APPEAL NO. 93253

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8303-1.10 *et seq.* (Vernon 1993) (1989 Act). A contested case hearing, (hearing officer), presiding, was opened in (city), Texas, on January 20, 1993, and the record of the hearing was closed on January 29, 1993. The issues at the contested case hearing were: 1. whether the appellant (claimant herein) sustained an injury in the course and in the scope of his employment with (employer herein) on (date of injury); 2. whether the claimant timely reported any such injury to the employer; 3. whether the claimant made an "election of remedies" by filing under his health insurance policy; and, 4. whether the claimant had any disability as a result of the alleged injury.

The hearing officer found that the claimant was injured in the course and scope of his employment, but that the claimant did not timely notify the employer of his injury and there is no explanation for his failure to do so. The hearing officer held that the claimant did not make an election of remedies by filing for medical benefits under his group health insurance and that since the injury is not compensable due to the claimant's failure to timely report it, the claimant had no disability. The claimant appeals contending he reported the injury timely, and if he did not, he had good cause for not doing so. The respondent (carrier herein) argues that the appeal is untimely and that there was evidence to support the findings of the hearing officer both as to failure to report the injury timely and lack of good cause for untimely reporting. The carrier also requests that we reform the decision of the hearing officer to correct a typographical error in regard to the proper name of the carrier.

DECISION

Finding the appeal timely, no reversible error in the record, and sufficient evidence to support the decision of the hearing officer, we affirm. We reform Finding of Fact No. 3 in the hearing officer's decision to reflect that the correct carrier is "National Union Fire Insurance Company of Pittsburgh, Pennsylvania," and not "National Insurance Fire Company of Pittsburgh, Pennsylvania."

As to the timeliness of the appeal, the records of the Texas Workers' Compensation Commission (Commission) reflect the decision of the hearing officer was distributed March 23, 1992. The request for review filed by claimant's attorney was mailed under cover letter of March 29, 1993 was received April 2, 1993, and is clearly timely.

The hearing officer summarizes the evidence in detail in his Decision and Order, and we adopt his statement of evidence. Briefly, the claimant worked for the employer as a "dry mix operator," a job that involves mixing powered detergents. According to the testimony of the employers' production manager, who is one of the claimant's supervisors, the claimant brought him slips from doctors restricting the claimant to light duty work on several dates in 1992--May 12th, (date)th, July 24th, and August 5th. The production manager testified that on none of these occasions did the claimant inform him that these restrictions had anything to do with a work-related injury.

Two other supervisory officials of the employer testified at the hearing and according to this testimony the earliest indication the employer had that the claimant was alleging an injury at work was in "late July or early August" when the employer received a call from the claimant's doctor's office. An Initial Medical Report from this doctor indicates that he first treated the claimant on (date), 1992, for a work-related injury to claimant's left arm. This report places a question mark in the box entitled "Date of injury."

Claimant's first Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated August 10, 1992, states the claimant was injured on May 12, 1992, while "picking up 100 lbs (sic) sacks." An amended TWCC-41 dated October 9, 1992, cited the date of injury as (date of injury). The claimant's testimony is unclear and contradictory as to when or if he ever reported his work-related accident to his employer until he filed his initial TWCC-41. Running through his testimony is his apparent assumption that by giving his supervisor doctor slips placing him on restricted duty that the employer should have known that he had suffered a work related injury.

The uncontradicted testimony of the employers' supervisory personnel is that the slips themselves only stated the claimant's physical restrictions and did not in any way indicate that a work-related injury had taken place. Running through their testimony is the assumption that if the claimant had been hurt on the job he would have reported the injury to them.

The only issue before us on appeal is whether the claimant timely reported his injury to the employer. Article 8308-5.01(a) of the 1989 Act provides that an employee or a person acting on the employee's behalf shall notify the employer of an injury not later that the 30th day after the date on which the injury occurs. Article 8308-5.02 provides that an employee's failure to notify the employer as required under Article 8308-5.01(a) relieves the employer and the employer's insurance company of liability under the 1989 Act unless (1) the employer or person eligible to receive notification under Article 8308-5.01(c) or the insurance carrier has actual knowledge of the injury; (2) the commission determines that good cause exists for failure to give notice in a timely manner; or (3) the employer or insurance carrier does not contest the claim.

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 be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact that it is job related (emphasis added). DeAnda v. Home Ins. Co., 618 S.W.2d 529, 533 (Tex. 1980). Thus where the employer knew of a physical problem but was not informed it was job related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). It is also the claimant's burden to prove the existence of good cause for failing to give the employer

notice. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). Also, the actual knowledge exception requires actual knowledge of an injury. Fairchild v. Insurance Company of North America, 610 S.W.2d 217, 220 (Tex. Civ. App.-Houston [1st Dist] 1980, no writ). The burden is on the claimant to prove actual notice. Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.).

The hearing officer found that the claimant was injured while working for the employer on or about (date of injury); that the claimant did not notify the employer of the injury until after he filed the first TWCC-41 dated August 10, 1992; that the employer had actual notice that the claimant sustained a work-related injury no earlier than late July or early August, 1992; and that there is no explanation of the claimant's failure to notify the employer of the injury before that time. Article 8308-6.34(e) provides that the contested case hearing officer, a finder of fact, is the sole judge of the relevance and materiality of the evidence, as well as the weight and credibility that is to be given the evidence. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

It is very unfortunate that a claimant who has suffered an injury which according to the record is serious and has required surgery and whose injury under the findings of the hearing officer, well supported by the evidence, would have been compensable if timely reported, is precluded from recovery by Article 8308-5.01 which sets forth legislatively mandated notice requirements. There is more than ample evidence to support the finding of the hearing officer that the injury was not timely reported and the law requires us to affirm the decision of the hearing officer denying benefits on this basis.

We reform the decision of the hearing officer to reflect in Finding of Fact No. 3 that the correct carrier is "National Union Fire Insurance Company of Pittsburgh, Pennsylvania," and not "National Insurance Fire Company of Pittsburgh, Pennsylvania."

The decision of the hearing officer is affirmed as reformed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur with the opinion in this case. I write separately only to emphasize that an employer's knowledge that an employee is suffering from a medical condition or some injury is not sufficient to provide notice under Article 8308-5.01(a) or to establish knowledge by the employer under Article 8308-5.02(1). It appears that the claimant may have assumed that the employer knew or should have known of the work-related nature of his medical problem or injury although he did not actually give notice, within the statutory time frame, that his injury was caused by or related to his work. We have previously held in accordance with decisions of the Texas Courts, that notice of an injury alone is not sufficient. There must be notice to the employer or knowledge on the employer's part for the statutory requirements to be met. Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991.

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Stark O. Sanders, Jr.
Chief Appeals Judge