APPEAL NO. 93302

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on March 18, 1993, (city) presiding as hearing officer. The hearing consolidated two separate claims of back injury filed by the appellant (claimant), one allegedly occurring on (date of injury), and the second on (date of injury). The hearing officer determined that the claimant did not sustain work-related injuries on either occasion, that the claimant did timely report the alleged injury of (date of injury), and that the respondent (carrier) did not waive its right to contest compensability because its Notices of Refused or Disputed Claim satisfied the timeliness and specificity requirements of Article 8308-5.21 of the 1989 Act. Claimant urges that the hearing officer's findings and conclusions indicated above are against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Carrier asserts in responses filed to each claim that there is sufficient evidence to support the findings and conclusions of the hearing officer and asks that the decision be affirmed.

DECISION

Determining that there is sufficient evidence to support the findings and conclusions of the hearing officer, his decision is affirmed.

Claimant testified through an interpreter that she was a housekeeper for the employer, a hotel chain, when she injured her back on (date of injury), while turning mattresses over. She stated she told "S" (a supervisor) the day it happened but that S told her it was not the employer's fault and that she should be more careful. There was evidence that the claimant had recently returned to work after being off for about a month to have a baby. She did not seek medical treatment and continued to work. She testified that she injured her back again on (date of injury), when a "pressure door" hit her in the back after she pushed a cart through a door and she was attempting to stop it from going into the revolving door. She says she told "Blas to tell B that I hurt myself and that I wasn't going to be able to do the work."

The claimant also testified that the manager, (Mr. J), told B to make a doctor's appointment and that she subsequently went to (KP), an HMO organization. She stated that the doctor gave her an off duty excuse for two weeks and that she has not been back to work since (date of injury).

A medical report from KP indicates that the claimant was seen on "(date)" at 6:55 p.m. complaining that her low back is hurting and had been for three days. The report notes "no trauma," gives a diagnosis of "low back pain," and prescribes Motrin. A form from KP, in a block entitled "Worker's Comp," is checked as "no," and a report indicates that the claimant has no lumbar spine abnormality. The claimant saw a Dr. P, who in a medical report dated September 25, 1991, lists his impression as "injury to the lumbar area with bilateral radiculopathy."

Mr. J testified that the records of the employer indicate that the claimant was not on the work schedule for 29, 30 or 31 July, that it was very unlikely that the claimant would have been turning any mattresses in July as that is done quarterly, that they did not have any employee by the name of Ms B during 1991, that the first he heard of the claimant's claimed injury was when he got a certified letter from her attorney dated September 19, 1992, and that he did not have any knowledge of a report of injury being made to any other supervisor. He stated that after he got the letters from the claimant's attorney setting out the claimed on-the-job injuries, he filed the required reports. The Notice of Refused or Disputed Claim for the July 30th incident states "Clmts medical condition is not work related. Alleged injury was reported on (date). Our investigation continues." and for the (date) incident states "Clmts condition is not work related. On (date) clmt advised sup. that her back was hurt due to the birth of her child. Our investigation continues." Mr. J also testified that in (date), the claimant alleged that she had not gotten a pay check but that upon investigation with the home office it was found that the claimant had actually cashed the check involved.

A sworn statement from a MO (MO), a supervisor, was admitted into evidence and in it she indicates that the claimant complained to her that in 1991 she hurt her back flipping mattresses but that it was not true because she, MO, flipped the mattresses for the claimant when she stated she could not do it because it was too soon after the birth of her baby. She said that the claimant asked her to get a doctor's appointment for her on "(date)" because "her back has hurt her since giving birth to her child."

As indicated above, the hearing officer determined that the claimant did not sustain a work-related injury on either of the alleged occasions and that the carrier sufficiently and timely disputed the claimed injuries. To be certain, the evidence was in conflict and the credibility of the witnesses and the weight to be given the evidence became the critical matter in resolving the issues presented. In his Discussion section, the hearing officer noted that the burden is on the claimant to prove by a preponderance of the evidence that she was injured in the course and scope of her employment and stated that she has not sustained that burden of proof with respect to either claimed injury. Texas case law holds that the burden is on a claimant to establish that a claimed injury occurred within the course and scope of employment (Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.) and we have followed that authority. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991; Texas Workers' Compensation Commission Appeal No. 92461, decided October 12, 1992. As indicated, whether that burden has been carried involves determining the relevance and materiality of the evidence and the weight and credibility to be accorded the evidence. The hearing officer, as the finder of fact, fulfills that role under the 1989 Act. Article 8308-6.34(e). It is the fact finder who considers and sifts through the evidence before him or her, resolves conflicts and inconsistencies in that evidence and in the testimony of witnesses and arrives at factual findings. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ);

Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ); Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. The fact finder can believe all, part or none of the testimony of any witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e)) and a claimant's testimony, that of an interested party, only raises an issue of fact for the fact finder. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). It is apparent the hearing officer did not accord full credibility to the testimony of the claimant, and with the inconsistencies and conflicts in the testimony and other evidence, we cannot hold that his determinations do not find sufficient support. Only if we were to determine, which we do not, that the findings and conclusions of the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would it be appropriate to disturb the decision. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

We also do not find merit to the claimant's contention that the carrier waived its right to contest compensability of the claimed injury because its stated reasons did not amount to a defense to compensability. The hearing officer concluded, and we agree, that the statement in the Notices of Refused or Disputed Claim sufficiently disputed that the alleged injury occurred within the course and scope of the claimant's employment. In both instances, the carrier included in its assertion that the basis for the refusal to compensate was because the claimant's medical condition "is not work related." A fair reading of the notices sufficiently appraised the claimant that the carrier was contesting the claimed injuries were not work related or within the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992. *See also* Texas Workers' Compensation Commission Appeal No. 93202, decided April 28, 1993. *Compare* Texas Workers' Compensation Commission Appeal No. 92468, decided October 12, 1992.

For the above reasons, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts

Appeals Judge

Joe Sebesta
Appeals Judge