APPEAL NO. 93326

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 23, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not sustain an injury in the course and scope of his employment and that the carrier timely and sufficiently contested or disputed the claim. Claimant appeals stating that he is not satisfied with the decision of the hearing officer, does not feel his attorney helped him as he should have, and complains that the respondent's (carrier) witnesses said things that were not true. No response has been filed by the carrier.

DECISION

Finding no error and concluding that there is sufficient evidence to support the hearing officer's decision and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, we affirm.

The claimant, who performed general construction labor for the employer, testified that he "felt something in his back" as he was stacking heavy concrete forms on the (date of inury). He states that he did not report the injury to any supervisor for fear of being fired (he testified that he did not know of anyone getting fired for being injured) but that he did tell a nonsupervisory coworker (who apparently stopped working for the employer several days following the asserted injury) that his back hurt. A statement in evidence from the coworker indicated that although he did not witness any injury, the claimant had told him his back hurt and that he got it from stacking forms. The claimant was terminated from his employment on October 30, 1992, because of not being able to retain instructions, according to the employer's project supervisor. It was not until several days after the claimant's termination that the employer was made aware of the asserted injury. The claimant believes he first sought medical attention on November 4th or 5th, and saw his doctor on November 11th. Examination and diagnostic tests were basically normal with no evidence of herniated nucleus pulposus or compromise of the thecal sac. He was diagnosed as having dorsal and lumbar sprain and strain and he is currently in a work hardening program. There was a medical opinion following an MRI of the lumbar spine indicating some signal decrease from the last disc "compatible with early or developing degenerative disc changes."

The project supervisor testified that it was stressed at regular safety meetings, in both Spanish and English, that injuries must be reported to a supervisor as soon as they occur (Article 8308-5.01 provides for notice of injury to be made no later that 30 days after the injury) and that each employee is required to sign out at the end of the shift indicating that no "incident, accident or injury" involving that employee had occurred on that date. The carrier introduced these sheets for the period (date of injury) through 30th which bear the claimant's signature. On the top of each form is the statement in both English and Spanish that the "undersigned employee of [employer] verifies by signature that on the referenced date there was no incident, accident, or injury involving the undersigned employee." Claimant stated that he just thought the sheet was a time sheet and denied that anyone ever

explained it to him (there was a notation in a claimant's exhibit that indicated the claimant had graduated from high school in M and had some college in M). The carrier also called two other employees who worked with the claimant and who indicated the claimant never mentioned anything about an injury. They also stated they were unaware of any injury and that the claimant worked the last two and a half days of his employment shoveling and spreading gravel without any indication of any physical behavior that would lead them to believe the claimant was injured prior to being terminated.

On "11/17/92" the carrier filed a Notice of Refused or Disputed Claim (Texas Workers' Compensation Commission Form-21) (TWCC-21) which set forth the following reason:

> (Claimant) reported his injury on (date) afer (sic) his termination on 10-30-92. Our investigation reveals the statements of three co-workers states [claimant] continued to work normally and never reported an injury up until his termination. We continue our investigation. [Claimant] first sought medical care 11-11-92.

The issues before the hearing officer were whether the claimant sustained a compensable injury in the course and scope of his employment, whether the carrier properly contested the claim and what period of time the claimant had disability. Because of his determinations on the first two issues; that is, that the claimant did not sustain a compensable injury and the carrier properly contested the claim, the hearing officer stated in his Decision and Order that it was not necessary to determine the matter of any disability. We agree. For there to be disability, by definition, a claimant must have the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16).

Addressing the issue of the carrier's proper contesting of the claim, we agree that the language use in the TWCC-21 was sufficient to provide notice that the claim was disputed or refused. Article 8308-5.21(a) places a requirement on a carrier to contest the compensability of an injury on or before the 60th day on which it is notified of injury or it waives its right to contest compensability. The rule implementing these provisions is found in Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 124.6(A)(9) (TWCC Rule 124.6(A)(9) and provides such notice shall contain among other things:

a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits. A statement that simply states a conclusion such as "liability is in question," "compensability in dispute," "no medical evidence received to support disability" or "under investigation" is insufficient grounds for the information required by this rule.

We have previously indicated that magic words are not necessary to contest the

compensability of an injury under the Article and Rule and that we look to a fair reading of the reasoning listed to determine if the notice of refusal or denial is sufficient. *See* Texas Workers' Compensation Commission Appeal No. 93302, decided June 2, 1993, where we held "is not work related" as sufficient and Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992, where, in affirming the sufficiency of the language used, we stated, "a fair reading of the grounds listed, when considered together, encompass a controversion or dispute on the basic issue that an injury was not suffered within the course and scope of employment." The language used in the present case meets that criteria. *Compare* Texas Workers' Compensation Commission Appeal No. 92468, decided October 9, 1992, where we determined that "no medical to support" and "compensability will be determined following further investigation" was insufficient, and Texas Workers' Compensation Commission Appeal No. 93202, decided April 28, 1993, where we agreed with the hearing officer that the Notice of Refused or Disputed Claim hardly stated a defense where it merely contained recitals that the claimant "was fired for failing to pass a drug test, that he made false statements on his job application, and that he `now alleges an on-the-job injury.'"

Concerning the hearing officer's finding that the claimant did not sustain an injury in the course and scope of his employment, he apparently did not find the claimant's testimony to be totally credible. Of course, the hearing officer, as the fact finder, is in the best position to judge credibility as he can see, hear and observe the witnesses as they give testimony. The 1989 Act recognizes the importance of this factor at the hearing level in providing that the hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e). As the fact finder in a case, the hearing officer resolves conflicts and inconsistencies in the testimony and the other evidence. Garza V. Commercial Insurance Company of Newark N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Texas Workers' Compensation Commission Appeal No. 92066, decided April 6, 1992. He can believe all, part, or none of the testimony of any particular witness (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. Civ. App.-Corpus Christi 1983, writ ref'd n.r.e.)) and a claimant's testimony, as an interested party, only raises a factual matter for the hearing officer's resolution. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Where there is evidence sufficient to support the decision of the hearing officer and it is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, it is not appropriate to disturb that decision. *See* Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Even though it is possible in a given case that a different conclusion could be reached, such does not justify the fact finder's judgement being substituted. *See* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

Although the claimant testified that he hurt his back lifting forms and mentioned it to a coworker at the time, there was evidence that tended to negate that an injury occurred at work. It was developed that the claimant did not report an injury to any one in a supervisory

position until after he was terminated (recognizing that a claimant has 30 days to report an injury) and that there were regular safety meetings where employees were instructed to report any injury or accident immediately. The employer had devised a form for all employees to sign at the end of a shift which stated in both English and Spanish that no injury or accident had occurred, and the claimant had signed the form each day during the period in question (although he stated he did not understand what the form was). Witnesses were called who worked with the claimant and who stated that the claimant did not mention any injury, that they did not seen any physical limitations on the part of the claimant right up to time he was terminated, and that the claimant performed somewhat demanding physical labor from the (date of injury) to the time he was terminated on October 30th for unrelated reasons. The hearing officer could also have taken into consideration the medical evidence offered, the extent of any medical condition and the matter that the claimant did not go to a doctor until November 11th, some 20 days after his claimed injury date. In sum, we cannot say there was not a sufficient basis in the evidence for the hearing officer's decision. Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge