APPEAL NO. 92651

On October 26, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the appellant, hereafter the claimant, did not sustain a repetitive trauma injury to his back in the course and scope of his employment with his employer, (employer); that he did not give timely notice of his injury to his employer; and that he did not have good cause for failing to timely notify his employer of his claimed injury. The hearing officer ordered that the claimant is 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). The claimant states in his appeal that he is dissatisfied with the hearing officer's decision and contends that the decision is contrary to the evidence. The claimant requests that we reverse the decision and render a decision that he is entitled to workers' compensation benefits. In the alternative, the claimant requests a rehearing. Respondent, hereafter the carrier, responds that the evidence supports the hearing officer's findings, conclusions, and decision, and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The issues at the hearing were whether the claimant sustained a repetitive trauma injury on (date of injury) while working for his employer, and whether the claimant timely reported his injury to his employer. On April 21, 1992, the claimant filed a written injury report with his employer claiming that he injured his back through "three days of strenuous work setting up, taking down tables, chairs, multi-media screen for [employer's] 20th anniversary."

The claimant was 49 years old at the time of the claimed injury and worked for the employer as an account executive. Prior to being promoted to an account executive in January 1991, the claimant had worked for the employer as a driver for about three years which required lifting packages. In the early 1980s the claimant was in weight lifting competitions setting records in certain power lifting events such as dead lifting.

The claimant testified that in (month year) he was asked to help out with the employer's 20th anniversary celebration to be held on (date of injury). In preparation for the event, the claimant said that on February 10th he spent three to four hours at his home ironing wrinkles out of plastic banners. He said that this task required him to stand and bend over his kitchen table. On February 11th he said he worked his normal job until about 4:00 p.m. at which time he and a coworker, (Mr. C), assembled a 12 by 14 foot multi-media screen which took until 7:30 p.m. The claimant said that this task required him to stoop, bend, and stretch. The claimant said that on February 11th he also went around town and picked up a helium bottle and some carpet for the employer event. The claimant testified that on (date of injury) he arrived at work about 5:00 a.m. and blew up balloons with the helium and that "we" set up about 150 folding chairs and about 20 folding tables. He said

that "we" cooked and served breakfast about 8:00 a.m. and about 9:30 a.m. started disassembling the tables and chairs which he said took about an hour and a half. He said he disassembled 75 percent of the tables and chairs by himself. He testified that he worked side by side with (Mr. C) in taking down the chairs and tables, that the tables were the "usual fold-up type tables," that the chairs were folding plastic chairs, and that there was "nothing real heavy" about the chairs.

The claimant further testified that the next day, February 13th, he woke up with a backache. The claimant added that "and so we rocked along, and I, other than just the normal aches and the pain, until I didn't have--outside of the normal aches and pains, I didn't have any problem until March the 11th." He said that he did not miss any work from (date of injury) through March 11th. The claimant said that on March 9th he drove from (city), Texas, to (city), Texas, on several days business for his employer and that that evening and the next evening he did calisthenics. On March 11th, while he was still at a motel in (city), the claimant said he began "aching all over." He said he had nausea, diarrhea and extreme back pain. He said that that morning he was "locked down" and could not get out of bed. He said he thought he had the flu or food poisoning.

The claimant said he stayed in bed all day on March 11th and that he called into work and told a (Mr. E) that he was sick with flu symptoms. He said that on March 12th he called into work and reported to his supervisor, (Mr. Ca), that he had flu symptoms and that his back hurt. The claimant testified that he did not tell (Mr. Ca) on March 12th or 13th that his back problem was work-related. On March 13th, the claimant said that his family came to (city) and took him back to (city) and that on March 16th he went to (Dr. W), who suggested an MRI which was performed on March 17th. The claimant testified that on March 17th (Dr. W) told him he had three "slipped discs" and that he learned from (Dr. W) that his back problems were the result of an on-the-job injury. However, the claimant also testified that on March 17th (Dr. W) asked him "what type of strenuous work have you been under?" and testified that he and his wife then "sat down, and we went back, and that is when we pinpointed the repetitious work, the strenuous lifting, is when I did injure my back." The claimant testified that he sustained an injury to his low back on (date of injury) as a result of the bending, stooping, and lifting he did at the 20th anniversary event.

