APPEAL NO. 93204

A contested case hearing was held in (city), Texas, on January 27, 1993, (hearing officer) presiding, to determine whether the appellant (claimant) sustained an injury in the course and scope of her employment on (date of injury), and whether she gave timely notice of such injury to her employer or had good cause for her failure to do so. The hearing officer determined that claimant did not injure her back on (date of injury), while working for her employer, did not report the alleged injury within 30 days of that date, and failed to establish good cause for having failed to timely notify her employer of the injury. Claimant has requested our review challenging the factual findings and legal conclusions pertinent to the hearing officer's decision against her. The respondent (carrier) urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

In its response, the carrier asserts it was not served a copy of the request for review by the claimant. We note, however, that claimant's request for review bore her certificate of service certifying that on March 12, 1993, she served the carrier by certified mail on March 12, 1993. Such service on the other party met the requirements of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.41(a) (Vernon Supp. 1993) (1989 Act) and the rules of the Texas Workers' Compensation Commission (Commission). *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §§ 102.5(b) and 143.1 *et seq*.

Claimant testified that on August 5, 1991, she commenced employment with the (employer) as a delicatessen (deli) cook in one of its stores. She said that she soon found the lifting requirements of the job, such as lifting baskets of chicken in and out of the cooking oil, lifting the trash and so forth, to be onerous and she became sore and ached. She would start each shift aching and by the end of the day she hurt. She attributed her soreness to being older (58 years of age) and out of shape. About two weeks after starting the job, claimant said she began to complain to her supervisor, (Ms. Y), of her soreness, sought rotation to duties not involving such lifting, and accepted reduced hours when such became available. On (date of injury), towards the end of her shift, she emptied trash from a garbage can into a garbage sack, struggled to lift the heavy sack onto a cart and eventually got it onto the cart with help from a coworker. She then took the cart to the area of the trash dumpster for disposal. She said she tugged and pulled on the bag trying to get it off the cart and into the dumpster but the bag would not budge. She was then helped by a male coworker.

Concerning the alleged injury date of (date of injury), claimant did not articulate at the outset of the hearing whether she was proceeding on the theory that she sustained a specific accidental injury on that date, or whether she was alleging a repetitive trauma injury of that date. The date of injury for an occupational disease such as a repetitive trauma injury is the date the employee knew or should have known that the disease may be related to the

employment. Article 8308-4.14. At one point late in her testimony claimant said she had doubts about whether her injury occurred on (date of injury)th or was a repetitive trauma injury, and further stated she did not have a specific injury. In her appeal, claimant contends she sustained a repetitive trauma injury and that the (date of injury)th incident was "a contributing factor." At the outset of the hearing, the parties acknowledged their understanding that the last day that carrier provided coverage to employer was (date of injury), and that thereafter the employer became a non-subscriber and instituted a self-insured program. The carrier adduced evidence that claimant was briefed on employer's new workers' compensation program prior to (date of injury), and that it required job-related injuries to be reported to employer within 24 hours. In an unsigned transcript of an interview by carrier with employer's claims administrator, (Mr. C), Mr. C stated that the reason employer had not sent an "E1" to carrier before March 1992 was that claimant had repeatedly stated she was not injured before October 1, 1991 (the date employer became self-insured).

Claimant's testimony varied concerning whether she thought her back was injured during her struggle with the garbage sack on (date of injury)th. Claimant at one point testified that her back did not then have an "abrupt disc pop," nor did she "have an instant thing" though she felt pain across her lower back. She thought the incident might have "triggered something" and made her "aware something might be wrong." At another point in her testimony, claimant said the following:

Q.Let me make sure I've got this clear now. You are -- your contention is that something specific happened to you on (date of injury)th, 1991, and that was the lifting the trash and that --

A.Yes.

Q.-- incident caused you to sustain this injury?

A.Right.

In an interview with a store supervisor on December 19, 1991, claimant said she thought her back started bothering when she pulled on the garbage bag. However, in a later interview on April 1, 1992, claimant said her back started bothering her about two weeks after commencing her employment and that when Mr. C asked her for a specific date, she told him she did not have a specific time and did not have "an incident of hurting in [her] back." In that statement she also said she first noticed her back bothering her "two weeks before my last day of work which was October the 30th," and agreed with the statement it was in the middle of October. When asked what she thought caused her back injury, claimant responded that she "thought it was a constant thing." She also stated her back was not bothering her when she lifted the trash bag but also thought "the constant lifting just

kind of ground me down or something, I don't know."

Claimant's testimony similarly varied concerning whether she reported a (date of injury)th injury to employer. She testified at one point that she did not report the (date of injury)th incident to employer but told Ms. Y after the incident that "it nearly killed [her] to take that garbage back there," and said she complained in general about having to lift heavy items and about her soreness as she had been doing all along. At another point claimant testified she told "them," possibly referring to Mr. C, that she thought her back injury started on (date of injury)th. Claimant continued to work until October 30, 1991, when she decided to take a week off and did so. She said she knew she had a work injury "that last day that I worked" and "really knew then [she] had to take off." She thought her pain would go away with rest and that is why she took that week off. She has not since returned to work for employer. She said she had back surgery 23 years earlier but denied having back problems again before (date of injury)th.

On November 7, 1991, claimant saw Dr. K, her family doctor for 30 years, complaining of low back discomfort radiating to her thighs, and of tingling. She provided a history of these symptoms developing after she began working three months previously indicating that her job included lifting heavy bags at work. Dr. K's report of January 26, 1993, stated that physical examination was consistent with lumbar radiculopathy and that "x-rays revealed marked disc changes at L4- and L5-S1 supporting the history and physical." Dr. K's report concluded that "[s]ince her problems arose after she began her job, the evidence is highly suggestive the back problems arose when her work started and it (sic) worsened as she continued in her job." Dr. K's record of November 12, 1991, indicated he felt her symptoms were "secondary to her lifting heavy bags at work," that she was given medication, and was advised to apply heat and not to work.

Claimant testified that after seeing Dr. K, who told her her back had been injured by her work and that she did not need to be working, she called Ms. Y on November 7th or 8th to report that her back was injured and that Dr. K felt she should not return to work involving lifting and twisting. She said it was not until she saw Dr. K that she realized in what "bad shape [she] was actually in." In her telephone conversation with Ms. Y, claimant said she told Ms. Y that her back was hurt and that Ms. Y responded, "you didn't do it here because you didn't report it within 24 hours," to which she rejoined, "I don't know where I done it." Claimant repeated her testimony that she told Ms. Y she did not know where she hurt her back, but also said she told her she had not done anything aside from work. Claimant agreed she did not mention the (date of injury)th incident at the dumpster with Ms. Y during the telephone call with Ms. Y. However, claimant went on to testify to the following: "I had told them that I thought that's when it started was the 30th of September. That that's when my back injury started. I thought that's when it started. Because that's the only thing I could think of that really . . . ."

Claimant was examined by a neurologist, (Dr. D), on December 4, 1991. In a report to Dr. D of December 1, 1991, a physical therapist stated that claimant reported she was initially injured "on or around October 30, 1991, while being employed at [employer]." Dr. D's report of December 4th stated that "about a month ago [she] had the onset of pain in her back and both legs," and indicated she had done heavy lifting at her employment. Dr. D's report further stated: " I reviewed her films which show marked degenerative changes at L4-5 and L5-S1 with facet arthrosis, spondylosis, degenerative disc disease, etc. I bet this is the etiology of her symptoms. I certainly do not think she clinically has a ruptured disc." In his report of a follow-up visit of January 8, 1992, Dr. D stated that claimant "has a terrible looking back on her plain lumbar spine films." A myelogram report of January 20, 1991, to Dr. D found evidence of severe disc degeneration at L4-5 and L5-S1 but no evidence of disc herniation or spinal stenosis. Claimant saw a neurosurgeon, (Dr. C), on February 3, 1992, who in his report to Dr. K indicated that Dr. D had recommended a fusion but that he felt claimant would be a poor candidate for fusion and should be treated conservatively. Dr. C reviewed her myelogram and CT which he said showed "mild degenerative change and no evidence of root cutoff or disc herniation." In the history portion of his report, Dr. C stated: "[claimant] was injured in November of 1991 while doing heavy lifting at work. Since that time she has had a dull ache that has involved her lower back and hips bilaterally." Claimant was also seen by an orthopedic surgeon, (Dr. W), who in his report of June 15, 1992, to Dr. D stated that claimant "related the onset of this pain [in lumbar spine and in the upper thighs] to working at [employer]." He, too, noted claimant's marked degeneration at L5-S1 and L4-5. He said claimant had a laminectomy about 20 years earlier and he felt that while it would be difficult to stabilize her spine for a posterior approach due to osteoporosis, she might benefit from another surgical approach to her spine.

Claimant signed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) (the date of which was obscured by a Commission stamp) which was received by the Commission on July 29, 1992. On this form claimant stated her date of injury as "don't know exact date - around 9-30-91." Claimant testified that she did not know her injury date when she filled out the TWCC-41 but that she now knows the date. She further reported on the TWCC-41 that the accident happened from "continuous heavy lifting," and that she first knew the disease was work related when "nagging back pain after 2nd wk of work."

Ms. Y testified that claimant had not reported a job-related injury to her before taking leave after work on October 30th, and that when they spoke on the phone a week or ten days later, claimant said she had hurt her back and Ms. Y had her talk to (Mr. J), the store manager. Ms. Y said that claimant did not tell her she was hurt trying to lift the trash bag on (date of injury)th, never complained of having to lift heavy objects, and gave no indication she was injured before taking leave after October 30th. Mr. J testified that when he spoke with claimant on November 11th, after her conversation with Ms. Y, claimant told him "she

didn't know what she was doing when she hurt her back," that the doctor told her she hurt her back at work "lifting heavy sacks of flour, trash bags," but that claimant did not know how or when she hurt her back. Mr. J said he thought it unusual that a doctor could tell claimant how she hurt her back and asked her, "how would he [Dr. K] know where you hurt your back." In a second conversation with claimant a few days later, claimant told Mr. J that she had tried to lift a heavy garbage bag, that an assistant manager, (Mr. H), helped her, that she wasn't sure of the day it occurred, and that she specifically stated she hurt her back lifting the trash.

In an unsigned transcript of an interview by employer's claims administrator on January 8, 1992, Mr. H stated that on the occasion when claimant rolled the deli trash bag back to the trash compactor on a dolly, he was in the area, told her he would lift the bag off and into the compactor, and did so. He said claimant never touched the bag which was heavy, even for him.

The factual findings challenged by claimant were that claimant failed to prove she sustained "a specific time and place injury on (date of injury) or a repetitive trauma injury based on constant heavy lifting," that claimant worked for one month after the alleged injury without missing any regularly scheduled time from work, that claimant performed her normal and customary duties between (date of injury) and October 30, 1991 and did not seek medical attention for her alleged injury until November 7, 1991, that there was insufficient credible evidence to establish a causal connection between the claimant's work and her alleged injury on (date of injury), that claimant did not report her alleged injury to employer within 30 days of (date of injury), and that claimant did not offer a satisfactory explanation which would excuse her failure to report the injury in a timely manner. The challenged legal conclusions were that claimant failed to prove by a preponderance of the evidence that she sustained an injury in the course and scope of her employment on (date of injury), and that she failed to give timely notice of injury as required by Article 8308-5.01(a) or to establish good cause for her failure to do so as provided for in Article 8308-5.02(2).

We disagree with claimant's contentions and are satisfied the evidence is sufficient to support the challenged findings and conclusions. Article 8308-6.34(e) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence, but also of its weight and credibility. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). 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. App.-Corpus Christi 1983, writ ref'd n.r.e.)). Though not obligated to accept the testimony of a claimant, an interested witness, at face value (Garza, *supra*), issues of injury and disability may be established by the testimony of a claimant alone. *See e.g.* Texas Workers Compensation Commission Appeal No. 91083,

decided January 6, 1992, and Texas Workers' Compensation Commission Appeal No. 92069, decided April 1, 1992. As an interested party, the claimant's testimony only raises an issue of fact for determination by the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ).

The first disputed issue from the BRC was whether claimant sustained an injury in the course and scope of her employment with employer on (date of injury). Claimant's position at the BRC was that when she had to lift a bag of garbage on that date, her back started to hurt. Apparently, claimant was then asserting a specific, accidental injury on that date. However, her testimony at the hearing varied repeatedly between asserting an accidental injury on (date of injury)th without prior back trouble to experiencing back pain after about two weeks on the job with the (date of injury)th incident constituting a "trigger" event which made her aware she had a back problem. If claimant was asserting she sustained an occupational disease from the repeated lifting of heavy objects between August 5th, the date she started the job, and October 30th, her last day of work, then claimant faced the problem of proving a date of injury on or before (date of injury)th for that disease since (date of injury)th was the last day of the carrier's coverage. As noted above, the date of an occupational disease injury is the date the employee knew or should have known the disease may be related to the employment.

The second disputed issue from the BRC was whether claimant reported an injury to employer within 30 days of (date of injury)th. As for the date of her giving notice of her injury to employer, claimant's testimony was somewhat varied but claimant seemed to fairly consistently maintain that she did not provide notice until after being told of her back problems by Dr. K on November 7th, a date well beyond 30 days of (date of injury)th. The hearing officer's findings that claimant neither reported her injury within 30 days of (date of injury)th nor established good cause for failing to do so were supported by the evidence. Claimant testified that she thought her back problems would get better if she took off work for a week after October 30th, that she thought her pain was attributable to her age and physical condition, and that she did not know her work had caused her back injury until she was told so by Dr. K on November 7th. If claimant had a November 7th date of injury for an occupational disease injury, which she reported shortly thereafter to Ms. Y, as both she and Ms. Y testified she did, she would have timely reported an occupational disease injury with an injury date of November 7th, a date well beyond the injury date she alleged and a date subsequent to the expiration of carrier's coverage of employer. Given the numerous inconsistencies in claimant's testimony, the conflicts between her testimony and her two prior statements which themselves were in conflict, as well as the conflicts between her testimony and that of other witnesses, we cannot say that the great weight and preponderance of the evidence is against the challenged findings and conclusions concerned with the date of the injury and the timeliness of its being reported to employer.

Respecting the adverse finding on the causation of the injury, aside from claimant's

testimony, which was itself inconsistent on the matter, the only medical evidence, aside from histories, relating claimant's severe degenerative disc disease to her employment was the report of Dr. K which was based in part, of course, on the history provided by claimant of heavy lifting on the job. Dr. K did not attempt to explain how it was that claimant's lifting duties as a deli cook on a job she held from August 5th to October 30th resulted in severe degenerative disease in a 58 year old women with apparent osteoporosis and, in the words of Dr. D, a "terrible looking back."

The challenged 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); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge