APPEAL NO. 93282

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on March 5, 1993, in (city), Texas, before hearing officer (hearing officer). The appellant, hereinafter claimant, appeals the hearing officer's determination that claimant was not injured in the course and scope of his employment and that he did not give timely notice to his employer. The respondent, hereinafter carrier, essentially argues that the hearing officer's decision is supportable.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that he was working as a mechanic for (employer) on (date of injury), and was changing the hydraulic clutch in a rig when he felt pain in his left leg. He said he mentioned the pain to a coworker, PY, to employer's secretary, (Ms. R), and to Mr. L, carrier's adjustor. However, he acknowledged that he did not tell anyone that the pain was caused by a particular injury; as he stated, "I didn't know what had caused it really, for sure." The claimant previously had had a compensable back injury at L3-4 for which he had a discectomy in 1990. That claim was the subject of a compromise settlement agreement pursuant to which the claimant had three more years of open medical for his back.

The claimant testified that a couple of days after the (date of injury) incident he told Ms. R that his leg hurt and he needed medical attention. She arranged for claimant's medical records to be sent to the (back clinic) where he was originally scheduled for a February 25th appointment which was later postponed to March 31st. On that date he was seen by (Dr. H), who noted claimant's complaint of pain in his legs, "left being worse than right. He has had no back pain. He had an on-the-job injury in August of '90. Not sure why his leg started hurting him." Dr. H also wrote, "[p]lease note: The patient relates he had a new injury 3-4 months ago when his legs just spontaneously started hurting." Dr. H recommended an MRI, which disclosed as follows: "1. Chronic L1 anterior wedge deformity. 2. Loss of signal intensity within the L3-4 and L4-5 discs with mild reduction in disc space height. The findings are consistent with mild degeneration of each disc space. There is no significant extradural encroachment upon the thecal sac or nerve rootlet displacement." Health insurance claim forms relating to treatment by Dr. H give the date of the accident for which treatment was sought as "08/09/90."

On March 16, 1992, claimant was fired by employer because of absenteeism. He continued to receive medical treatment, including epidural injections from (Dr. O) and physical therapy. Dr. O's report of August 4, 1992, says the claimant began experiencing pain almost immediately upon returning to work after his surgery, and he gave a diagnosis as failed back syndrome. When (Dr. B), who had performed claimant's surgery in 1990 and

who had moved out of the state, returned to the back clinic, the carrier arranged for claimant to see him. On December 4, 1992 Dr. B wrote that claimant's MRI showed no evidence of recurrence of his herniation; he also wrote that "[b]ased on the patient's history and previous response to treatment, I do feel that this is a new injury." The claimant testified that it was not until December 4th that he realized his problems were the result of a new injury.

Ms. (Mr. MC), employer's shop foreman, and (Mr. CC), employer's yard manager, all testified that claimant had complained of pains in his back and leg during the period of time from January 1991, when he came back to work following his back surgery, to March 1992 when he was terminated. The claimant acknowledged that during that period of time he had done things that had irritated his back. Mr. MC testified that claimant worked as a mechanic's helper and that changing a clutch was not something that a mechanic's helper would usually do. Mr. CC stated that claimant had originally been a pulling unit hand until his back surgery, after which he returned to work in a lighter duty capacity, as a helper. He characterized clutch repair as "major . . . not a one-man job" and said employer would not have had someone doing a job like that alone in the field.

In this case, the hearing officer made the following findings of fact:

FINDINGS OF FACT

5.Claimant did not inform his supervisor or anyone he could consider to be his supervisor of an injury on (date of injury), within thirty days of (date of injury).

6.Claimant did not suffer an injury on (date of injury), while replacing the hydraulic clutch on rig 85.

The claimant in a workers' compensation case has the burden of proving that he sustained an injury in the course and scope of employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). Whether such an injury occurred is a question of fact for the hearing officer, as trier of fact, to determine. Our review of the record in this case reveals sufficient probative evidence to support the hearing officer's determination that the claimant was not injured in the course and scope of his employment on (date of injury). There was testimony to the effect that claimant had complained of leg and back pain on a continuous basis since returning to work after his surgery in January of 1991, and that his complaints of pain after (date of injury) were not distinguished in any way from the prior complaints. The claimant testified that he had done some things that would irritate his back. While two of employer's employees expressed doubt that claimant would have been alone in the field, replacing a hydraulic clutch, in January of 1992, claimant testified that he had done so, although he did not for some time thereafter relate that event to the pain he was experiencing. A claimant's

testimony, however, even where unrebutted, does no more than raise a question of fact for the hearing officer to resolve. Anchor Casualty v. Bowers, 393 S.W.2d 168 (Tex. 1965). Even Dr. B's diagnosis of new injury, made following a history claimant gave nearly 11 months after the event, is not necessarily dispositive of the cause of the injury. Minor v. Commercial Insurance Co. of Newark, N.J., 557 S.W.2d 608 (Tex. Civ. App.-Texarkana 1977, no writ).

We note that the hearing officer did not make a specific finding with regard to good cause for failure to timely report, despite the fact that the issue agreed to as correct by the parties was "[d]id the claimant report an injury to employer within thirty days as required by the Texas Workers' Compensation Act or have good cause for failing to do so?" This panel has previously ruled that a hearing officer is entitled to consider good cause, even where not specifically raised as an issue, as it is subsumed within the issue of timely notice. Texas Workers' Compensation Commission Appeal No. 92386, decided September 8, 1992. There was even more reason to do so in this case, where good cause was specifically mentioned as part of the disputed issue and where the claimant consistently testified that he did not inform his employer of a specific injury (as opposed to a symptom) within 30 days, and, in fact, did not do so until he was told by his previous treating doctor that this was a new injury. However, the hearing officer's failure to make such finding is harmless error in light of his determination, affirmed herein, that the claimant was not injured in the course and scope of his employment.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge