APPEAL NO. 93565

On June 8, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the respondent (claimant) was injured in the course and scope of his employment with his employer, (employer), on or about (date of injury), and further determined that the claimant notified his employer of his injury not later than 30 days after (date of injury). The appellant (carrier) disputes certain findings of fact and contends that there is "no evidence" to support the hearing officer's conclusions that the claimant was injured at work and that the claimant gave timely notice of injury to his employer.

DECISION

The decision of the hearing officer is affirmed.

The parties stipulated that the claimant was employed by the employer on (date of injury), and that the employer had workers' compensation insurance coverage with the carrier on that date.

The claimant, who is 23 years of age, was discharged from the (CS) in May of 1989 because of chronic, recurrent low back pain which existed prior to his enlistment. The (CS) medical records indicate that an x-ray showed a mild decrease in the space between the L5-S1 discs and that there was sacralization of the L5 disc. (According to Dorland's Illustrated Medical Dictionary, 27th Edition, W.B. Saunders Company 1988, "sacralization" is an anomalous fusion of the fifth lumbar vertebra to the first segment of the sacrum, so that the sacrum consists of six segments.) The claimant said that the (CS) doctor told him that he had had this condition since birth.

The claimant testified that his father-in-law, (Mr. G) helped him obtain a job with the employer who operates a grain elevator. The claimant said that Mr. G was his foreman at work and Mr. G, in a transcript of a recorded statement introduced into evidence by the carrier, indicated that he was the claimant's supervisor. The claimant further testified that on (date of injury), he twisted to stack a 50-pound feed sack on a pallet at work when he felt a very strong pain in his lower back along with some pain radiating down his left leg. He said he stopped working for about fifteen minutes and told Mr. G that "I'd hurt" and that "I told him that I had hurt it sewing up the feed sacks and stacking them." The claimant also testified that he thought he might have "worsened" his prior injury from the (CS) and that he told Mr. G that he had "just reactivated a previous injury."

In his recorded statement, Mr. G gave the following answers:

Q: Do you know anything about him [the claimant] hurting himself while at work?

A: Well, that day they were bagging some feed or something. I was on the outside doing something else, and he came up to me and said something about his back locked up or something, you know, he couldn't, you know.

Q: Said his back had locked up?

A: Uh huh.

Q: What else did he say, did he say what he was doing or anything?

A: Well, he was, I think, throwing some sacks on a trailer.

The claimant testified that his financial condition prevented him from seeing a doctor for about a week or so. He said that he finally was able to see a doctor in a hospital emergency room under an indigent health care program. He was subsequently seen by three other doctors. Diagnostic tests were done in June and July of 1992. A June 1992 hospital record recites the history of injury as "most recently, stacking feed sacks and hurt back, previously hurt while in (CS)." The claimant said that in August or September 1992, he had an MRI done at the request of (Dr. N). Dr. N's medical reports indicate that the claimant told him that when he was twisting and stacking feed sacks at work his back "locked up," and that he had a previous injury in the (CS). In a report dated September 15, 1992, Dr. N stated to the effect that the claimant has a sacralization of the L5 disc but that that condition is a different problem from what the claimant has now. On October 12, 1992, Dr. N wrote that the claimant's MRI scan showed disc herniations at L4-5 and at L2-3 and stated that "I feel strongly that the reason that he was discharged from the (CS) was as a result of the sacralization of L5 and not this current problem that he has." In March 1993, Dr. N wrote that he felt that the claimant needs an "L2-3 and L4-5 diskectomy done."

(Mr.N), the employer's general manager, testified that he first learned that the claimant was claiming an on-the-job injury when he received a notice from the Texas Workers' Compensation Commission (Commission) in November 1992, requesting the employer to file a report of injury with the Commission. This witness also said in a transcript of a recorded statement that Mr. G was the claimant's foreman.

Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's findings that the claimant injured his back at work on (date of injury); that his injury was different and unrelated to the condition which resulted in his discharge from the (CS); that Mr. G was the claimant's supervisor on (date of injury); and that the claimant notified Mr. G of his injury on (date of injury). We further conclude that those findings are not against the great weight and preponderance of the evidence. In Re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951). We also conclude that the findings support the hearing officer's conclusions that the claimant was injured in the course and scope of

his employment on (date of injury), and that the claimant notified his employer of his injury within 30 days of (date of injury) as required by Article 8308-5.01(a). We find no merit in the carrier's "no evidence" challenge to the hearing officer's conclusions of law.

The hearing officer is the judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The claimant was an interested witness and his testimony did no more than raise a fact issue for the hearing officer to determine. Nevertheless, the hearing officer had a right to believe the claimant's testimony, and believing it, had a right to find that he injured his back when stacking feed sacks at work on (date of injury). Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App. - Eastland 1980, no writ). The claimant testified to the prompt onset of back pain when he twisted with the feed sack. The claimant was diagnosed as having herniated discs. The herniated discs do not appear in medical reports prior to the claimant's injury at work. The claimant's doctor stated to the effect that the claimant's previous back condition was unrelated to his present back condition. The claimant also testified that he reported his injury to his foreman on the day of the injury and the foreman's statements tend to corroborate the claimant's testimony. We point out that notice of injury may be given to any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). Considering the evidence which supports the hearing officer's conclusions, the carrier's "no evidence" contention presents no basis for disturbing the decision of the hearing officer. The hearing officer's findings concerning the reason the claimant did not seek immediate medical attention and the reasonableness of his belief that his injury was due to the condition for which he was discharged from the (CS) are sufficiently supported by the evidence; however, such findings were not strictly necessary for a decision in this case and error, if any, in making such findings would not present reason for reversal.

We note that the carrier in its appeal states that "[the claimant] never gave notice to anyone at [the employer] that he wanted to make a workers' compensation claim nor did he make a workers' compensation claim within the 30 days prescribed by the Act and did not have good cause for not making his claim." The carrier misstates the law with respect to filing a claim for compensation. Under Article 8308-5.01(b), an employee has one year to file a claim for compensation. Timely filing of a claim for compensation was not an issue at the hearing, although it appears from Mr. N's testimony that a claim was filed in November 1992, within one year from the date of injury. However, notice of injury to the employer must be given within 30 days of the injury, unless the employer or carrier has actual knowledge of the injury, or good cause exists for failure to give timely notice. Article 8308-5.01(a); Article 8308-5.02. Nowhere does the law state that an employee must give notice to his employer that he wants to make a workers' compensation claim within 30 days of the injury as asserted by the carrier. In DeAnda v. Home Insurance Company, 618 S.W.2d 529, 532-533 (Tex. 1980), the Supreme Court of Texas stated that to fulfill the purpose of the notice of injury provision, the employer need only know the general nature of the injury and the fact that it is job related.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge