APPEAL NO. 92694

A contested case hearing on remand was held in (city), Texas, on September 30, 1992, (hearing officer) presiding as hearing officer. The issues on remand as set forth in our decision, Texas Workers' Compensation Appeal No. 92271, decided July 30, 1992, involved whether the respondent (claimant) had given timely notice of injury to a person in a supervisory capacity and whether there was disability. The hearing officer determined on remand that the claimant had timely notified a person "who was functioning in a supervisory capacity" for the employer at the time and that there was disability. Appellant (carrier) urges error in the hearing officer's determination that the person to whom the notice was given held a supervisory or management position and argues that the hearing officer's conclusion that the claimant had disability is against the great weight and preponderance of the evidence. Claimant asks, in response, that the decision of the hearing officer be affirmed.

DECISION

Determining that the curative action required by our remand has been completed and that there is sufficient evidence to sustain the hearing officer's findings and conclusions, we affirm the decision.

The hearing officer officially noticed the complete record and decision from the original hearing. The evidence considered in the earlier hearing in this case was set forth in our previous decision and will not be repeated here. Appeal 92271, *supra*. At the hearing on remand, the claimant testified and the carrier called one witness, the customer services manager for the employer. The claimant reiterated some of his testimony at the first hearing and again stated the he believed Mr. M.D., the lead frozen foods clerk, was a supervisor to whom he could report an injury and that he did so that day following his injury. He also indicated that he reported his injury to another person in a supervisory position although it was not clear if this was done within the statutory 30 day period. He testified that he did not think the injury was serious at first and indicated that it was a reason he did not report the matter, apparently referring to someone in upper management. He acknowledged that he told Mr. M.D. and the other person in a supervisory position not to mention the injury to upper management because he was in fear of losing his job.

The customer services manager testified at the original hearing that Mr. M.D. was only a supervisor over himself and that he was not a supervisor over the claimant. At the rehearing, he testified that Mr. M.D. was not authorized to hire, fire, terminate or discipline in his position, and that Mr. M.D. was the lead frozen foods clerk. The customer services manager acknowledged that during the November time frame when the claimant states he was injured that there was a lot of upheaval and disarray in the department and that there were a number of changes in positions during that time. In answer to a question if it was hard to tell who was in what position in November, he answered that "[t]here was a lot of experimentation going on in that time frame . . . [i]t's not hard for me to know who should have been doing what . . . [t]he problem was is (sic) that about half of the department was doing things on their own, cowboy style, instead of having someone directly in charge and

responsible setting their goals and setting their job duties."

Regarding the matter of the claimant's disability, the evidence consisted of the claimant's own testimony, the testimony of Mr. M.D. that the claimant did appear injured when he reported the matter to him, and the medical records which showed the nature of the claimant's injury and his being taken off work on January 6, 1992 and his subsequent return to work. This, we find, was sufficient to support the hearing officer's determination that the claimant had disability between January 6 and May 18, 1992.

Regarding the matter of the notice, we pointed out in our previous decision, and again mention here, that the evidence was somewhat conflicting and unclear as to who held a "supervisory" position at any given time. Although there was testimony that Mr. M.D. had no authority to hire, fire, terminate or discipline, the evidence also showed he held a title as "lead" clerk in a department, that he thought he was a supervisor, and that there was confusion, even on the part of the customer services manager, as to who held what position or had what authority during critical times involved in this case. Under these circumstances, we cannot state that there was an insufficient basis or insufficient evidence to support the hearing officer's determination that at the time the claimant reported his injury, Mr. M.D. was the head of a department and was functioning in a supervisory capacity. That he may or may not have been a supervisor of the claimant at the time is not pivotal to the finding since the 1989 Act does not require that there be a direct supervisory chain, only that the person to whom a report is made holds a supervisory or management position. Article 8308-5.01(c). Our holding in Texas Workers' Compensation Commission Appeal No. 92125, decided May 4, 1992, is consistent with the decision in this case. In Appeal No. 92125, the facts supported the hearing officer's determination that a truck driver's partner was only an employee for purposes of the notice of injury in that case. Here, it was appropriate, under the circumstances, for the hearing officer to give a less grudging reading and application of Article 8308-5.01(c) to the facts. *See generally* Texas Workers' Compensation Commission Appeal No. 92661, decided January 28, 1993. Even though different inferences might reasonably be drawn from the evidence, this is not a sound basis to overturn the findings and determinations of the fact finder. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

We share the concern of the carrier that the claimant here asked that Mr. M.D. not tell upper management about the injury for fear of being terminated. Clearly, this thwarts one of the very purposes of making timely notice: to afford the employer and carrier the opportunity to promptly and timely investigate an alleged injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). It is a factor that can appropriately be taken into account by a fact finder. However, it seems axiomatic that once a supervisor has been advised of an injury, it is incumbent upon him in fulfilling his responsibility to management to take required actions.

Finding sufficient evidence to support the determinations of the hearing officer and

concluding that those determinations are not so against the great weight and preponderance of the evidence not to be clearly wrong or unjust, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge