

## APPEAL NO. 93287

On March 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer determined that the appellant (claimant herein) did not sustain an injury to her back on (date of injury), in the course and scope of her employment with her employer, Hospital; that the claimant did not timely notify her employer that she claimed an injury to her back; that no good cause existed for the claimant's failure to timely notify her employer of her clad injury; and that the claimant did not have disability for the periods of time claimed by the claimant. The hearing officer denied the claimant benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The claimant disputes the hearing officer's decision and requests that it be reversed. The respondent (carrier herein) responds that the claimant's request for review was not timely filed and that the hearing officer's findings of fact, conclusions of law, and decision are supported by sufficient evidence.

### DECISION

The decision of the hearing officer is affirmed.

The claimant's request for review was timely filed. The hearing officer's decision was mailed to the parties on March 25, 1993. The claimant does not state when she received the decision. Accordingly, under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)), the claimant is deemed to have received the decision on March 30, 1993, which is five days after the date the decision was mailed. The claimant's request for review is postmarked April 9, 1993 and was received by the Texas Workers' Compensation Commission's central office in Austin on April 13, 1993. Consequently, the request for review was filed not later than the 15th day after the date on which the decision was received as required by Article 8308-6.41(a) and Rule 143.3.

The parties agreed that the issues to be resolved at the hearing were: (1) whether the claimant sustained an injury to her back on or about (date of injury), in the course and scope of her employment with her employer; (2) whether the claimant timely reported an injury to her employer; and, (3) whether the claimant had disability for the periods of July 10, 1992, to September 1, 1992, and September 19, 1992, to November 16, 1992.

The claimant testified that prior to quitting her job on (date) she had worked for the employer, a hospital, for four years. For the last two years of her employment she was a supervisor in the housekeeping department. She testified that she inspected rooms and public areas, checked on maids, and moved furniture. She did not recall having to lift things at work, but said she pushed and pulled beds and scales and moved furniture around. She said that on Monday, (date of injury), she was asked by her employer to wear a four inch wide adjustable safety or support belt, which she said she wore around her waist below her bellybutton. The claimant testified that her lower back on the right hand side started hurting the week she began wearing the belt, and that her back had not been hurting before then.

She testified that the belt pinched her lower back and caused her back to hurt. She said that the belt covered the area of her back where she felt pain. She also said that she did her regular duties at work the week of May 11th.

The claimant further testified that on Thursday of the week she began wearing the belt, which would have been Thursday, May 14, 1992, she told two other housekeeping supervisors, (DM), and (TC), that her lower back had been hurting since she started wearing the belt. She said that TC is the assistant to (CC) who is the director of the housekeeping department. The claimant said that CC was her supervisor and that TC told CC about her back problem, but did not say when this occurred. The claimant said that she was afraid to tell CC herself that her back was hurting because she, the claimant, was a supervisor responsible for training others about safety.

The claimant said that on the Saturday following the Monday she began wearing the belt, which would have been Saturday, May 16, 1992, she did regular household chores at home without the safety belt on. She said the housework included dusting, vacuuming, mopping, sweeping, cleaning, and laundry, but no lifting. She said that on Sunday morning her back started hurting and she could not get out of bed for most of the day because of back pain. She said that during the last part of May she told CC that she had a doctor's appointment because her lower back was hurt, but said she never mentioned the belt to CC. The claimant said she continued to work and that on June 12, 1992, she went to see (Dr. O), M.D. about her lower back pain from wearing the safety belt. She said that Dr. O told her that "this is job related" and told her to "report it." She said she told Dr. O that she did not want to report it because she didn't want to have problems with CC, her supervisor. She said she "didn't think it was a big deal" because Dr. O told her it was just a sprain. She said Dr. O referred her to (Dr. MA) and to (Dr. MO). The claimant said that Dr. MO diagnosed a "herniated ruptured disc" and performed surgery on her back on October 11, 1992. The parties stipulated that the claimant's back surgery on October 11th was at the L4-5 level. When the claimant was asked when was it that she first decided to report "this" as a workers' compensation claim, the claimant responded "when I was told that I needed to have back surgery." She said that on September 22nd Dr. MO told her she needed back surgery.

The claimant said that she was taken off work by a doctor on July 8, 1992, and that she returned to work on September 1, 1992, and worked until September 19, 1992. She said she was admitted to the hospital for her back surgery on September 22, 1992, had the surgery on October 11, 1992, and returned to work on November 16, 1992. She said she worked from November 16, 1992, until January 5, 1993, when she quit because of a lack of communication with her supervisor. She said that when she quit her job she was able to do her work.

TC testified that she is a housekeeping supervisor and is on the same level as the

claimant. She said she is not the claimant's supervisor. She said that around May 11th employees received "support belts" and training in their use. She said the belts are about 12 inches wide. She said the claimant told her that her back hurt when she took the belt off after work and that the claimant said she thought it was because she wore the belt too tight. She did not recall when the claimant told her that. She said she told CC, the director of housekeeping, that "[the claimant] and three more girls, they were complaining about when they wear the belt, it was hurting." She did not recall when she imparted that information to CC, but did indicate that the complaints were made before a meeting in August. This witness further testified that the claimant told her that she had moved furniture at home on some unspecified Saturday after the employees started wearing the belts and that the claimant mentioned that she could not get out of bed on Sunday. She also said that she has been working for the employer for 18 years and that employees do not get in trouble for reporting on-the-job injuries. She said the claimant, as a supervisor, knew about the need to report work-related injuries.

DM testified that she is employed by the employer as a supervisor in the housekeeping department along with the claimant and TC. She said that she is not the claimant's supervisor; they are on the same level. She said that about the middle of May, or the last part of May, or the first part of June, the claimant told her and TC that "my back hurts, and I think it is because of the belt." She said that she told the claimant to report "it" to CC and to make an incident report. She further testified that she thought that TC "brought it up" to CC in the first part of June, but was not certain about this. This witness further testified that the claimant complained of back pain while working for the employer in early 1990, and at that time had asked the claimant if she felt she had hurt her back at work and the claimant said no.

CC testified that she is the director of the housekeeping department and that she was the claimant's immediate supervisor, as well as the supervisor of DM and TC. She said that the claimant was aware of the employer's policy of reporting work-related injuries within 24 hours. She said the claimant had complained of back pain in 1989 or 1990, but that the claimant said it was not work-related. She said that on some unspecified date DM had told her that the claimant was complaining about wearing the support belt and that she told DM to tell the claimant how to wear the belt correctly. She said that the claimant wore the belt too high. CC further testified that when the claimant went into the hospital as a patient (the claimant said she was admitted in September 1992) the claimant told her that she didn't know how she had hurt her back, but then TC told her that the claimant had told DM that "it was due to the belt." She said she immediately went to the claimant's hospital room with the employer's health nurse, (DW), where DW told the claimant "if it was an incident that happened at work, she needed to make out an incident report." She said the claimant did not make a report. When this witness was asked if she had asked the claimant if she had been hurt on the job, the witness answered "she said it was the support belt that we wear at work." The witness further testified that after the claimant "said that the belt had hurt her,"

she held an employee meeting and found only one other employee who had complaints about wearing the belt and after it was explained to the employee how to wear the belt it ceased to bother the employee. The witness testified that she first knew that the claimant was claiming to be hurt on the job when she went to the claimant's hospital room. She said that the claimant also told her about working at home on some unspecified Saturday and having difficulty getting up on Sunday.

DW testified that she is the employer's health nurse and that sometime in July the claimant complained to her about back pain and she told the claimant that if the back pain was due to work the claimant needed to fill out an incident report so that she could file "a workers comp." She said the claimant told her at that time that she was not sure how "she did it." She said that the claimant told her that several weeks earlier, on a Friday, she was wearing her support belt when she helped another worker with a patient, that she was fine when she went home, but that after she cleaned her house on Saturday she could not get out of bed on Sunday. The witness said that "she [the claimant] did not even say it was due to the belt, at that time, in July." This witness further testified that she met with CC and the claimant when the claimant was released to return to work in the first part of September and stated that "that is when she [the claimant] said it was due to the back support belt." She testified that that was when she first became aware that the claimant was claiming to have been injured on the job. Later in September when the claimant was a patient in the hospital, DW said she asked a social worker to talk to the claimant about filing a workers' compensation claim.

Progress notes from Dr. O's office showed that in January 1990 the claimant complained of chest pain which radiated into her back, and that on June 12, 1992, the claimant complained of having had lower back pain and right buttock pain which radiated into her right leg for one month and told the doctor that she wore a "demonstrator low back brace." X-rays of the claimant's lumbar spine revealed mild disc narrowing at L2-3 with associated hypertrophic spurring. Progress notes show that the claimant visited Dr. O several more times in June, July, August, and September 1992, with complaints of back, hip, buttock, and leg pain and was prescribed pain medications, injections, and physical therapy. Dr. O gave several assessments of the claimant's condition, including lower back pain, right buttocks strain, hip strain, and SI [sacroiliac] inflammation. One note indicates that the claimant was taken off work from July 8th to July 20th. Another note indicates that the claimant was continued off work through July 31st and was then released to return to limited duty on August 6, 1992. However, a note dated August 31, 1992, states that the claimant was released to return to light duty on that day.

In a letter dated September 23, 1992, Dr. O wrote that the claimant was "recently admitted for a herniated lumbar disc that will be requiring surgery in two weeks by Dr. [MO]." He further stated that there would be an eight week convalescence period following surgery and that light duty would be required following the convalescence. In a note dated

November 11, 1992, Dr. MO stated that the claimant could return to her regular job on November 12, 1992. In a letter dated February 12, 1993, Dr. O wrote that the claimant's job description required frequent moving of heavy equipment such as hospital beds and stretchers, that many times moving these items is done without help from other employees, and that he had informed the claimant that the cause of her back pain most likely originated from her duties in moving heavy equipment at the hospital and she [the claimant] agreed. He further stated that his final diagnosis was a herniated nucleus pulposus, that the claimant was operated on by Dr. MO, and that the claimant has been unable to return to work because of persistent pain.

As previously stated, the first issue before the hearing officer was whether the claimant injured her back on or about (date of injury), while in the course and scope of her employment with her employer. From the claimant's testimony, it is clear that she was claiming that the injury to her back, which was finally diagnosed as a herniated nucleus pulposus, resulted from wearing a back support or safety belt at work. The asserted causal connection between the back support and her injury rests on her testimony that she did not have back pain until she began wearing the back support. However, there is also testimony that the claimant experienced severe back pain at home after cleaning her house and moving furniture without the use of her back support, and that at one point she told CC she didn't know how she injured her back. The claimant had the burden of proving that she was injured in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). There was no evidence adduced as to how the wearing of a back support belt could cause a herniated nucleus pulposus. The claimant's testimony as an interested party only raised a question 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). The hearing officer is the trier of fact in a contested case hearing and is the sole judge of the weight and credibility to be given to the evidence. Articles 8308-6.34(e) and (g). The hearing officer found that on (date of injury), the claimant did not injure her back from wearing a "back brace" while working for her employer, and concluded that the claimant did not sustain an injury to her back in the course and scope of her employment. Having reviewed the record, we conclude that the hearing officer's finding and conclusion 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, 244 S.W.2d 660 (1951).

The hearing officer also determined that the claimant did not have disability for the periods claimed by the claimant. "Disability" means "the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury." Article 8308-1.03(16). A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). Since we have upheld the hearing officer's determination that the

claimant was not injured in the course and scope of her employment, the claimant does not have a compensable injury as defined by the 1989 Act, and hence, cannot have disability as defined by the 1989 Act. See Texas Workers' Compensation Commission Appeal No. 92217, decided July 13, 1992.

The hearing officer further determined that the claimant did not notify her employer of her injury within 30 days as required by Article 8308-5.01(a), and that the claimant did not have good cause for failing to timely notify her employer of her injury. Our affirmance of the hearing officer's finding of no injury in the course and scope of employment renders moot the issue of notice of injury to the employer, because even if the claimant had timely notified her employer of her claimed injury or had good cause for failing to timely notify her employer of her claimed injury, she would still not be entitled to workers' compensation benefits in the absence of a compensable injury. We would note, however, that the claimant has the burden of proving the existence of notice of injury. Miller v. Travelers Insurance Company, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). And, a claimant who fails to give the employer notice of the alleged injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e). The testimony concerning when the claimant notified the employer of her injury, who she notified, and what she notified the employer of in regard to her back pain was somewhat conflicting and dates were vague and uncertain. Consequently, we would not find the hearing officer's determinations concerning the issues of timely notice and good cause to be against the great weight and preponderance of the evidence.

On appeal, the claimant asserts that she now feels that her "back damage" was "cumulative over several months," and states that she worked for years without any back support. She further states that the cause of her injury originated from her duties of moving heavy equipment, such as hospital beds and stretchers, and that her injury was aggravated by wearing a back brace or belt at work. We observe that the claimant's assertion on appeal of a repetitive trauma injury to her back from moving equipment at work is consistent with Dr. O's opinion as stated in his letter of February 12, 1993. However, it has been held that opinion evidence of expert medical witnesses is but evidentiary, and is not binding on the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). Despite having put Dr. O's letter into evidence, the claimant did not assert at the hearing that her injury was caused by anything other than wearing the back support. Dr. O does not mention the back support in his letter. The claimant did not assert, as she appears to do on appeal, that she injured her back at work moving equipment without a back support and that her injury was then aggravated by wearing a back support. Having considered the issue of injury in the course and scope of employment on or about (date of injury), as agreed to by the parties, and having further considered the claimant's stated position at the hearing concerning her back injury being caused by wearing the back support belt, it is our opinion that the claimant's assertion on

appeal does not present a sufficient basis for disturbing the decision of the hearing officer in the circumstances presented in this case.

The decision of the hearing officer is affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Lynda H. Nesenholtz  
Appeals Judge