APPEAL NO. 93225

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on February 17, 1993 to consider whether the claimant suffered a compensable injury in the course and scope of employment on (date of injury); whether she timely reported an alleged work-related injury to her employer; whether she timely filed a claim for benefits with the Texas Workers' Compensation Commission; and whether the claimant's "current incapacity" arose from a (date of injury) injury. The carrier in this case appeals hearing officer (hearing officer) determination of these issues in claimant's favor. The claimant, who also filed a response to the carrier's appeal, timely appeals the hearing officer's determination regarding dates of disability.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was employed by (employer), testified that on (date of injury), she was about to demonstrate a truck to a customer. As she pulled herself up into the truck she said she felt a sharp pain in her back. She said the truck was an F150 4 x 4, which was higher off the ground than most trucks, and that to climb in she had to hold onto the steering wheel and the armrest. After she felt the pain, she said she froze for a few seconds, then regained herself and climbed into the truck. She proceeded with the demonstration drive, then when she returned to the lot she said she went into the showroom and told her supervisor, (Mr. R), that she had stepped into a truck and hurt her back. She said he did not really say anything in response. The claimant continued to work for a couple of days, then called her doctor, (Dr. S), and got an appointment for (month) 10th. (Dr. S had treated her, and performed surgery, for a herniated disk in 1990.) Dr. S's (month) 10th report stated claimant "presents back today after an 8 month absence. She was doing very well until last week, (date), when she stepped up into a F150 pickup truck. She is employed at a Ford dealership as a salesman. She felt an acute onset of pain in the low back. Since then she has had increased low back pain." Dr. S took x-rays, diagnosed acute lumbar pain, and advised conservative treatment including physical therapy.

The claimant underwent physical therapy on (month) 11, 16, 18, and 23. The therapist's records reflect, and claimant agreed, that she stopped going to therapy because she felt her condition had improved. She said Dr. S did not give her anything in writing that took her off work; she said he told her it might be better if she took some time off to rest, but she felt she did not need to and that her employer would work with her if she needed any time off.

Claimant said she continued to work for about two more weeks. She said she had an appointment with Dr. S on (month) 24th but she was told on that day she could not see the doctor until she settled a past due account. Close to the same time, she said she called Mr. R and told him she was still having problems with her back and was still seeing a doctor;

she said she expressed concern that this would prevent her from working for employer and that maybe it would be better if she resigned.

The claimant did not return to Dr. S until December 6, 1991, complaining of acute onset of low back pain. Dr. S again determined to treat her conservatively and again prescribed physical therapy. The claimant said he did not take her off work, as she was not working at the time. The claimant testified, and it is reflected in a letter from the physical therapist, that she had moved in November and all the walking she did then aggravated her back pain. She denied moving or lifting anything, and introduced into evidence written statements from family members to this effect.

Following physical therapy sessions in December, the claimant did not return to Dr. S until (month) of 1992. She said she had not seen him before because of financial considerations, and because she had been under conservative treatment and had been doing exercises at home, as advised by her physical therapist. She said she had had several bouts of back pain, which had caused her to stay in bed, and that her back pain in (month) was so severe she was entirely bedridden. Dr. S's report of (month) 20th states, "[claimant] returns once again with continued complaints of back and leg pain. . .[which] has continued since her injury in (month) 1991. . .She returned in December 1991 with similar findings and symptoms." Dr. S noted that claimant said she was developing more pain in her left leg, buttock, and calf, while her previous herniation at the L4-5 level affected mainly the right side. A (month) 22, 1992 MRI was read as showing disc desiccation at the L3-4 and L4-5 discs. Dr. S also stated, "She also has a question of postop scar versus residual disc material within the right lateral recess at the L4-5 level. . .This questionable disc versus postop scar is on the right side, whereas her symptoms at this time are on the left side." He continued to treat her conservatively until an August 24th radiology report showed "a defect on the left side," which was later stated to be a herniation at L4-5 with left L5 radiculopathy. The claimant underwent a laminectomy on September 29th.

The claimant stated that her lost time from work started (month) 10 or 12, 1991; she said she informed Mr. R that she would be taking a couple of weeks off because of back pain, and that she resigned on (month) 25, 1991 and has not worked since that time. On November 25, 1992, a Commission benefit review officer wrote Dr. S to ask whether claimant was unable to work after the incident in (month); whether walking or moving affected claimant and whether this was a new injury; and whether claimant's (month) 1992 surgery and resulting inability to work was due to pre-existing back problems, the (month) 1991 incident, or the incident in December 1991. Dr. S replied as follows:

1.There is no specific notation in my dictation of 7/10/91 as to whether the patient was to have been off work. She was, however, started on an aggressive physical therapy program which often prevents a person from returning to work activities. The patient did not return for her

7/24/91 follow up visit, therefore, I have no indication as to how long the patient was actually off the job at that time.

2.I have no record of a walking or moving incident, based on review of the patient's chart.

3.The surgery performed on 9/29/92 was a result of the injury of (month) 1991. This is very specifically stated in my dictation of 7/20/92. . .I have had no information that would contradict what the patient has stated.

The claimant said that after the benefit review conference, on advice from a Commission ombudsman, she contacted another doctor for a second opinion. A November 20, 1992 note from (Dr. B), with whom claimant said she never treated, stated he reviewed her medical records from (month) 10, 1991 to October 29, 1992, and concluded that her surgery was necessary. The claimant submitted follow-up questions to Dr. B, asking whether, upon review of her records, he believed the type of injury she received on (date of injury) would cause her to be unable to continue her normal work duties; whether it would substantially limit her mobility; whether it would have been treated as long as possible with conservative care; whether it could extend over a period consistent with the medical records and have periods where it would serve no purpose to see a doctor; and whether this type of injury "did in this instance lead to a herniated disc which required surgery." Dr. B answered all these questions affirmatively.

Mr. R, claimant's supervisor who was sales manager at the time of claimant's alleged injury, recalled that claimant came in and told him she was in pain, but stated that he did not recall her saying what caused the pain or where it occurred. He said she asked whether she needed medical attention, and that claimant said no. He said that to the best of his recollection, he did not discuss it with her again, although he said there was a period in which she was off work sick before she resigned in late (month). He said she quit her job because the hours were too long and the pay too low.

Mr. R said the employer's standard practice with regard to a workers' compensation claim would be to make a note of the injury and turn it in to personnel, who would immediately process a form. He said that that was not done in this case because, "Once she told me that she didn't need medical attention, I didn't see the severity of the problem." He also said he was not aware that claimant had had a job-related accident, and that he thought she was just not feeling well. A summary of his August 19, 1992 recorded statement to carrier's adjuster (signed by the adjuster but not by Mr. R) stated the claimant, on or about (date of injury), "reported to me that she hurt her back outside" and "I seem to recall she indicated she was stepping up into a truck showing it to a customer." When asked about this statement at the hearing, Mr. R said he did not recall why he said she had hurt herself outside.

The claimant said a portion of her medical treatment for this injury was paid for by Aetna, her husband's group health insurer. She said that her doctor originally submitted the claim; however, she testified at the hearing that that carrier currently was refusing to pay any more until her workers' compensation claim was settled. The carrier introduced into evidence an affidavit of Mr. M, who works in Aetna's customer service department. He stated that Aetna has been paying claimant's medical bills for her (date of injury) back injury, and that on August 12, 1991, they received a telephone call from the claimant wherein she stated she was injured stepping into a vehicle at home. When asked about this statement, the claimant denied she had said the injury occurred at home. She also said she was not aware at that time that Aetna did not cover work-related injuries. The carrier also introduced benefits request forms which had been submitted to Aetna, apparently for reimbursement for prescription medication, and signed by the claimant on (month) 24 and August 14, 1992.

The carrier alleges as points of error the following: the hearing officer failed to rule on the carrier's defensive issue under the election of remedies doctrine; the hearing officer's findings that the claimant received a lumbar strain while performing her job for her employer on (date of injury), that she gave timely notice of such injury, that she had disability between (month) 11 and 26, 1991, and that her back pain in (month) 1992 and subsequent surgery in September 1992 were the consequences of an aggravation of a pre-existing condition alleged to have occurred on (date of injury), were not supported by the evidence; and that the hearing officer erred in finding that claimant timely filed her notice of injury and claim for compensation. The claimant challenges the hearing officer's determination that she did not have disability from (month) 26, 1991, until September 28, 1992, when she had surgery. These points will be addressed below.

I.
Election of Remedies

The carrier contended at the hearing, and argues on appeal, that the claimant had waived her rights to workers' compensation benefits under the election of remedies doctrine by requesting and receiving benefits from her husband's group health carrier. The carrier notes that the evidence that claimant received such group health benefits is undisputed, and that the evidence shows she is still attempting to draw benefits from group health, a position it says is so inconsistent with a workers' compensation claim as to constitute manifest injustice. The carrier also says the hearing officer abused his discretion in failing to identify and rule upon its defensive argument.

This panel has previously quoted the Texas Supreme Court's test for whether an election of remedies has occurred: "The election doctrine. . .may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies,

rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice. Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980). The court further said that a person's choice between inconsistent remedies or rights does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice. It stated an exception to that rule where the choice of a course of action, though made in ignorance of the facts, will cause harm to an innocent party. *Id*. at 852.

The summary of evidence in the hearing officer's decision and order sets forth the carrier's election of remedies argument, and it notes the affidavit from Aetna's employee which recites that claimant gave a statement in (month) 1991 to the effect that she had been injured at home. The hearing officer obviously considered this argument and implicitly did not accept it, as demonstrated by his determination that claimant had suffered a compensable injury, and his order that benefits be paid to claimant. We believe a finding can be implied that the claimant did not waive her rights to workers' compensation insurance because of election of remedies, and that such a finding is supported by the evidence. *See* Texas Workers' Compensation Commission Appeal No. 91071, decided December 30, 1991, citing Charter Oak Fire Insurance Company v. Hollis, 511 S.W.2d 583 (Tex. Civ. App.-Houston [14th Dist.] 1974, writ ref'd n.r.e.). The claimant testified that at the time she applied for group health benefits she was not aware that that carrier did not cover work-related injuries, and she stated that she has not received health benefits since her workers' compensation claim was filed. She specifically denied telling anyone with the group health carrier that she was injured at home. Based upon the evidence in the record, which includes evidence that the claimant did not exercise the informed choice necessary to a finding of election of remedies (*see* Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993), and the hearing officer's decision and order which implicitly overrules waiver by election of remedies, we find no error on the part of the hearing officer.

II.
Timely Notice

The carrier argues that the hearing officer's finding of fact that "On (date of injury), the claimant reported to her immediate supervisor that she had injured her back while climbing into a truck as she demonstrated same for a customer," and the conclusion of law that "The claimant gave timely notice of the above referenced injury to her supervisor in accordance with Article 8308-5.01" are supported by no evidence or, alternatively, are against the great weight and preponderance of the evidence. The carrier also contends the hearing officer incorrectly interpreted and applied the law, citing caselaw, the 1989 Act, and Commission rule, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.1(a).

Under the 1989 Act, an employee must notify the employer of an injury not later than

the 30th day after the date on which the injury occurs. Article 8308-5.01. The statutory notice requirements are fulfilled if the employer knows the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980). Rule 122.1(a), cited by the carrier, does not alter this interpretation of the law; while it sets forth details (e.g., date, time and place of injury; names of witnesses; name and location of health care provider) that would certainly be useful to an employer in investigating a claimed injury, the rule is stated in conditional language (". . .notice of injury should include the following information. . ." (emphasis added)) and should not be read to expand the scope of the statute, as interpreted by caselaw.

Upon review of the evidence with regard to timely notice, we find the hearing officer's determination supportable either under a "no evidence" or an "insufficient evidence" point of error. *See* Highlands Insurance Co. V. Youngblood, 820 S.W.2d 242 (Tex. App.-Beaumont 1991, no writ). In addition to the claimant's consistent testimony that she informed Mr. R she had hurt her back on the job, we find Mr. R's testimony--that he knew claimant was in pain but was not aware that it was job related--to be at odds with his statement to carrier's adjuster that claimant had "hurt her back outside." We thus affirm the hearing officer's finding and conclusion on the issue of timely notice.

III.
Injury in Course and Scope

The carrier contends the hearing officer's determination that the claimant was injured in the course and scope of her employment is so against the great weight and preponderance of the evidence as to be manifestly unjust. Carrier also disputes the hearing officer's finding that the claimant's back pain and subsequent surgery in (month) and September 1992 were the consequence of an aggravation of her previous condition which occurred on June 3, 1991. The carrier contends that this finding (and the related conclusion of law concerning claimant's disability from September 28, 1992, and thereafter) is supported by no evidence or is against the great weight and preponderance of the evidence.

The record shows the claimant testified regarding the onset of her pain on (month) 3rd and her subsequent actions and medical treatment. She testified, and Dr. S's records reflect, that she saw Dr. S for back pain arising from climbing into a truck at work and that she was treated conservatively. She contended that between (date of injury), and (month) 24, 1992, she had bouts of back pain which caused her to be bedridden. Dr. S's reports clearly relate her symptoms, and the ultimate diagnosis of a herniated disc, to the injury. We are satisfied, upon review of the record below, that there was sufficient probative evidence to support the hearing officer's findings and conclusions on these points.

IV.

Disability

The carrier alleges error in the hearing officer's finding that the claimant was unable to work and suffered disability between (month) 11 and (month) 26, 1991; as noted above, the carrier also challenges the hearing officer's finding of disability from September 28, 1992, and thereafter. The claimant appeals the hearing officer's finding that "the claimant's inability to obtain or retain employment at her preinjury wage after (month) 25, 1991, was due to her resignation from employment for reasons other than as a consequence of her injury."

We note at the outset, parenthetically, that one of the issues as stated by the hearing officer and agreed to by the parties at the hearing was "Whether the Claimant's current incapacity arose from a (date of injury) injury." The hearing officer proceeded to make findings of fact and conclusions of law regarding disability. We have previously cautioned against use of the term "incapacity," a pre-1989 Act term which is not contained in current law and whose meaning, within the context of the 1989 Act, can be inexact. *See* Texas Workers' Compensation Commission Appeal No. 93143, decided April 9, 1993. We note, however, that neither party appealed the fact that the hearing officer decided the issue of disability; indeed, a disputed issue from the benefit review conference was, "Is [claimant's] current disability related to the injury that occurred on (date)? If so, is she entitled to Temporary Income Benefits?" In light of the foregoing, it appears that disability should properly have been an issue at the hearing, and that, even if not stated as an issue, the parties tried this issue by consent. As this panel has previously held, all relevant evidence can be considered in determining whether disability exists. Texas Workers' Compensation Commission Appeal No. 92202, decided (month) 13, 1992. Furthermore, disability, which is defined in Article 8308-1.03(16) as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury, is a condition which may recur. Texas Workers' Compensation Commission Appeal No. 91122, decided February 6, 1992.

The evidence in this case shows that the claimant was off work at some time between the date she was injured, (month) 3rd, and the date she resigned, (month) 25th. At the hearing Mr. R stated claimant was "off sick" and "missed time from work;" a written statement by claimant which was made part of the record states that claimant began missing time from work because of her injury on either (month) 10th or 12th; at the hearing she testified that she was off work "approximately two weeks." In light of this evidence, we find supportable the hearing officer's finding that claimant had disability for the period (month) 11 through (month) 25, 1991.

With regard to the time period subsequent, the hearing officer found that the claimant's inability to obtain or retain employment at her preinjury wage after (month) 25th was due to her resignation for reasons other than as a consequence of her injury. In her

appeal, the claimant says both Drs. S and B say she would not have been able to work after her injury; that she testified she could not work and affidavits from family members support this; that she began suffering "completely disabling pain" in late June 1992 which caused her to return to Dr. S; that she was confined to bed from such pain; that the tests ordered by Dr. S ultimately led to surgery.

Whether disability exists is a question of fact for the hearing officer, who is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Article 8308-6.34(e). In this case, the claimant contended she quit her job on (month) 25th because, due the problems with her back, she was uncertain as to whether she could continue to work. Mr. R stated that claimant told him the hours were too long and the pay too low. Claimant denied saying this, although she testified that she worked 10-hour days. It was also undisputed that claimant had received no off-work statement from Dr. S, although she testified he advised her to take some time off and rest, and Dr. S's December 5, 1992 letter says that physical therapy "often prevents a person from returning to work activities." Dr. S also indicates in that letter that since claimant did not return for her (month) 24th follow up visit, "I have no indication as to how long the patient was actually off the job at that time." The medical records show that when the claimant returned to Dr. S in (month) of 1992, Dr. S initially continued with conservative treatment, and patient notes of September 28, 1992 reflect that he first ordered her to stay home on that date. We find there was sufficient probative evidence to support the hearing officer's determination that the claimant's disability recurred on September 28, 1992.

V.
Tolling of Limitation Period for Filing of Claim

As the carrier maintains in its appeal, it is undisputed that the claimant filed her claim for compensation with the Texas Workers' Compensation Commission on (month) 30, 1992, which is more than one year after the date of her injury. Article 8308-5.01. The 1989 Act provides that an employee's failure to timely file a claim for compensation relieves the employer and its insurance carrier of liability under the Act unless good cause exists for such failure, or the employer or carrier does not contest the claim. The carrier alleges that no good cause exists, nor was any found by the hearing officer, and that the claimant's claim was contested by both the employer and the carrier.

The claimant contended at the hearing, however, that the employer's failure to file a report of injury as required by Article 8308-5.05, tolls the limitations of Article 8308-5.01. She cites Article 8308-5.06, which provides that the limitations contained in that provision "do not begin to run against the claim of the injured employee. . .or in favor of the employer or insurance carrier, until the report has been furnished as required under [Article 8308-5.05]. . . ." It was also undisputed, as carrier acknowledged in its appeal, that claimant's employer did not file a notice of injury with the Commission until August 18, 1992.

The carrier first argues that pursuant to Article 8308-5.05, the employer has no duty to file a report of injury until it knows the alleged injury is work related and the employee is absent from work for one day due to an injury. As noted above, we find sufficient evidence to support the hearing officer's determination that claimant informed her employer that her injury was work-related, and that she missed time from work (see discussion of claimant's disability) due to a compensable injury.

We have reviewed the case cited by carrier, Camarillo v. Highlands Underwriters Insurance Co., 625 S.W.2d 11 (Tex. Civ. App.-Beaumont 1981, no writ), and conclude it does not change this result. Camarillo, construing a similar provision in prior law, does hold that the employer's actual knowledge of a work-related injury does not toll the limitation period in which the employee must file his or her claim. However, that case involved a situation in which the employee lost no time within eight days of the injury, and hence the employer was not required by law to file a notice of injury. For that reason, the lack of such a report did not toll the period allowed for filing a claim. (The decision notes that the prior law was amended in 1979 to require an employer's report of injury to be filed at any time after the injured worker was absent from work for more than one day.) *See also* Lowe v. Pacific Employers Indemnity Co., 559 S.W.2d 370 (Tex. Civ. App.-Dallas 1977, writ ref'd n.r.e.), which holds the tolling provision "applies only when the employer `fails, neglects, or refuses to file a report thereof, as required by [applicable statute].' An employer cannot be said to have failed, neglected, or refused to file such a report if he had no duty. . .to do so." *Id*. at 372. We have already found sufficient evidence to support the hearing officer's finding of fact that, as a consequence of her work-related injury, claimant was unable to work from (month) 11th through the date she completed her physical therapy, on or about (month) 26, 1991. The carrier thus had an obligation to file a report of injury, Article 8308-5.05. We thus affirm the hearing officer's conclusion that pursuant to Article 8308-5.06, the claimant's claim for benefits shall be considered timely. The decision and order of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge