

APPEAL NO. 931150

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On September 9, 1993, in (city), Texas, the hearing officer, (hearing officer), conducted a consolidated contested case hearing to consider disputed issues relating to two workers' compensation claims of the appellant and cross-respondent (claimant), one for an injury he said he sustained on (date of injury), and the other for a neck and chest injury sustained on (date of injury), while he was employed by (employer) and working at (the company). The disputed issues with respect to the first claim were whether claimant sustained an injury in the course and scope of his employment on (date of injury), and whether the respondent and cross-appellant (carrier) is excused from liability therefor because claimant failed to timely report the injury to his employer and lacked good cause for his untimely reporting. The disputed issues concerning the second claim were whether claimant injured his neck and chest in the course and scope of his employment on (date of injury), and whether he had disability resulting from such injury.

Respecting the first claim, the hearing officer determined that while claimant's chest pain while swinging a hammer at work on (date of injury), resulted from a pre-existing angina condition and not from his work activities, claimant did sustain an injury to his neck at work while loading O-rings onto a truck on that date. However, the hearing officer also determined that claimant did not report the neck injury to his employer within 30 days after (date of injury), 1993, that he did not have good cause for not timely reporting it, and that neither the employer nor the carrier knew of the neck injury until July 1993. Respecting the second injury, the hearing officer found that while claimant suffered neck and chest pain on (date of injury), such symptoms were not caused by his work in pulling "bags" off valves that day but rather by an underlying condition unrelated to his work. Accordingly, the hearing officer determined that claimant did not sustain an injury in the course and scope of his employment on (date of injury), and thus that he did not have disability as a result of such an injury.

Claimant has timely requested our review of these adverse determinations. The carrier has timely requested our review of the determination that claimant sustained a compensable neck injury on (date of injury), and in its response urges affirmance of the determinations adverse to the claimant. Claimant filed a timely response opposing the carrier's cross-appeal.

DECISION

The decision of the hearing officer is reversed and the case is remanded for further findings on the issue of whether claimant provided employer with timely notice of his neck injury of (date of injury).

Claimant testified that on (date of injury), at about 11:00 a.m., he placed a heavy O-ring over his head and onto his left shoulder and carried it to a pickup truck for loading. As he lifted it up to throw it into the truck, it slipped in his right hand and fell against his neck.

Claimant apparently did throw it on the truck. He said he then walked back to where his supervisor, (Mr. L), was standing and told him he had a pain in his neck. At other points in his testimony claimant said he told Mr. L that he "pinched" his neck when he threw the O-ring into the truck. Claimant said that Mr. L simply responded: "Oh yeah," and said nothing further. Claimant said that he and coworker (Mr. S) then loaded two other O-rings onto the truck and he commenced his lunch break. Claimant said he walked over to the eating table and said to (Mr. DH) whom he described as "my other supervisor": "I got a sting in my neck from toting these O-rings." Claimant said that Mr. DH responded: "Oh yeah, I wouldn't be doing it," whereupon he replied that his other supervisor, Mr. L, told him to do it.

At sometime after lunch on that date, claimant said he was swinging a hammer hitting a metal structure called a "bag" (an annular blow-out preventer, also referred to as a "lid") and that his neck and chest started hurting. Claimant said the pain was worse in his chest and that the chest pain started when he was swinging the hammer. Claimant said he told Mr. L he "had to go to the doctor" whereupon Mr. L told him to get Mr. S to take him to the Mediclinic which he did. According to the evidence, the company sent employees with injuries to the Mediclinic. Claimant said that at some later time he was admitted to a hospital where he stayed for about one week for testing.

According to the transcript of his May 10, 1993, interview, Mr. DH stated that he was employed by "(employer)" and was in charge of the outside inventory but also worked in all departments as needed. When working in the assembly department Mr. DH said he was supervised by "W" (apparently referring to (Mr. N) who according to the transcript of his May 10, 1993, interview began employment at the company after claimant and Mr. DH, about eight months before the interview). Mr. DH stated that claimant had started out as a laborer and advanced to the assembly department where he was supervised by Mr. DH. Mr. DH also stated that he was working with claimant on (date of injury), when they were tightening up a "bag" and that he did not recall hearing claimant complain of pain on that occasion. However, Mr. DH also indicated that claimant's chest pain and dizziness problems started sometime in 1992 when "he picked up . . . an LTV ring."

Claimant introduced a handwritten, signed statement dated "6-10-93" from coworker (Mr. CH) which stated that on (date of injury), he heard claimant tell Mr. L he hurt his shoulder on the job. Also in evidence was a transcript of an August 4, 1993, interview with Mr. H during which Mr. CH stated that claimant and his wife had come to Mr. CH's house, that the incident was discussed, that claimant's wife was writing on a note pad, that he, Mr. CH, could neither read nor write, and that while the signature on the handwritten statement looked like his, he could not be sure that it was. Mr. CH also said during the interview that he heard claimant tell "J" (apparently referring to Mr. L) that he hurt his shoulder on the job. Claimant testified that while he did not know whether Mr. CH could read or write, that Mr. CH's stepdaughter wrote the statement and that Mr. CH signed it.

In the transcript of his August 4, 1993, interview, Mr. L stated that his employer was "(employer)," that he had worked at the company for about five years and was the plant supervisor, that claimant was an assembly worker, that he did not recall when claimant first

began to complain of "chest pains and stuff" but that he had been voicing such complaints for approximately one and one-half years, and that he was claimant's supervisor at work "off and on." When asked who else supervised claimant, Mr. L responded: "Oh God, D [possibly referring to Mr. DH] was back there, over it at one time, and B was, it has just been several people . . . in charge of assembly." Mr. L also stated he did not recall claimant saying he had hurt his neck on the job but did recall a time that claimant said he was having chest pains from swinging a hammer, that he told claimant not to be swinging it, and told one of the truck drivers, Mr.S, to take claimant to see the doctor.

The hearing officer's decision finds that Mr. L was "a supervisor" of claimant on (date of injury), that claimant did not report his neck injury to his employer within 30 days of (date of injury), and that neither employer nor carrier knew claimant suffered the (date of injury) neck injury until July 1993. The evidence was in possible conflict respecting whether claimant told Mr. L of his neck injury on (date of injury) in that Mr.L did not recall being told of the neck injury. The hearing officer made no finding as to whether claimant told Mr. L of his neck injury on (date of injury). It was within the province of the hearing officer as the sole judge of the weight and credibility of the evidence to resolve evidentiary conflicts. See Section 410.165(a). The evidence from both claimant and Mr. DH is unrefuted that claimant told Mr. DH of the injury on (date of injury), and that Mr. DH was a supervisor. However, the hearing officer made no findings as to whether claimant provided notice of his neck injury to Mr. DH on (date of injury) nor as to Mr. DH's status as "a supervisor" on that date. Further, the hearing officer made no findings regarding whether either Mr. L or Mr. DH were supervisory personnel of either the employer or the company or of both entities on (date of injury). We note that (Ms. K) testified that she worked "at (employer) which is leased out of (employer)," that she had been a secretary and was the "office manager," and that she and another person handled the employees' insurance matters. The hearing officer in his statement of the evidence stated that Ms. K "was the secretary and office manager at [the company] and was an [employer] employee." Section 409.001(b) provides that the notice of an injury required by Section 409.001(a) may be given to the employer or to an employee of the employer who holds a supervisory or management position. It is to resolve such questions that we remand the case for additional findings pertaining to the issue of claimant's having provided timely notice of his neck injury of (date of injury).

On (date of injury), claimant saw (Dr. C) at a Mediclinic. Dr. C diagnosed a chest muscle strain and the records relating to this visit referred to the visit as "worker's comp." A medical record dated January 30, 1992, stated a history of one week of left anterior chest discomfort which was exacerbated when claimant did a job of hammering. This record stated a diagnosis of probable angina, hypertension, and obesity. Records of (Dr. L) showed that claimant was admitted to Hospital on February 19, 1992, with complaints of chest pain radiating down his left arm. These records indicated claimant had undergone a cardiac workup earlier in February including an EKG and angiogram which were essentially normal. An echocardiogram of February 20, 1992, indicated an enlarged left ventricle. A neck x-ray of February 21st showed no evidence of compression fractures or subluxations but did show small posterior osteophytes at the C4-5 level and the impression was early degenerative changes. An MRI showed narrowing of the C4-5 interspace and

encroachment on the right nerve root canal. A neurologist felt claimant could have some cervical nerve root problem. Claimant was discharged February 29, 1992, and his final diagnosis was stated as follows: "Angina, but most likely, the patient has musculoskeletal pain."

An echocardiogram of April 28, 1992, reflected not only an enlarged left ventricle but also a mitral valve prolapse. Dr. L's records reflect he took claimant off work from February 18 to April 15, 1992, from April 26 to April 30, 1992, and from October 7 to October 8, 1992, apparently for chest pain.

Claimant testified that on (date of injury), he was jerking on a "bag" trying to open it and his chest and neck started hurting. He said he told Mr. N that he hurt real bad and was going to go to the doctor. According to coworker (Mr. R) interview transcript, claimant frequently complained of chest pain but not about his neck. In April 1993, Mr. R worked with claimant and several others tightening up the "lid" or "bag" with a "cheater bar" and claimant stated that "jerking on those bars was making him feel bad." Mr. R said claimant complained of his chest and of feeling dizzy and lightheaded but did not complain about his neck. According to the transcript of his interview, Mr. DH had been claimant's supervisor before Mr. N. Mr. DH worked with claimant on (date of injury), but did not recall claimant's complaining of pain on that occasion. Mr. DH also stated that he was aware of claimant's having chest and dizziness problems prior to (date of injury), which started sometime during the previous year when he picked up an "LTV ring" and thereafter went to a doctor.

Mr. N testified that he supervised claimant during the latter part of 1992 and in 1993, that claimant missed work periodically in 1992 and 1993 to see doctors, and that claimant was not sure what his health problems were but said he had headaches, chest aches and dizziness. Mr. N stated that claimant never told him he had been hurt at work at any time from and after January 1992. In fact, Mr. N testified that on (date of injury), claimant told him he had chest pains over the weekend while working on a car and that when Mr. N asked, pursuant to employer's procedures, claimant specifically said he had not hurt himself at work. Mr. N said he nonetheless sent claimant to the Mediclinic "to get checked out."

Claimant said he saw (Dr. R) who asked him if he had had a recent injury, that he responded that he had had the injury since 1992 from "stinging in neck," and that it got worse on (date of injury), while working on the "bag." Dr. R's report of April 16, 1993, indicated claimant was admitted to the hospital with complaints of left chest pain, dizzy spells, weak spells and hand paresthesia over the past several months. The report also states: "The patient denies any recent injuries or any other intercurrent illness of any kind, except for hypertension." An April 18, 1993, consultation report stated a history of left chest pain and shoulder pain radiating bilaterally to the arm and neck which has been intermittent for the last three weeks occurring three to four times a day. An April 21, 1993, MRI of the cervical spine showed degenerative changes with disc herniation and degenerative spurring at C4-5.

Claimant said he returned to Dr. R in August 1992 to try to clear up the medical

history concerning his injury because he had not understood what Dr. R had meant when he asked about a "recent injury." It was claimant's theory that while at work for approximately 24 hours on April 14-15, 1993, and struggling manually with the "bags" because the tow motor was broken, he aggravated his earlier injury of (date of injury). Dr. R's letter of August 25, 1993, stated that claimant returned on that date for a neurological follow-up and for clarification of his medical history, that he still had neck and arm pain and had been off work since hospitalized in April 1993, that he had worsening of his neck and arm pain with chest pain when he worked 27 straight hours on April 14-15, 1993, and that he has been found to have cervical herniated nucleus pulposus which "appears to be a recurrent injury, happening in mid-April 1993, as mentioned above, with initial injury occurring on (date of injury)."

Mr. L's statement also adverted to an occasion when claimant talked to Mr. L about his medical bills and Mr. L told him he would have to file it on his insurance since as far as Mr. L knew, claimant had not had a work-related injury. Claimant testified that Mr. L had advised him to file his medical bills with his wife's carrier, which he said he did, and claimant did not remember when his wife's carrier stopped paying them. Ms. K testified that she was employer's office manager. The hearing officer describes her as the secretary and office manager at the company and an employee of employer. She testified that when she received the Mediclinic bill in 1992, she discovered that no workers' compensation injury had been reported for that date ((date of injury)). She said she then called both claimant and Mr. L into the office and asked if the injury happened on the job and if it was to be a workers' compensation claim and that they both responded, "no." According to Ms. K, claimant said his medical bills were going to his wife's health insurance carrier. Ms. K also testified to numerous days in 1992 and in early 1993 when claimant was off work to see doctors and claimant agreed he was off frequently in 1992 for medical tests.

Claimant's wife testified that claimant's 1992 medical bills were submitted to her employer's group health carrier, and that in September 1992 she changed to an HMO plan which provided claimant with health care until he obtained his own health insurance and met his deductibles. She also testified that on both September 9 and September 13, 1993, claimant was in automobiles which were hit in rear end accidents. Indeed, in his closing statement claimant contended that he had disability only for the period from (date of injury), to September 13, 1993. Claimant's wife also said she went with her husband in August 1993 to see Dr. R and try to clear up problems concerning workers' compensation coverage. She said that had Dr. R asked claimant about an "aggravation" rather than a "recent" injury, claimant would have known what was meant.

We find the evidence sufficient to support the hearing officer's determination that claimant sustained a compensable neck injury on (date of injury). The Appeals Panel has many times observed that the testimony of a claimant alone may be sufficient to prove that a compensable injury was sustained. See e.g. Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. In this case, claimant's testimony as to this injury finds support in the medical records indicating he has a herniated cervical disc. Accordingly, we find no merit in the carrier's appeal.

We similarly find the evidence sufficient to support the hearing officer's determinations that claimant did not sustain a compensable injury on (date of injury), and, consequently, that he did not have disability as a result of such an injury. The evidence would have supported a determination that claimant aggravated his (date of injury), neck injury on (date of injury). However, that different inferences might reasonably be drawn from the evidence does not provide a sufficient basis to reverse a decision where there is some probative evidence sufficient to sustain a decision. See Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992. In that the findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust (In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951)), we affirm the hearing officer's decision in the case under (Docket No) concerning the (date of injury), injury and claimant's not having disability therefrom. As for the companion case regarding the (date of injury), injury, we affirm the conclusion that claimant sustained an injury to his neck on that date in the course and scope of his employment while loading O-rings for employer. However, we reverse and remand for further consideration and findings on the issue of whether claimant timely provided employer with notice of his neck injury of (date of injury), whether he had good cause for not providing timely notice, and whether the employer or carrier had actual knowledge of the injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Thomas A. Knapp
Appeals Judge