusions of the hearing officer. We will reverse the hearing officer, based on insufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio, 1982, writ ref'd n.r.e.); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find.

Claimant also alleges that good cause for untimely notice exists because he was denied due process in that the employer failed to comply with Texas W. C. Comm'n, 28 TEX. ADMIN. CODE §§ 110.102, 160.1 and 110.106 (Rules 110.102, 160.1 and 110.106), and Article 8308-5.41(C). Without discussing each Rule or Article in detail, we note that all the cited sections deal with the employer's duty to post certain notices, duty to give notice of workers' compensation coverage to new employees, reports of safety violations and the duty to notify employees of the Ombudsman program. As the hearing officer pointed out during the hearing, whether the employer is complying with those rules is not the subject of the CCH procedure. There is no evidence regarding the relevance of these rules and certainly no evidence of the employer's failure to comply with those rules, or how they affected this case. It is the claimant's principal contention that he timely informed his employer, by means of telephone calls to certain individuals, of his injury.

There being ample evidence to support the hearing officer, we will not substitute our judgment for the hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge