APPEAL NO. 92719

On November 12, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issues at the hearing were whether the claimant sustained an injury in the course and scope of his employment on (date of injury 1); whether he timely notified his employer of his injury; and whether the claimant had disability. The hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment on (date of injury 1); that the claimant did not timely notify his employer of his alleged injury and did not have good cause for failing to give timely notice; and that the claimant did not have disability. The hearing officer decided that the carrier was not liable to the claimant for workers' compensation benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The appellant, hereafter the claimant, disagrees with the hearing officer's decision and with certain findings of fact made by the hearing officer. The respondent, hereafter the carrier, requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified that he sustained a work-related injury while working for his employer, (employer), in April 1990, which claim he settled in April or May of 1992; that he injured his back at work lifting a cable on (date of injury 2) (the claim for the alleged injury of (date of injury 2) was the subject of a separate hearing and Texas Workers' Compensation Commission Appeal No. 92720); and that he injured his back lifting a cable at work on (date of injury 1). The claimed injury of (date of injury 1) is the subject of this appeal. The claimant said a coworker, Sammy Abernathy, saw him get injured on (date of injury 1), and that he told (Mr. A), who was not a supervisor, that he hurt his back. He also said that after he was hurt he went to the truck to relax and that a supervisor, (BP), saw him in the truck. He testified that he did not tell (Mr. P) that he was injured and that as a result of relaxing in the truck he was taken off work for one day by his employer as a disciplinary measure. The claimant testified that he did not miss any work because of his injury until after August 26, 1991, when (Dr. P), M.D., advised him that he could do light work but the employer had no light work available. The claimant said that on August 16 or 22, 1991, he reported to his supervisor, (RG), that he had been injured at work on (date of injury 2), but did not report an injury occurring on (date of injury 1). The claimant said that he saw (Dr. P), M.D., on August 26, 1991, that he saw (Dr. M), M.D., at the request of the employer, and that (Dr. P) referred him to (Dr. W), a neurologist, whom he initially saw on November 1, 1991. The claimant said that he did not work from August 26 to September 10, 1991, the day he was terminated by his employer.

The claimant admitted at the hearing that he did not notify his employer of his alleged injury of (date of injury 1), until May or June of 1992. He said that he considered the injury of (date of injury 1) to be a "reoccurrence" or aggravation of his (date of injury 2) injury until the benefit review officer advised him at a benefit review conference, apparently held in

regard to the claimed injury of (date of injury 2), that he should file a separate accident report for the (date of injury 1) incident. The claimant also testified that he considered the incident of (date of injury 1) to be a separate accident.

In a signed unsworn written statement, (Mr. M) stated that he worked with the claimant installing cable on (date of injury 2), that he noticed the claimant grab his lower back, that he got down off the machine to see if the claimant was all right, and that the claimant told him he had hurt his back in the same place as his previous injury. (SA) stated in a signed unsworn written statement that he was running cable with the claimant on (date of injury 1) when the claimant picked up the cable and "apparently strained his back." He added that the claimant went to the truck to rest.

A medical record from (Dr. P's) office indicated that the claimant was examined by him on August 26, 1991, and was diagnosed as having a back strain and a possible ruptured disc. (Dr. P) indicated that the claimant told him he had hurt his back at work two years before and that about three and one-half weeks before the examination he felt a sudden burning on his left lower back when he was lifting some cables. In a written certificate to return to work, (Dr. P) stated that the claimant could return to restricted work on "8-9-91" (sic) with no lifting over 10 pounds and no bending. In a patient information form dated August 27, 1991, which was signed by the claimant, but which does not indicate the health care provider the form was provided to, the claimant indicated that he had been injured at work on April 21, 1990, (date of injury 2), and August 9, 1991. On or about August 30, 1991, the claimant had a magnetic resonance imaging (MRI) of his lumbar spine done at the request of (Dr. M). In a letter to (Dr. M) dated August 30, 1991, Dr. Andrews summarized the results of the MRI as follows:

1.Disc degeneration L4-5 with a congenitally small canal throughout the lumbar spine. With a minimal bulging annulus, ligamentous and facet hypertrophy this combination appears to be causing a mild degree of bilateral lateral recess stenosis.

2.Mild facet arthrosis L3-4 and L5-S1 without evidence of focal disc herniation or neural foraminal compromise.

3.At the L4-5 level the canal measures 1.1 cm in anterior to posterior dimension.

On September 5, 1991, (Dr. M) stated in a letter to the employer that "[t]here is no evidence of injury and he [the claimant] has been returned to full duty." However, in a medical absence report dated September 16, 1991, (Dr. M) stated that the claimant had an "acute inflammation left sacroiliac area."

The claimant testified that (Dr. P) referred him to (Dr. W) whom he saw on November 1, 1991, and in May and June of 1992. On November 1, 1991, the claimant filled out and signed a patient information form for treatment by (Dr. W) in which the claimant gave the

date of injury as "April 90." (Dr. W) gave the date of the claimant's injury as April 19, 1990 in an initial medical report to the Commission dated November 5, 1991, and in a subsequent medical report to the Commission dated June 3, 1992. An electro diagnostic examination performed in May 1992 at the request of (Dr. W) indicated that the claimant had "mild and chronic left L-5/S-1 radiculopathy, perhaps with more L-5 nerve root involvement." In a letter dated June 5, 1992, (Dr. W) stated that he initially saw the claimant on November 1, 1991, that the claimant related that he had an injury to his back at work in April 1990, that his low back pain worsened in February 1991 when he lifted objects at work, and that on (date of injury 2) he lifted cable at work and had low back pain radiating down the left leg. (Dr. W) further stated that he did not see the claimant again until May 29, 1992. In a letter dated August 10, 1992, (Dr. W) stated that it was his impression that the claimant has a left L5-S1 lumbar radiculopathy and possibly a right C7 radiculopathy. He also stated that the claimant "has been unable to return to work since I initially saw him in November of 1991."

The hearing officer determined that the claimant did not notify his employer of his alleged injury of (date of injury 1), within 30 days of the date of injury as required by Article 8308-5.01(a); that the claimant did not have good cause for failing to timely notify his employer of his alleged injury of (date of injury 1); and that the claimant's failure to timely notify his employer of his injury relieved the employer and carrier of liability under the 1989 Act as provided in Article 8308-5.02. The hearing officer further determined that the claimant did not sustain an injury in the course and scope of his employment on (date of injury 1), and that the claimant did not have disability because the claimant did not have a compensable injury on (date of injury 1).

Pursuant to 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. The hearing officer may believe all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.) and may believe one witness and disbelieve others. Cobb v. Dunlap, 656 S.W.2d 550 (Tex. Civ. App.-Corpus Christi 1983, writ ref'd n.r.e.). In this case, the hearing officer's findings regarding failure to timely notify the employer of the injury and no good cause for failing to give timely notice are supported by the testimony of the claimant. Thus the carrier is relieved of liability for the claimed injury of (date of injury 1), under the provisions of Article 8308-5.01.

Several matters may have cast doubt on the claimant's claim that he was injured on (date of injury 1) while at work. He did not report his back problem to the supervisor who found him relaxing in the truck. It stands to reason that if he was in the truck because his back hurt, such an explanation to the supervisor could have prevented disciplinary measures that were taken. He also did not report his alleged accident of (date of injury 1) to his employer for about eight months. While there is some documentary evidence to the effect that the claimant told at least one health care provider that he sustained an injury at work in (month year), he indicated on his patient information form for treatment by (Dr. W) that he was injured in April 1990 and made no mention on that form of a August injury or

accident. When the claimant initially saw (Dr. W) he had not settled his April 1990 workers' compensation claim and (Dr. W) reported to the Commission that he was treating the claimant for an injury that occurred in April 1990. On review of (Mr. A's) written statement that the claimant "apparently strained his back" on (date of injury 1), we cannot conclude that that statement is so strong as would compel the finder of fact, who weighs the evidence, to find that the claimant was in fact injured at work on (date of injury 1).

In regard to the hearing officer's determination that the claimant did not have disability, we observe that without a compensable injury, the claimant could not have disability as defined by the 1989 Act. *See* Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

Having reviewed the record, we conclude that the complained of findings of fact and the decision of the hearing officer are sufficiently supported by the evidence and are not so against the great weight and preponderance of the evidence and to be clearly wrong and manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

The claimant attached several documents to his request for appeal, most of which were made a part of the hearing record and some of which were not. We do not consider on appeal those documents that were not made a part of the hearing record because pursuant to Article 8308-6.42(a) our review is limited to the hearing record. We note that the documents that were not made a part of the record appear to have been available to the claimant at the time of the hearing, and that if we were to consider such documents on appeal, they would not compel a different decision.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING IN PART, CONCURRING IN PART:

I concur in that part of the decision upholding the hearing officer's determination regarding the injury issue.

I dissent from that portion upholding the hearing officer's determination on the notice issue, because I believe that claimant proved good cause for failure to notify the employer within 30 days of his (date of injury 1) injury. That good cause was that he assumed his pain that day was a flare-up of his prior (date of injury 2) injury, and that he did not appreciate that it could be an injury in its own right until apparently so informed by the benefit review officer. He timely notified his employer of the (date of injury 2) injury, and, had he been permitted to file a written accident report by the employer, might well have included the (date of injury 1) incident in that report.

I do not believe that good cause requires a claimant to understand and appreciate the case law regarding aggravation under which a theory and claim of separate accident could be formulated. In my opinion, he acted as a reasonably prudent non-medical person would have under the circumstances. Therefore, I would reverse the hearing officer's determination that the claimant had no good cause for failure to notify the employer of the (date) accident within 30 days, and render a decision that the claimant demonstrated good cause.

Susan M. Kelley
Appeals Judge