The claimant said that on March 17th he reported to (Mr. Ca) that he had a back injury that was work related and that he had injured himself working on the employer's 20th anniversary event. The claimant testified that prior to March 17th he was not able to recognize the nature, seriousness, or work-related nature of his back injury. He testified that about a week after returning from (city), (Mr. Ca) had asked him how he had hurt his back, and he said that he had no idea. The claimant further testified that on April 8th he told (Ms. W), who is the employer's workers' compensation case manager, that "the doctor" told him he had a job-related injury and told her that he hurt his back at the 20th anniversary event. The claimant said that he continues to have pain and difficulty with his back, wears a back brace, and is on a home exercise program. He said he was off work from March 11th to March 30th, and then he went to the hospital on April 12th with chest pains. He

said he was again off work from April 12th through either April 18th or May 18th. While he was off work he continued to receive his salary from his employer under a management disability program and his medical bills were submitted to the employer's group health plan. He testified that when he filled out the group health insurance forms he was confused and was afraid of losing his job if he claimed a work-related injury.

The claimant also testified that on February 13th he knew that he had been doing hard work, that his back hurt, that he knew it was because of the work he did on the 20th anniversary event, that his back continued to hurt him after that event, but that he did not know the extent of his injury. He said that to alleviate his back pain he did calisthenics, and sat in a whirlpool and a "steam and dry." He said he had worked out at a health club every day for 20 years. He acknowledged that he had had repetitive strains to his back over the years, but denied that he had had a back injury other than the one he claimed from the work he did for the employer's anniversary event.

(Mr. Ca) testified that he, the claimant, and (Mr. C) were involved in setting up the anniversary event for the employer. He said he saw the claimant set up six-foot long tables, plastic folding chairs, and a trade show display. He said the claimant worked setting up the event for two or three hours the evening before the event and for about 30 minutes the morning of the event. He said the claimant's activities involved some stooping, bending, and lifting. He denied that the claimant did 75 percent of the work taking down the tables and chairs. He said that about 10 people helped take down the event and that there were about 50 chairs and between 15 and 20 tables. He said it took about an hour to set up the back drop for the event, 45 minutes to set up the chairs and tables, and between 15 and 30 minutes to take down the event. He recalled that the claimant had told him that he, the claimant, had ironed the banners. He also testified that he did not observe the claimant exhibit any sign of a back injury in setting up or in taking down the event. He further testified that on March 11th or 12th he was told by (Mr. E) that the claimant was at a motel in (city) and had a bad case of diarrhea. He said he spoke to the claimant on March 12th or 13th; however, the claimant did not tell him anything about his back hurting. He also said that a few days after March 13th, the claimant told him his back was hurting but did not mention to him that his back problem was related to the work the claimant did at the anniversary event. He said that when he asked the claimant what happened, the claimant said "I have no idea what happened." This witness testified that he found out from (Ms. W) on or about May 7th that the claimant claimed a work-related injury, and that the claimant never told him that he had sustained a back injury at the 20th anniversary event.

(Mr. C) testified that he worked with the claimant in setting up and taking down tables and chairs at the anniversary event. He said that several people were helping them and that he did not think that the claimant did 75 percent of the work taking down the tables and chairs. He did not recall the claimant complaining of hurting his back and he said the claimant gave no indication that his back was hurt.

(Ms. W) testified that on April 6th, 7th, or 8th the claimant told her about the

"possibility" of having a workers' compensation claim from an injury he sustained on (date of injury), that she told him that he needed to file an injury report with the employer, that there would be a problem with late reporting of the injury, and that "we" could be in trouble for late reporting of the injury. Her testimony revealed that she knew prior to her conversation with the claimant that he had been off work due to back problems. However, she testified that the claimant had been receiving his salary while off work under the employer's management disability program and that the employer's benefits staff had processed the claimant's off work status as resulting from an off-the-job injury or illness and was unaware of any claim of a work-related injury.

Medical records and reports showed that the claimant was examined by (Dr. W) on March 16, 1992, and was diagnosed as having myofascial low back pain and marked restricted range of motion of the lumbo sacral spine. The history of the claimant's injury as recited in (Dr. W's) March 16th report stated that the claimant had an insidious onset of low back pain a week to 10 days prior to his visit to the doctor. The history recorded that the claimant was traveling, was in a hotel, and had severe pain in his low back, but does not mention anything about lifting, bending, or stooping activities at work or the anniversary event. (Dr. W) noted that the claimant has been very athletic with weight lifting and other sporting activity and has had repetitive strains of his back, but nothing that ever persisted. An MRI of the claimant's lumbar spine performed on March 17th revealed: 1. degeneration with desiccation of the discs of L1-2 and T12-L1 with central disc protrusion at T12-L1; and, 2. small lateral disc protrusion at L3-4 on the left side. Nerve conduction studies and electromyographies done on March 18th and 25th showed no evidence of entrapment neuropathy nor radiculopathy. (Dr. W) took the claimant off work until April 6, 1992 when he released him to work half-days at light duty work. He again took the claimant off work on April 17th and released him to work half-days at light duty work on May 18th. At (Dr. W's) recommendation, the claimant had physical therapy treatments for his back. (Dr. W) first mentioned the claimant's work activities from February in a report dated April 3, 1992. In reciting the history of illness in that report, he stated that the claimant had an acute onset of mid low back pain approximately the first part of March. (Dr. W) went on to state that in the middle of February, the claimant assisted in setting up a presentation, that he was bent over for hours trying to put up a multi-media screen, that he carried many tables and chairs, and that he has had some aching after that but really started having pains approximately two weeks after that. (Dr. W) then stated that:

> It could have been a combination of overexertion in that area as well as driving that brought about the severe back pain. However, his MRI does show some significant degenerative disc changes. He has seen Dr. Meyer who feels that this is non-surgical in nature. He wants an orthopedic opinion and would like (Dr. T) to see him and I agree.

In a May 18th report, (Dr. W) repeated the history of injury recited in his April 3rd report but added that "[i]t is within reasonable medical probability that the patient sustained a significant injury to his low back from the above activity." In another report dated May

18th, (Dr. W) stated that "[t]here is some difficulty with making this a work related injury. It is causing a lot of financial difficulty for the patient." In a report dated June 29, 1992, (Dr. W) noted that the first mention in his records of the claimant's activities in regard to setting up a screen and moving tables in February was in his report of April 3rd. (Dr. W) then explained that "[h]owever, I distinctly remember the patient talking to me about this possibility in the hallway at my office. I assume that was either after the March 18th or the March 25th visit. I don't remember the exact date." (Dr. W's) assessment of the claimant's condition on June 29th was discogenic low back pain.

(Dr. W's) oral deposition was taken on September 8, 1992. (Dr. W) testified that improper lifting places stress on the spine and could definitely aggravate the claimant's condition and cause pain; that his findings on examination were consistent with the history provided to him by the claimant; that the claimant had significant spine disease and the type of activities that the claimant described were definitely enough, within reasonable medical probability, to act adversely "on that" to cause pain; and that carrying tables and chairs away from the body puts a lot of torque on the spine and the forces would be great enough that they could aggravate or injure "that area of the spine." When asked for his opinion as to whether the claimant sustained an injury on (date of injury), assuming that the claimant was taking down tables and chairs and setting up multi-media screens, (Dr. W) responded that "with the historical information provided by [the claimant], I felt that there was reasonable medical probability that that could cause his area of pain." (Dr. W) also testified that he was not going to say that the claimant's disc collapsed "at that time" or protruded since he had no way of knowing when that happened, but that there probably was damage to soft tissue structures. (Dr. W) agreed that degenerative disc disease is something that can take place over a period of time and can be chronic, and that desiccation of a disc can be something that is not necessarily acute, but may have been there for a period of time. (Dr. W) acknowledged that the claimant did not tell him on his initial office visit that he got hurt on or about (date of injury). He testified that his opinion as to the cause of injury was based on what the claimant described to him. He also testified that the claimant's back injury could have as easily been sustained at home, at play, or away from work. He further testified that he rarely had a patient that didn't know they hurt themself; it was just a matter to what degree. He added that it sometimes takes three or four days to know if it is going to be a significant injury.

In a letter dated May 20, 1992, (Dr. T) stated that "[i]t is my opinion that the back symptoms that [the claimant] is presently experiencing are work-related." There is no mention of what, if any, repetitious, physically traumatic activities at work caused the claimant's back symptoms.

The hearing officer found that the claimant did not injure his back by repetitive lifting on (date of injury), and further found that the claimant did not sustain a repetitive trauma injury to his back while working for his employer on (date of injury). The hearing officer concluded that the claimant did not sustain a compensable injury on (date of injury). The claimant disagrees with the findings and conclusion and contends that the evidence

establishes that he did sustain a repetitive trauma injury to his back while working for his employer on (date of 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 (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 also prove that a causal link existed between these activities on the job and one's incapacity. Under Article 8308-6.34(e) 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. We should not set aside a hearing officer's finding unless it is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Texas Workers' Compensation Commission Appeal No. 92171, decided June 17, 1992. Having reviewed the record, we conclude that the hearing officer's findings that the claimant did not sustain a repetitive trauma injury are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. There was conflicting evidence on the extent and duration of the claimant's physical activities in regard to setting up and taking down the items used in the employer's anniversary event; the claimant did not mention his February work activities to (Dr. W) on his initial visit to him which occurred over a month after the anniversary event; and the claimant related his back problem to the anniversary event only after (Dr. W) inquired as to his activities. It has been stated that, generally, opinion evidence of expert medical witnesses is but evidentiary and is not binding on the trier of fact. *See* Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). (Dr. T) gave no indication as to what, if any, activities at work he thought had caused the claimant's back symptoms, thus his opinion was not so persuasive as to compel the hearing officer to find for the claimant on the issue of repetitive trauma injury. Having reviewed the deposition testimony of (Dr. W), we cannot conclude that his testimony was so compelling on the issue of repetitive trauma injury as to require the hearing officer to find for the claimant. For one thing, his opinion was based on the history of the injury as described to him by the claimant. That description was the subject of conflicting testimony as was the extent and duration of the claimant's physical activities at the anniversary event. (Dr. W) also opined that the claimant's injury could have occurred just as easily at home or at play. The hearing officer had before him evidence that the claimant performed exercises shortly before his back started hurting on March 11th. Considering (Dr. W's) opinion as to when the injury could have happened, the hearing officer was not required to rule out the possibility that the claimant's back hurt as a result of physical activities not related to work.

In regard to the notice of injury issue the hearing officer found that:

Findings of Fact

6.On or before March 13, 1992, claimant did not tell or otherwise notify anyone holding a supervisory or management position with the employer that he claimed an injury to his back.

7.Neither the employer nor any person in a supervisory or management position with the employer had actual knowledge of the injury claimed by the claimant on or before March 13, 1992.

8.In delaying reporting that he claimed an injury to his back in excess of 30 days from (date of injury), the claimant did not exercise the degree of diligence which an ordinary prudent person would have exercised under the same or similar circumstances.

From the above findings, the hearing officer concluded that the claimant did not timely report a repetitive trauma injury to his back to his employer, and further concluded that no good cause existed for the claimant's failure to timely notify the employer. The claimant contends that the evidence establishes that he did give timely notice of his repetitive trauma injury to his employer, and that good cause existed for his failure, if any, to timely notify his employer of his injury.

A repetitive trauma injury is an occupational disease. Article 8308-1.03(36). Article 8308-5.01(a) provides that if an injury is an occupational disease, the employee shall notify the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. The hearing officer made no finding as to the date on which the claimant knew or should have known that his injury may be related to his employment. Instead, the hearing officer simply determined that the claimant had not given notice within 30 days of (date of injury). In order to determine whether notice of injury was timely in regard to a repetitive trauma injury, the hearing officer should first make a finding as to the date the claimant knew or should have known that his injury may be related to his employment. A finding in regard to the date the claimant knew or should have known that his injury may be related to his employment could have also impacted the hearing officer's adverse determination on good cause for failure to give timely notice. However, since we have upheld the hearing officer's finding that the claimant did not sustain a repetitive trauma injury as claimed, the hearing officer's failure to make a finding in regard to when the claimant knew or should have known his injury may be related to his employment does not amount to reversible error. For the same reason, error, if any, on the part of the hearing officer in finding adversely to the claimant on the issues of timely notice of injury and good cause for failure to give timely notice would not amount to reversible error. The finding of no compensable injury, which we have upheld, precludes entitlement to benefits. Although it does not change our decision, we note that there was evidence that the claimant did not know the extent of his injury or appreciate the seriousness of his injury until about March 17th. A bona fide belief of an injured employee that his injury is not serious is sufficient to constitute good cause for delay in giving notice of injury. Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960,

no writ). The employee has the burden to show good cause for failure to give timely notice of injury to his employer. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.)

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge