APPEAL NO. 92661

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On November 10, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether the claimant, (claimant), was injured on (date of injury), while employed by (employer). Also in issue were whether the claimant notified his employer of injury within 30 days after its occurrence, and whether the claimant made a binding election of remedies by applying for short term disability benefits offered by the employer. The hearing officer determined that no binding election of remedies was made; however, the hearing officer found that the claimant had not sustained an injury in the course and scope of employment on (date of injury). The hearing officer further determined that he had not given notice of his injury within 30 days to his employer, and had not shown good cause for failure to do so.

The claimant has filed an appeal that takes issue with the hearing officer's findings on various points of evidence. The claimant argues that the hearing officer erred by failing to consider whether a repetitive trauma injury occurred. The claimant claims good cause for failing to notify his employer within 30 days because of good faith belief his injury was trivial. The claimant points out that his employer knew about the injury within 30 days. Finally, the claimant contends he was harmed by exclusion of a memo from the employer's vice president. The carrier responds that the decision is supported by the evidence, and points out that the appeal is based on many facts not in the record of the hearing.

DECISION

We affirm the hearing officer's decision that the claimant did not sustain an injury on (date of injury). We reverse his determination regarding the effect of lack of notice, however, and render a decision that no notice was required because an exception under Article 8303-5.02(1) applies, in that the supervisor's testimony supports actual knowledge of claimant's back injury and its possible relation to work within 30 days.

I.

FACTS

On a date that the claimant described as "on or about" (date of injury), he stated that he was working in the employer's warehouse, lifting some hose reels and lengths of hose. The employer sold hydraulic and pneumatic equipment for industrial use. He felt a pull in his leg when moving a reel of hose that he estimated weighed about 90 pounds. The claimant said that the pain eventually increased to the point where he could hardly walk, so he went to his family physician at the (city) (clinic), (Dr. L), on February 20, 1992. Dr. L diagnosed stress and, with regard to his leg, tendinitis of the hamstring.

The claimant said he went to the clinic the next day and saw (Dr. B), the after-hours

physician, who first told him that his condition could be related to his back. The claimant testified that the clinic assigned whatever doctor was available each time he returned to the clinic, and there was no guarantee that the doctors would be the same. He saw (Dr. M) on February 25th, who ordered a CT scan. On the 28th, (Dr. S) reviewed the CT scan with claimant, and noted a L4-L5 herniated disc. The claimant had back surgery on March 6, 1992 to remove his disc. The claimant was discharged from the hospital on March 8, 1992. In mid-June, 1992, the claimant returned briefly to work in an office job for the employer, but the job was terminated July 6th due to lack of funds. He said that he could not return to lifting work he had done most of his life because he was still under restrictions, and that prospective employers did not offer jobs once they found out he had a back injury.

The claimant said that his job was described as inside sales and warehouse, that his supervisor, (Mr. P) directed him that his work was "primarily" in the warehouse, and that he in fact worked about 30% of his time in the warehouse. His work also involved customer service, answering the telephone and taking orders. At the time of his injury, he had worked for employer for a little over three years. He stated that no back problems were detected in an x-ray that was part of his required preemployment physical. The claimant stated that he received a letter from Mr. P dated March 15, 1992, telling him that his paid leave was used up and his pay would be discontinued.

The claimant stated that he discussed with Dr. S that his injury was work-related, and that Dr. S told him he had a year to file a claim. Under cross-examination about what he told other doctors about his injury, the claimant admitted that he did not tell Dr. L or the others that he was hurt at work, but that he did tell each doctor he hurt himself lifting "something." He said that he did not tell his surgeon that the injury was work-related until after his surgery. His explanation was that he was initially interested in fixing the problem.

The claimant stated that he had a conversation on February 23, 1992 with Mr. P. He said that while he never told Mr. P "exactly" that he was hurt while lifting in the warehouse, he assumed that Mr. P knew because Mr. P saw him limping around the workplace, and, further, Mr. P asked him on February 23rd if he intended to file a workers' compensation claim. The claimant said that he was afraid to file workers' compensation because of the negative impact he thought it might have, and that he told Mr. P that he would file for short term disability benefits through the employer instead.

The claimant said that he talked to the employer's payroll clerk, (Ms. SB), on March 12, 1992, and asked her about filing for workers' compensation. He stated that she told him he had to file within 24 hours, and referred him to (Ms. CM), the company vice president. Both Ms. SB and Ms. CM were located at company headquarters in North Texas.

Mr. P stated that he was in charge of the employer's (city) branch office. He said that claimant did not tell him that he had a work-related injury, and that he had no knowledge of the (date of injury) injury. Mr. P testified that he was aware that claimant was going in for back surgery, and that they had a conversation about this in the third or fourth week of

February. The carrier's attorney asked Mr. P: "Was there a conversation between you and Mr. Smith about whether or not he'd hurt his back on the job?" Mr. P replied, "I wasn't aware that he had hurt his back on the job until he told me that he was going in for surgery." Mr. P agreed he then asked claimant if he was going to file under workers' compensation or group insurance. Mr. P agreed that he had seen claimant in pain around the workplace on his last day of work.

Mr. P stated that he had knowledge, from a conversation with the claimant, that the claimant was building a retaining wall with cross ties. The claimant cross-examined Mr. P about whether he recalled that claimant was building the wall with rocks, rather than with cross ties, and Mr. P stated he did not recall. (There is nothing further in the record about the building of the wall, and no evidence to support the claimant's argument on appeal that the retaining wall was built almost a year before the injury; the claimant's wife attended the hearing but the claimant told the hearing officer that he did not intend to call her as a witness). Mr. P denied that claimant ever told him that he did not want to file a worker's compensation claim because he feared a stigma.

Ms. SB stated that the first time that the claimant told her he was injured on the job was March 23, 1992. She recalled that it was around April 16, 1992, that she received a statement from claimant that he was unable to work, along with some doctor bills annotated with references to workers' compensation. Ms. CM, the company vice president, said that she told claimant that she thought a 24 hour "waiting" period was required, but later corrected herself after checking with the carrier. Ms. CM said that she was first contacted by claimant on April 16, 1992 about his injury, and that claimant did not know for sure when he hurt himself. Under cross-examination, the claimant brought out a note that she had written somewhere in his employment records: "Stat equals expenses, wrongful termination, he terminates himself, we're okay." Ms. CM states that she felt that she was writing down notes based on what an employee of the carrier was telling her about the new law, but she had no recollection as to what these words were intended to mean. A long discussion took place regarding the relevance of this document to the issues of injury or notice, and the document was ultimately not admitted. Ms. CM stated that it was more costly for the employer to bear the expense of short term disability than of workers' compensation benefits.

The preemployment x-ray report submitted by the claimant stated that as of October 20, 1988, claimant had a mild disc space narrowing at L4-5 and L5-S1 without other specific findings. It notes the lack of evidence of trauma or lesions.

Records from the clinic show that on February 20, 1992, Dr. L recorded a long history of various complaints that claimant said had troubled him, including headaches, difficulty sleeping, fatigue, and stress. Dr. L noted that he was also having some discomfort on the left hamstring, usually upon movement, and that "[t]here is no history of trauma." Dr. L noted also that, upon examination, there was no tenderness over the lumbar spine or sacroiliac joint, and that claimant had full range of motion with discomfort only in the

hamstring. He noted that the claimant was quite obese.

The next day, records from the clinic show increased pain, including back pain, and diagnose muscular back strain and spasm. A herniated disc was diagnosed by February 28th at L4-5. No reference is made in any notes leading up to and including this diagnosis of any work-related incident, or any lifting incident in general. A presurgical report from (Dr. T), a neurosurgeon, dated March 4, 1992, states that "[t]here is no known precipitating incident for this problem."

II.

PRESENTATION OF EVIDENCE

The claimant indicates that there was other evidence he could have presented but that he was counselled by the ombudsman that some of it could be used against him. The record indicates that the claimant conducted most of his case himself, although the ombudsman asked the claimant some questions to bring out important information about the claim. There is nothing on the record which indicates that the ombudsman precluded the claimant from presenting evidence important for his claim.

III.

WHETHER THE CLAIMANT PROVED THAT HE WAS INJURED IN THE COURSE AND SCOPE OF EMPLOYMENT

At the beginning of the hearing, the claimant asked to broaden the issue of injury to include repetitive trauma, and, therefore, the date of injury could be on, about, or after (date of injury). No formal ruling was made, but the hearing officer noted that repetitive trauma was included in the claimant's response to the benefit review conference report, and entered this as a Hearing Officer's Exhibit, without objection.

We have noted in previous decisions that the hearing officer is at liberty, if the evidence warrants it, to find that an injury occurred on a different date than the date alleged on the claim.[1] In this case, the claimant stated generally that he worked in the warehouse around three days a week, or 30% of his overall time, and he described the various activities and objects that he moved or lifted. But there was nothing in the record concerning specific actions of a repetitive nature, as opposed to a discreet incident, that would have led to the claimant's back injury. It is clear that the hearing officer did not agree that the claimant sustained his injury on the job through his activities, either on (date of injury), or (by implication) through repetitive trauma. Consequently, the fact that the hearing decision did not recite repetitive trauma as part of the summary of the claimant's position is not error in

[1]Texas Workers' Compensation Commission Appeal No. 92022, decided March 11, 1992.

light of acceptance of claimant's response into the record, as well as the lack of evidence in the record supporting repetitive trauma injury.

The hearing officer indicated that the nature of activities that the claimant described could lead to a back injury. The hearing officer apparently considered, however, the totality of evidence, including the fact that the claimant did not say he was injured at work at a time close to the detection of the herniated disc. While a history of an accident in medical records, derived from an injured worker, is not good evidence to prove that an injury in fact occurred[2], evidence of a claimant's failure to tell his doctor how an accident happened can be admitted and considered as an "inconsistent statement" to a contention that injury occurred on the job.[3] Therefore, the hearing officer could consider the doctors' notes as tending to prove that a job-related incident had not occurred. While it is true, as claimant argues, that one cannot control what doctors write down, the number of doctors involved, the definite statements from two of them that there was no known incident causing the condition, the claimant's admission at the hearing that he told no doctor but Dr. S that the condition could be work-related, and the lack of any notes to this effect in Dr. S's records, are factors which lend more weight to the lack of a work-related injury history as it relates to occurrence of an injury.

The evidence also indicates, and claimant admitted, that he did not tell Mr. P that his back pain was related to the warehouse. Mr. P disputed that claimant ever told him that he feared his job would be stigmatized by filing a workers' compensation claim. The inference to be drawn from the limited testimony about claimant's building of a retaining wall was that this activity took place in the same time frame that claimant said he was injured. The hearing officer could have determined that the herniated disc was a consequence of a condition that flowed from the disc space narrowing indicated in the preemployment x-ray. In summary, although the record contains evidence that could lead to inconsistent inferences, the decision of the hearing officer is not so against the great weight of evidence so as to be manifestly unfair or unjust that a different conclusion is warranted.

IV.

WHETHER THE CLAIMANT GAVE TIMELY NOTICE OF INJURY OR WHETHER AN EXCEPTION TO NOTICE APPLIES

The earliest two dates that either party admits as a clear notice of a work-related back injury is March 12th (claimant's testimony) or March 23rd (Ms. SB). Both dates are more than 30 days after the date of injury found by the hearing officer.

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[2]Presley v. Royal Indemnity Insurance Co., 557 S.W.2d 611 (Tex. Civ. App.- Texarkana 1977, no writ).

[3]Texas Employer's Insurance Ass'n v. Smith, 592 S.W.2d 10 (Tex. Civ. App.- Texarkana 1979, no writ).

The claimant argues that he initially thought his injury was trivial and not related to the back. This is supported by Dr. L's February 20th report. However, by the next day, the medical notes indicate that the clinic's after hours doctor speculated that his back was injured. The herniated disc, clearly not a trivial condition, was confirmed to claimant on February 28th. This was still within the 30 day time period for giving notice.

While the belief that an injury is trivial can constitute good cause for failure to give notice or file a claim, the good cause must continue up to the date that notice is eventually given.[4] In this case, the hearing officer's determination that this was not good cause is not erroneous.

What is more troublesome is that the hearing officer has apparently overlooked another exception that is subsumed in the issue of timely notice: whether the employer had actual knowledge of a work-related injury. If an employer has such knowledge, then an employee's failure to give notice does not relieve the carrier of liability. Article 8038-5.02(1). Such actual knowledge need not apprise the employer of the exact time, place, and extent of the injury, but only of the general nature of the injury and the fact that it may be job related.[5]

In this case, Mr. P was clearly a supervisor qualified to receive notice. His testimony (including the questions and answers recited above) indicated that while he denied that claimant told him directly that he was injured (which was consistent with claimant's own testimony), he was aware that claimant was in pain. He admitted that "I wasn't aware he had hurt his back on the job until he told me he was going in for surgery." In this context, Mr. P (and not the claimant) raised the question of whether claimant intended to file the injury as workers' compensation. The sufficiency and scope of what is "notice" of injury under the 1989 Act (and the exceptions thereto) should be liberally determined because the purpose of notice is to allow prompt investigation of facts underlying an injury.[6] Mr. P's knowledge, however derived, is under the facts of this case enough to trigger the exception set forth in Article 8038-5.02(1). Because he said that he was aware that claimant's back injury was work-related the third or fourth week of (month year), within the 30 day period, claimant's failure to give notice does not release carrier from liability.

V.

WHETHER EXCLUSION OF CM'S MEMO NOTES WAS ERROR

Finally, the claimant contends that it was error for the hearing officer to refuse to

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[4] Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.- Corpus Christi 1991, no writ)

[5] DeAnda v. Home Insurance Co., 618 S.W.2d 529, 533 (Tex. 1980).

[6] *See* DeAnda, cited *supra.*

admit Ms. CM's notes. We would agree with the hearing officer that they seem to be of marginal relevance on the issue of whether an injury took place or not. Because they reflect a conversation Ms. CP says she had with the adjuster in April 1992, they were made after the occurrence of the injury and first notice. Admission of these notes, which would seem to indicate an awareness that the employer could not lawfully terminate an injured worker for filing a compensation claim, would not have caused the hearing officer to reach a different result or conclude that the witnesses for the employer were not truthful. Most of the evidence in support of the hearing officer's decision came from the medical records or the claimant himself.

We reverse the hearing officer's determination on the issue of notice and render a decision that the exception set forth in Article 8038-5.02(1) applies. However, because notice of an alleged claim does not prove that an injury actually occurred, our reversal of this issue does not affect our affirmance of the hearing officer's decision on the issue of injury.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge