APPEAL NO. 93194

On January 27 and 28, 1993, a contested case hearing was held in (city), Texas, with Nannette Webster-Amador presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The issues at the hearing were whether the respondent (claimant herein) suffered a back injury and an injury to his abdomen (hernia) in an accident on the job on or about (date of injury), and if so, was the injury reported in a timely manner to the employer. The hearing officer determined both issues in favor of the claimant and ordered the appellant (carrier herein) to pay medical and income benefits in accordance with her decision and the 1989 Act.

The carrier contends that the claimant failed to show by a preponderance of the evidence that he sustained an injury to his back and to his abdomen as a result of an on-the-job-accident on (date of injury), and disputes certain findings of fact. In addition, the carrier contends that the hearing officer erred in failing to grant a continuance so that a witness could be subpoenaed to testify, erred in failing to give credence to a recorded and transcribed statement of the same witness, and erred in disregarding and failing to give proper effect to the deposition testimony of two doctors. The carrier requests that the decision of the hearing officer be reversed and a new decision rendered in favor of the carrier. The claimant requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant cannot read or write and does not speak English. The hearing was translated into Spanish. The claimant said that when he started working for the employer, , as a laborer on some unspecified date, he was healthy and passed a physical examination. The claimant testified that while he was working for the employer on (date of injury), he and a coworker were carrying a 16 foot long, four foot wide, wood form that weighed about 200 pounds when the coworker slipped and dropped the front end of the form to the floor leaving the claimant holding the back end of the form which "shook" him. The claimant testified that he immediately noticed his hernia (later diagnosed as an umbilical hernia), felt pain in his stomach, right side, and right arm, and indicated that he felt numb above his waist and to the right of his spine. The claimant said that prior to the accident on May 7th, he did not have a hernia and had not had back trouble.

The claimant further testified that immediately after the accident he told his foreman, Mr D that he had "got hurt;" that he had pain in his arm, stomach, leg, right side, and back; and that he felt like his stomach was "ripped up." The claimant said that his foreman took him to the head foreman, Mr. C, and that his foreman told the head foreman that the claimant had been hurt and needed medical treatment. The claimant said that he also told the head foreman that he was hurt and that he needed help to see a doctor. The claimant said that the head foreman told him to "go rub his hand" because if he brought a doctor, the employer

would go broke. The claimant further stated that he left work after reporting his injury on May 7th and did not return until May 13, 1991, when the head foreman called him and told him to come back to work or be fired. The claimant said that he did not see a doctor while he was off work because the employer refused to send him to a doctor. The claimant testified that he could not perform his work as well when he returned to work; that he had pain in his hand, arm, leg, stomach, neck, and upper and lower back; and that a coworker, Mr G, helped him with his work. He said that after (date of injury), he would sometimes show up to work "real bad" and would be sent home.

The claimant continued to work for the employer and on some unspecified date, the claimant said he asked the employer's safety supervisor, Mr. A, for a paper from the employer so that he could get medical treatment. The claimant said that the safety supervisor refused to give him the paper because the head foreman had not reported the claimant's injury. The claimant said that he did not go to a doctor even though he was in pain, because the employer didn't want to pay for a doctor and he didn't have money to go to a doctor.

The claimant further testified that in July 1991 he got sunburned or heat exhaustion at work and went to the hospital emergency room where he said he was seen by Dr. M, . Medical reports show that he was examined by Dr. M. The claimant denied that Dr. Moore ever examined him. The claimant admitted that he did not complain about his back when he saw Dr. M or Dr. M for his sunburn or heat exhaustion. In a deposition upon written questions, Dr. M stated that he treated the claimant on July 17, 1991; that he palpated or examined the claimant's abdomen; that there was evidence of an umbilical hernia on that date; that he diagnosed the claimant as having gastroenteritis; that the claimant was not complaining of pain in the area of the umbilical hernia, and that the claimant did not complain of a back injury.

In August 1991, the claimant was hit in the left foot by a hammer at work, was examined by Dr. C, and was off work for two weeks. In a deposition upon written questions, Dr. C stated that on August 12, 1991, he saw the claimant for a workers' compensation injury to his left foot, and that the claimant did not mention any type of back injury or hernia. The claimant testified that his wife, who interpreted for him at Dr. C's office, told Dr. C that his back was hurting, but that Dr. C refused to look at his back because he did not have a paper from the employer authorizing treatment for other than his foot injury and would not get paid for treating his back. Dr. Cs medical records do not reflect any complaint from the claimant other than the left foot injury and treatment was given only for the foot injury.

The claimant said that his hernia kept "growing and growing," that he thought he had a back sprain or strain, but that over time his back continued to get worse until he stopped working about November 1, 1991. He also said that the head foreman fired him when he did not return to work for about two weeks. The claimant also testified that the first time he

was examined for his hernia and his back injury was on December 4, 1991, when he went to the hospital emergency room. Medical records show that the claimant went to the hospital emergency room on December 4, 1991 complaining of back pain and abdominal pain and reported that he had hurt his back seven months before by lifting a heavy object at work. Nurse's notes indicate that the claimant's ambulatory gait was slow, that he was limping, and that he had a half-dollar size umbilical hernia. In his deposition, Dr. M confirmed that he diagnosed the claimant as having an umbilical hernia on December 4, 1991. Dr. M opined that "umbilical herniae are congenital lesions, i.e., he [the claimant] was born with this hernia." Dr. M referred the claimant to Dr. S., who performed surgery for the hernia on December 19, 1991. The claimant said that the county indigent health care service people helped him get his operation.

In January 1992, the claimant said he returned to Dr. C, but Dr. C again refused to exam his back. In a letter dated May 28, 1992, Dr. C stated that on January 22, 1992, the claimant came to his office requesting to be seen "as a worker's compensation injury to his back," and that the claimant was informed that he needed to have his employer give permission for an office visit. Dr. C stated in his deposition that he did not see the claimant on January 22, 1992, for what the claimant claimed to be a workers' compensation injury to his back.

The claimant further testified that on some unspecified date after he left work in November 1991, he saw Dr. C (phonetic spelling - no records from this doctor were in evidence and his name was not spelled out at the hearing). He said he asked Dr. C why he was getting "paralyzed" and was told that he wasn't getting paralyzed; that his nerves were being pinched or clamped. He said he told Dr. C about "what happened with the form" and Dr. C told him "well that's it, that's why you are suffering from this." When asked about what Dr. C said was wrong with his back, the claimant responded that Dr. C told him "the same thing, that the nerves were liked clamped." The claimant said that Dr. C gave him a paper to see another doctor in Galveston whom the claimant has not yet seen. The claimant said that he has not returned to see Dr. C since December 1992 because he does not have any money.

The claimant said he still has pain in his back, his right arm and right leg get numb, he is not able to bend over or stand up straight, and he has trouble sleeping. The hearing officer noted in the statement of evidence portion of her decision that during the hearing the claimant was unable to sit for long periods of time, that he was dragging his leg, and that he appeared to be experiencing almost constant pain. The hearing officer stated that it was apparent to her that the claimant had significant back problems. In addition to his other problems, the claimant said he has had blood in his urine since his hernia operation.

The claimant introduced into evidence the signed, handwritten statements of eight coworkers. Four coworkers state that they witnessed the accident described by the

claimant; the other four indicate that they know about the accident. Seven of the coworkers state that the claimant reported the accident to the foreman, Mr. D. One coworker states that the claimant reported back pain, others state that he reported that he was injured or hurt. Several of the coworkers state that the claimant was denied first aid or medical treatment when he reported the accident. Several of the coworkers also state that after the accident the claimant was in pain but continued to work, and that he continued to complain about his pain and discomfort. One coworker specifically states that the claimant kept complaining about back pain while he was working after the accident, and two state that the claimant's continuing requests for medical treatment were denied.

In a signed, sworn, handwritten statement (Joint Exhibit No. 2) the foreman, Mr. D, stated that the claimant did have an accident while working for the employer; that the claimant reported the accident to him at the time; that he, the foreman, told the general foreman what happened; that the "day of the accident [the claimant] was sent home around the 7th of May;" that the claimant returned to work on May 13, 1991 still hurt; that the claimant worked until November 1991, but was still in pain at that time; and that the claimant could not take the pain any longer so he left the employer. The foreman further states that as far as he knows, nothing was ever done to help the claimant; that the claimant had hurt his arm and developed a lump in his naval; and that the claimant also seemed to have sprained his back when the accident happened "around September 9, 1991." The foreman made virtually the same statements in a signed, but unsworn handwritten statement (Claimant's Exhibit 1). However, in a recorded statement which was transcribed, but which is not signed or sworn to by the foreman (Carrier's Exhibit 2), the foreman stated that the claimant's accident happened at the end of April (no year is given); that the claimant reported the accident to him the day after the accident; that the claimant reported only that he had sprained his right wrist; that the claimant did not ask to see a doctor; and that the claimant was fine and had no problems whatsoever when he came back to work. The foreman further stated in his recorded statement that it was not until three or four months after the accident that the claimant began complaining that his stomach hurt and that the claimant kept saying that his belly button popped out and that that happened when the accident occurred.

Other evidence included a very short transcription of a recorded statement of the head foreman, Mr. C, in which he indicated that the accident happened in April (no year is given), and that the claimant reported "it" to Mr. D and a payroll information document showing that the claimant continued to work until November 1991, with the exception of about two weeks off in August 1991 (around the time of his foot injury).

As previously noted, the hearing officer determined that the claimant sustained an injury to his back and to his abdomen within the course and scope of his employment on (date of injury), and that the claimant reported his injury within 30 days. On appeal, the

carrier contends that the following findings of fact are not supported by a preponderance of the credible evidence.

FINDINGS OF FACT

7.The claimant felt pain in his stomach and his back as a result of trying to support the form on (date of injury).

8.The claimant told his supervisor that he had injured himself while transporting the form.

9.[The claimant's supervisor] and the claimant told [the head foreman], the supervisor of the employer's work site, that the claimant was injured.

10.The employer refused to authorize the claimant's treatment for a doctor for his injuries sustained to his back and abdomen as a result of trying to support the form.

Having reviewed the record, we conclude that the disputed findings of fact are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. In Re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951). Concerning the notice of injury issue, Article 8308-5.01(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs." Article 8308-5.01(c) provides that the notice may be given to the employer or to any employee of the employer who holds a supervisory or management position. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App. - El Paso 1965, no writ). To fulfill the purpose of the notice provision, the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). In Associated Employers Insurance Company v. Burris, 321 S.W.2d 112 (Tex. Civ. App. - Amarillo 1959, writ ref'd n.r.e.), the court held that there was sufficient evidence to support a finding of timely notice of injury where the employee swore he told his foreman about his injury on the day it occurred, the foreman swore he didn't, and the trier of fact believed the employee. The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). In the instant case, the determination of timely notice of injury is supported by the claimant's testimony. He said he told his foreman about the accident and about stomach and back pain, as well as other problems. Timely notice of injury is also supported by the statements of several coworkers and by the sworn and unsworn handwritten

statements of the foreman. Conflicting evidence was for the hearing officer to resolve.

Concerning the hearing officer's determination that the claimant sustained an injury to his back and to his abdomen at work on (date of injury), we note that the claimant has the burden to establish that an injury was received in the course and scope of his employment. Spillers v. City of Houston, 777 S.W.2d 181 (Tex. App. - Houston [1st Dist.] 1989, writ denied). Moreover, the claimant's testimony as an interested party only raised questions of fact for the hearing officer's determination. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App. - Amarillo 1973, no writ). In Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.), the court observed that the general rules relating to expert medical opinion are well known and that opinion evidence of expert medical witnesses is but evidentiary, and is never binding on the trier of fact. The court stated that:

> In workmen's compensation cases the issues of injury and disability may be established by testimony of the claimant alone, even though such lay testimony is contradicted by the unanimous opinions of medical experts. [citations omitted].
>
> An exception to these well settled general rules is that, when a subject is one of such scientific or technical nature that the jury or court cannot properly be assumed to have, or to be able to form, opinions of their own based upon the evidence as a whole and aided by their own experience and knowledge of the subject of inquiry, only the testimony of experts skilled in that subject has any probative value. [citations omitted]. It has been held that the cause, progression, and aggravation of disease, and particularly of cancer, are such subjects.

The court in Pegues, *supra*, then noted that the exception to the general rule concerning expert medical testimony is a narrow one and is not to be applied unless the facts come strictly within it. In Travelers Insurance Company v. Strech, 416 S.W.2d 591 (Tex. Civ. App. - Eastland 1967, writ ref'd n.r.e.), the court held that an injury such as a

strain may be shown by symptoms and circumstances which support a reasonable inference that the injury occurred. The court stated that:

> Where there is sufficient lay testimony of an employee's injury it is held that testimony of a medical expert as to his opinion concerning the nature and extent of an injury is not necessary to entitle the employee to compensation under the Workmen's Compensation Act.

In the instant case, the hearing officer's determination that the claimant sustained an injury to his back and to his abdomen during the course and scope of his employment on (date of injury), is supported by the testimony of the claimant, the statements of his coworkers, and the sworn statement of his foreman. Dr. M's opinion to the contrary concerning the claimant's hernia was but evidentiary, was not binding on the hearing officer, and the weight to be given the opinion was for the hearing officer to determine. In our opinion, the hearing officer was entitled to conclude, based upon the totality of the evidence in the case, that the claimant sustained an injury to his back and to his abdomen during the course and scope of his employment. *See* Northern Assurance Company v. Taylor, 540 S.W.2d 832 (Tex. Civ. App. - Texarkana 1976, writ ref'd n.r.e.) where the court held that the totality of the evidence was sufficient for the jury to conclude that the employee sustained a job-related hernia despite the fact that there was no medical testimony that the employee's raising out of the seat of a truck in all reasonable medical probability precipitated the ensuing hernia. *See also*, I.N.A. of Texas v. Lackey, 688 S.W.2d 689 (Tex. App. - Beaumont 1985, no writ) where the court affirmed an award of workers' compensation benefits for an injury that resulted in an umbilical hernia. The court held that the evidence was sufficient to establish that the umbilical hernia was work-related noting the claimant's testimony and medical testimony. However, the court did not say that medical testimony concerning causation was necessary to support the jury's finding. We distinguish our decision in Texas Workers' Compensation Appeal No. 92092, decided April 27, 1992, from the instant case. In Appeal No. 92092, *supra*, the employee noticed a pain in his groin area one night at home after eating a large meal. The next day he noticed a bulge which was later diagnosed as a hernia. The employee attempted to trace his hernia to a 16-month period where he was lifting and carrying heavy objects during his employment. We affirmed the hearing officer's determination that the evidence did not establish a causal connection between the claimant's employment and the hernia. We stated that there must be some expert testimony of probative value, either alone or together with lay testimony and circumstantial evidence, to establish causation between a hernia resulting from repetitive trauma injury and work activities in the circumstances presented in that case. In the instant case, there is evidence of prompt onset of

symptoms following a specific event at work from which the hearing officer could reasonably connect the claimant's umbilical hernia to his employment.

The carrier contends that it objected to the introduction into evidence of the two handed written statements of the foreman. That is simply not the case. When the claimant offered Claimant's Exhibit 1, the carrier said it was not going to object to the document, but simply wanted the record to reflect that that was the first time that the carrier had seen the document. The document was then admitted into evidence. Later in the hearing, the carrier, when discussing Claimant's Exhibit 1, said "I had no real objection to it." Still later, the sworn, handwritten statement of the foreman, which is virtually identical to Claimant's Exhibit 1, was introduced into evidence as a joint exhibit, Joint Exhibit 2, and the carrier told the hearing officer that " I think that affidavit should be considered because I think its helpful in resolving the timing of some of these things." Evidence which is admitted without objection cannot be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App. - Waco 1971, writ ref'd n.r.e.). Moreover, it is well-settled that a party cannot complain on appeal of evidence it introduced at the hearing. The carrier's contention concerning the admission into evidence of Claimant's Exhibit 1 and Joint Exhibit 2 is without merit.

The carrier also contends that the hearing officer erred in failing to grant a continuance so that the carrier could subpoena the foreman to testify. At about 6:15 p.m. on the second day of the hearing the carrier requested that the hearing be continued so that it could subpoena the foreman to testify. The hearing officer denied the request for a continuance noting that three statements from the foreman were in evidence. The hearing officer then allowed the carrier's attorney to testify concerning a telephone conversation he had with the foreman during the second day of the hearing. The carrier's attorney basically testified that the foreman verified that he gave the recorded statement (Carrier's Exhibit 2); that he wrote Claimant's Exhibit 1 and Joint Exhibit 2 and did not know why he wrote the date September 9, 1991, on those exhibits; and that he had assumed that the head foreman had filed an accident report when he and the claimant reported the accident to the head foreman. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE Sec. 142.10(c)(3) provides that a party may orally request a continuance during a hearing, but that in addition to showing good cause, the party must show that a continuance will not prejudice the rights of the other parties. Determination of good cause is within the sound discretion of the hearing officer and that determination can only be set aside if that discretion was abused. *See* Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In light of the record, we cannot say that the hearing officer abused her discretion in denying the carrier's request for a continuance. The conflicts and inconsistencies that existed in the

written statements and the recorded statement of the foreman were for the hearing officer to resolve. Article 8308-6.34(e); McGalliard, *supra*.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge