APPEAL NO. 92623

A contested case hearing (CCH) was held on October 9, 1992 and the record closed on October 19, 1992 in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the appellant, claimant herein, did not sustain a repetitive trauma injury that arose out of and in the course and scope of her employment from (date of injury) to (date of injury), and denied her benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act).

Claimant timely appeals and requests a new hearing based on inadequacy of counsel and "for the purpose of the introduction of evidence that [her former attorney] had at his disposal . . . and with two other witnesses . . . ." The appeal recites certificate of service on Continental Insurance Company, carrier. The carrier did not file a response.

DECISION

The claimant's appeal, as noted above, is based principally on inadequacy of counsel and requests a new hearing based on unspecified evidence and witnesses which had not been introduced at the CCH. We are limited in our review to the record developed at the CCH, to include exhibits offered and admitted, the written request for review and the response, if any, in accordance with Article 8308-6.42. Consequently, we will review the record, exhibits and request for review for legal sufficiency. The notes of carrier's attorney, which were offered but not admitted, will not be reviewed.

The issues which were unresolved at the benefit review conference and were considered at the CCH were:

(1)whether claimant suffered a repetitive trauma injury in the course and scope of her employment; and

(2)whether claimant timely reported a repetitive trauma injury to employer.

Claimant was employed as a teller and vault teller for (employer) from (date of injury) to (date of injury). Claimant testified she was a regular teller, a vault teller, and was in charge of ordering and receiving supplies. Specifically, claimant's regular teller duties involved selling money orders and traveler's checks, pulling balances and account histories, and general customer services. Claimant testified this occupied 50% of her time. According to the evidence, in (month year) claimant assumed additional duties as a vault teller. As a vault teller, claimant testified that she had to remove money from the safe and place it on top of the safe, count coins, and place $50.00 worth of pennies in separate bags. On one occasion claimant alleges she lifted and carried several bags of $50.00 in pennies weighing approximately 30 pounds each. Claimant testified her duties required her to bend and stoop and she had to carry teller drawers containing coins twice a day. Claimant testified that she was responsible for ordering supplies and carrying the supplies from the

delivery door to the storeroom. Carrier disputed much of this testimony and presented witnesses who stated that claimant's duties as a teller and vault teller required only light physical exertion, there was a cart available for transporting bags of coins, that claimant only carried a bag of coins on two occasions, and that the delivery services transported the supplies or bags of coins to the appropriate location.

Claimant contends she began having problems with her back in October 1990, that the problems became worse, and that her duties as a teller and vault teller caused a repetitive trauma injury to her back or were an aggravation of her preexisting back condition. The testimony developed at the CCH indicated that claimant had sustained a back injury and had back surgery in 1981. Claimant subsequently injured her back and neck in an automobile accident, and again in a slip and fall accident in a store, prior to (month year). Claimant also concedes that she had been having some back pain and was taking pain medication and muscle relaxants from 1981 through (month year). Claimant's testimony, as well as other testimony, indicated that in early (month year), while in the process of moving from one residence to another, claimant, in moving a box of kitchen supplies, "felt [her] back pull." Claimant told her supervisor and one or more coworkers that she had injured her back at home while moving a box in (month year). Claimant's initial notice of injury, dated (date), reported a back injury on "(date) . . . @ home . . . lifting boxes." Claimant's amended notice of injury, filed by her attorney on July 14, 1992, reported injury to the whole body beginning on "(date of injury) [to] (date of injury), inclusive."

The medical records of (Dr. W), claimant's family physician, indicate the prescription of medication for back pain before (month year). The medical records of (Dr. S), the neurosurgeon who subsequently performed back surgery in August 1991, show a history of claimant stating ". . . that on (date) she was moving into a new home lifting on (sic) heavy boxes and felt something pull in her low back and left side." Dr. S's records indicate he first saw claimant on July 22, 1991 rather than earlier, as claimant testified.

Carrier denies that claimant suffered a repetitive trauma injury, contending that the medical report and evidence indicate claimant injured her back moving a box in her home on (date), that claimant had reported her back injury was not work related, that claimant had sustained previous injuries to her back, and that claimant had not given timely notice of the injury.

The hearing officer found, in pertinent part:

Findings of Fact

6. Claimant experienced severe back pain when she moved a box at home in early (month), (year). Claimant reported this incident to employer.

7. Claimant did not establish that her duties as a bank teller and vault teller were causally related to her back condition on (date) or to the lumbar

laminectomy performed at the L4-5 level of her back in (month), (sic) (year).

8.Claimant's original notice of injury did not notify employer that she was claiming a work-related injury to her back. Claimant did not establish that she gave employer notice of a repetitive trauma work-related injury.

The hearing officer concluded:

Conclusions of Law

4.Claimant did not establish by a preponderance of the evidence that she suffered a repetitive trauma injury that arose out of and in the course and scope of her employment from (date of injury) through (date of injury).

5.Claimant did not establish by a preponderance of the evidence that she gave timely notice to employer as required by Article 8308-5.01 of the Texas Workers' Compensation Act.

The claimant has the burden of proving that an injury occurred in the course and scope of employment. *See* Reed v. Aetna Casualty and Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The first issue is whether claimant suffered an injury as a result of repetitive trauma in the course and scope of her employment. The hearing officer, in Conclusion of Law No. 4, found that claimant did not. That conclusion is supported by the evidence. Evidence to the contrary is a specific incident on (date) where claimant felt a pull in her back while moving a box in the course of changing residences. This incident was reported to claimant's supervisor, coworkers and to the neurosurgeon who did back surgery on claimant. Claimant contends her back problems were the result of repeated lifting of coin bags and the carrying of teller drawers and supplies. Article 8308-1.03(39) defines repetitive trauma injury as "[d]amage or harm to the physical structure of the body occurring as a result of repetitious physical traumatic activities that occur over time and arise out of and in the course and scope of employment." Claimant admits to previous back surgery, to at least two accidents where she injured her back, and to taking pain medication and muscle relaxants since 1981. Claimant's contentions regarding the repetitive nature of her duties are disputed by coworkers and claimant's supervisor. Further, Dr. S's report of July 22, 1991 indicates claimant's injury is not work related. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. *See* Article 8308-6.34(e). The hearing officer, in Finding of Fact No. 7 and Conclusion of Law No. 4, clearly did not give as much weight to claimant's testimony as she did to the evidence to the contrary. The hearing officer's finding and conclusion on this point are supported by the evidence.

The other issue raised is whether claimant gave timely notice of the repetitive trauma injury to her employer. Claimant testified she complained to her supervisor and

coworkers of her back hurting. However, even the claimant's testimony is vague in relating such to her job duties. Claimant was characterized as a "hypochondriac" by one of carrier's witnesses and even claimant's coworker witness conceded claimant "complained a lot." Claimant, in her original notice of injury filed (date), indicates an injury to her lower back from "lifting boxes [at] home." It was not until claimant's attorney filed an amended notice of injury in (month year) that any mention was made of repetitive trauma. Article 8308-5.01(a) requires an employee to notify the employer of an injury not later than 30 days after the injury, or in the case of an occupational disease, within 30 days after the date on which the employee knew or should have known that the injury may be related to the employment. Article 8308-4.14 also defines the date of injury of an occupational disease as the date on which the employee knew or should have known that the disease may be related to the employment. As mentioned previously, claimant did complain of back pain to her supervisors, doctors and others but even the claimant's own testimony is vague on how the complaints were work related. The evidence to the contrary was specific that claimant did not allege a work-related aggravation or repetitive trauma injury. Claimant testified she continued to complain of back pain until (date of injury) when she was no longer able to work. Claimant had surgery in August 1991, and filed her original notice of injury alleging she hurt her back at home while moving on (date). It was not until July 14, 1992 that she first filed a notice of injury alleging repetitive trauma injury. The hearing officer obviously determined that whatever complaints claimant may have voiced to her supervisor or coworkers before (date of injury) did not constitute notice of injury. *See* Texas Workers' Compensation Commission Appeal No. 92044, decided March 23, 1992. The hearing officer found claimant did not establish that she gave employer timely notice of a repetitive trauma work-related injury as required by Article 8308-5.01. The hearing officer's finding and conclusion are supported by the evidence.

The decision of the hearing officer will be set aside 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 Co. v. Middleman, 661 S.W.2d (Tex. App.-San Antonio, 1983, writ ref'd n.r.e.). Claimant, by her own testimony of a history of back injuries, back pain, and taking medication prior to (month year), complaints to her supervisor and coworkers of hurting her back while moving in (month year), the history given to the doctors of hurting her back moving heavy items at home and the initial notice of injury reporting an injury at home during a move, would support the hearing officer's findings and conclusions. We will not substitute our judgment for the hearing officer, as trier of fact, when the challenged decision is not against the great weight and preponderance of the evidence.

We understand that claimant is asking us to remand this case for a new hearing in order that claimant can present evidence and witnesses that were not presented at the CCH. Claimant does not provide information as to the nature of the evidence that was not introduced or the nature of the testimony of the other witnesses. Clearly claimant's request is not based on "newly discovered evidence" because by claimant's own appeal the evidence was available at the CCH but just not used. *See* Jackson v. Van Winkle, 660

S.W.2d 807, 809 (Tex. 1983) and Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992, as to what constitutes newly discovered evidence. In Texas Workers' Compensation Commission Appeal No. 92547, decided November 30. 1992, claimant contended the CCH was unfair "because his attorney failed to subpoena his `crucial witnesses"' and claimant, as in this case, sought a remand for another hearing. In that case, unlike the instant case, we were able to determine the nature of the evidence claimant alleges was not presented. In this case we can only speculate what evidence claimant's attorney might have presented but did not. We have previously stated that the fact finder is the hearing officer and we are limited in our consideration of evidentiary matters to the record developed at the hearing below. Appeal No. 92547, *supra*, and Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. As we have pointed out, claimant's own testimony was sufficient for the hearing officer to find as she did.

We have reviewed the complete record and the admitted exhibits and determine that the hearing officer's findings of fact and conclusions of law are sufficiently supported by the evidence and that her decision is correct.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge