APPEAL NO. 92616

On October 2, 1992, a contested case hearing was held in (city), Texas, before (hearing officer). The issues were whether the claimant suffered an injury in the course and scope of his employment with (employer) on or about (date of injury), and, if so, whether the claimant suffered disability as the result of compensable injuries and whether the claimant gave timely notice of his injuries to his employer. The hearing officer held that the claimant, appellant herein, did give timely notice of an alleged work-related injury to his employer. However, he also held that the claimant did not sustain an injury in the course and scope of his employment and that he has not suffered disability as defined in the Texas Workers' Compensation Act, TEX. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

In his request for review, the claimant contends that certain findings and conclusions are against the great weight and preponderance of the evidence, as well as inconsistent with admitted documents, and that as a matter of law injury in the course and scope of employment and disability have been established. The carrier urges that the challenged findings and conclusions were supported by sufficient evidence, but alleges error in the hearing officer's determination that the claimant timely notified his employer of an injury. The latter will not be considered on appeal, as it was not timely filed. We have previously held that points of appeal raised for the first time in a response will not be considered if not filed within 15 days after the decision of the hearing officer is received. Texas Workers' Compensation Commission Appeal No. 92109, decided May 4, 1992.

DECISION

We affirm the decision and order of the hearing officer.

Claimant testified through an interpreter that he had worked for (employer) for sixteen and one-half years as a machine operator helper. In his job, he worked on a flat die machine, which processes cards into cardboard boxes. On (date of injury), he said he was pulling a card bundle down from a pallet when the bundle came down on top of him. The impact pushed him backwards and he fell, hitting his lower back against a metal guide. He said he felt a pop at his waist, but that he continued to work. There were no witnesses to the accident because the machine operator, (Mr. O), was in front of the machine about 20 feet away. Claimant said on February 3rd he first told Mr. O and his supervisor, (Mr. W), that he had been injured on the job. On February 14th he said he made a special trip in the daytime to ask Mr. W to fill out an accident report (claimant testified that he and Mr. W worked different shifts). Claimant said Mr. W would not fill out an accident report because he had not seen anything. Neither Mr. W nor Mr. O appeared at the hearing, nor was any statement from either individual admitted into evidence.

Claimant first saw a doctor, (Dr. Ra), on February 6th. A patient report of that date signed by both claimant and Dr. Ra said, in part, "Has been seeing another Dr. for this problem x about 3 yrs. ago." A notation in another handwriting said in part, "Denies recent

injury." Claimant said he could not read much English and that he did not know the meaning of the notation. Claimant admitted he did not mention an accident to Dr. Ra, but said that Dr. Ra did not ask him about that. Claimant said the problem three years before was an "air problem" with his ribs for which he was seen by his family doctor, (Dr. J). He went to Dr. J for treatment as a result of the (month) injury, but he said that did not help him.

Claimant was next seen by (Dr. Ro) who diagnosed lumbar IVD/protrusion/herniation, ordered an MRI and CT scan of the lumbar spine, and referred claimant to (Dr. T). Both Dr. Ro's initial medical report dated February 19, 1992, and Dr. T's February 26th report noted an on-the-job injury. Dr. T performed EMG and nerve conduction studies, reviewed claimant's CT scan, and stated her impression to be herniated disk at L5-S1 with some displacement of the left S1 nerve root, and recommended a neurosurgical evaluation.

On May 19th claimant was seen by (Dr. M), who noted in his letter to Dr. Ro that claimant "was lifting some carton paper that is used to make boxes when he injured his back." Dr. M stated he had not yet seen all of claimant's available studies, but he opined the claimant was suffering from low back pain "that, based on the history and type of job he was doing, most likely is secondary to degenerative disk disease." On July 7th, Dr. M wrote that claimant's MRI showed evidence of a degenerated and herniated disk at the L5-S1 level, more toward the left side, and evidence of degenerative joint disease at the L5-S1 level.

Claimant stopped working for employer on February 6th because of his pain. However, he said he went back to employer to talk to employer's plant secretary, (Ms. D), about his medical bills. Claimant said at least one of these conversations occurred before February 28, 1992. Ms. D testified at the hearing, however, that she did not have notice that claimant was alleging a job-related injury until March, when she got a call from a doctor whose name she recalled as "(L)," asking to verify workers' compensation coverage. Approximately one month later, on April 21, 1992, Ms. D sent a letter to the carrier which stated the employer did not know claimant's injury was work-related until March 16, 1992. She stated that claimant called in sick and reported he was having back pain due to a kidney infection or flu soreness on February 6th, and that "at this time, I asked him if the back pain was due to a (sic) on the job injury. He stated, no it was not work related, it was soreness." She said that on February 14th he called in to say he couldn't work due to the pain in his back. In mid-March, when she received the call from "(Dr. L)", was her first indication that claimant considered this a workers' compensation claim. She testified that she spoke with an adjuster for carrier and told that person that Mr. W had been investigating claimant's alleged injury.

The hearing officer held that the claimant did give timely notice of a work-related injury to his employer, and that he did suffer a back strain and herniated disk, but that he did not sustain such injury in the course and scope of his employment. In his summary of evidence the hearing officer notes what the carrier has characterized as altogether

inconsistent and therefore not credible accounts of what gave rise to the claimant's back injury. In particular, the hearing officer notes the carrier's argument that the claimant never told any of the physicians he consulted that the injury occurred by falling against the machine.

Upon review of the record, we cannot say that the evidence supporting the hearing officer's decision is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). As the sole judge of the relevance and materiality of the evidence and the weight and credibility to be given the evidence, Article 8308-6.34(e), the hearing officer can believe all, part, or none of the testimony of a witness and can believe one witness over another. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer in this case may have chosen not to believe the claimant's testimony regarding the alleged injury at work, due to the variation between his testimony at the hearing and his accounts as given to his doctors. We note, for example, claimant's testimony that the bundle of cards fell on him and pushed him into the machine's guide, as compared to Dr. T's February 26th report, ("[t]he patient states that he was lifting a very heavy stack of machines (sic) and felt an acute onset of pulling and pain in his lower back region") and Dr. M's May 19th report, ("[h]e was lifting some carton paper that is used to make boxes when he injured his back.") In addition, Dr. Ra's February 6th patient report which states "denies recent injury," is in contrast with claimant's testimony. The hearing officer may also have believed the testimony of Ms. D, to the effect that claimant originally did not state that his back problems were job-related, and that claimant denied, in his conversation with her, that he had been injured on the job. In short, we find the hearing officer's decision and order to be supported by sufficient evidence of record. The decision thus will not be set aside, even though different inferences and conclusions could be reached from the evidence. Garza v. Commercial Insurance of Newark, NJ, 508 S.W.2d 701 (Tex. App.-Amarillo 1974, no writ).

The claimant argues in the alternative that even if the hearing officer's findings and conclusions of no injury in the course and scope of employment are upheld, this panel should not ignore the benefit review officer's conclusion that the carrier did not timely contest compensability pursuant to the 1989 Act (*See* Article 8308-5.21(a)). While it is true that the benefit review officer, in her recommendations and comment, essentially stated that the issue of injury in course and scope was not raised timely, and that, "My finding is that this issue is not a legitimate basis for a denial," the issue as framed remained "whether or not claimant sustained an injury in the course and scope of employment." As was discussed at the hearing, the issue before the hearing officer was injury in course and scope and not untimely contesting of compensability. The latter was not sought to be added as an issue by any of the means provided by the statute. *See* Article 8308-6.31. The hearing officer correctly did not address any issues other than those not resolved at the benefit review conference.

Finally, claimant also says Finding of Fact No. 7 incorrectly states that claimant

informed Mr. W on February 24, 1992, that his back pain was work related. This is undoubtedly a typographical error, as the following finding states that Mr. W held a supervisory or management position on February 14th. We thus reform Finding of Fact No. 7 to restate the date correctly as February 14th.

The decision and order of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge