APPEAL NO. 93657

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S art. 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on July 2, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) was not injured in the course and scope of her employment and did not timely notify her employer of the alleged injury and did not have good cause for failure to timely notify. He also determined, although mooted by his other holdings, that the respondent/cross-appellant (carrier) could not contest the compensability of the injury on grounds of course and scope. Claimant disputes the hearing officer's decision and urges that the evidence establishes her injury in the course and scope of her employment and that she had good cause for not notifying her employer of her injury within 30 days. Carrier urges that the hearing officer's decision is supported by the evidence and should be affirmed except on the issue of carrier's not being able to contest the claim on the basis that the claimant was not injured in the course and scope of her employment.

DECISION

Finding a sufficient evidentiary basis supporting the hearing officer's decision, the decision is affirmed.

The issues stated at the outset of the hearing and agreed to by the parties were:

1.Whether or not Carrier can contest the compensability of Claimant's injury as not occurring in the course and scope of her employment because it did not specify that as a grounds for defense in its TWCC-21.

2. Whether or not Claimant was injured in the course and scope of her employment.

3.Whether or not Claimant or a person acting on her behalf notified Employer of Claimant's injury not later than the (date) day after the date the injury occurred, and, if not, did good cause exist for such failure to timely notify Employer of her injury.

The claimant's evidence in the case consisted of the testimony of the claimant, her husband, and her mother, and a number of documents including medical records. The carrier's case consisted of the testimony of an administrator for a former employer of the claimant, the employer where the claimant worked at the time of the alleged injury, and the adjuster for the carrier. The case turned largely on credibility and in the resolution of conflicts in the evidence. The hearing officer, as the sole judge of the relevance and materiality of the evidence as well as the weight and credibility to be given to the evidence (Section 410.165(a)), is the one who resolves conflicts and inconsistencies and makes findings of fact. Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. *See* Garza v. Commercial Insurance Company of Newark, N. J., 508

S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Where there is sufficient evidence to support his determinations and they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, there is no sound basis to disturb the hearing officer's decision. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

Very briefly, the claimant, a nurse's aide, testified that she injured her neck on (date), when she was assisting a wheelchair bound patient onto a toilet seat. She stated she did not report the matter to anyone as it was a "little quick pain" in her neck at the time and that "it came and it left." Although she felt bad the next day, like she was catching something, she continued working the ensuing days. She testified she started having significant pain in the left side of her body and went to her doctor where she was apparently tested and treated for other than cervical problems. She eventually went to see the first of a series of other doctors on January 21, 1993, and was subsequently told that she probably had a ruptured cervical disc. A subsequent CT scan and an MRI indicated "posterior osteophytes at C4-5 with some minimal associated disc protrusion between the osteophytes extending slightly to the left of the midline." In any event, although claimant started having pain several days following the claimed incident on (date), she indicated that she did not know exactly what was involved and that was why she did not report an injury any earlier. She filed an Employee's Notice of Injury, TWCC-1, on February 11, 1993, and in it she alleges the date of injury to be (date of injury). (She indicated that her date of injury was (date) at the contested case hearing and, according to the assertion of the carrier, after she learned, subsequent to the benefit review conference, that the employer's records showed she was not with the patient she claimed she was with on (date of injury)).

The claimant testified that she resigned from her job with the employer on January 19, 1993, because of unprofessionalism on the part of the director of nurses and because of harassment. In neither a letter of resignation nor in her exit interview did the claimant mention anything about an on-the-job injury. The first the employer knew of the assertion of an on-the-job injury was on February 12, 1993, and carrier refused the claim on a Notice of Refused or Disputed Claim (TWCC-21) on February 22, 1993, asserting only that claimant failed to timely notify the employer of any injury. The claimant's husband and mother testified and indicated that the claimant injured her neck with the employer on (date) and that she had not seriously injured herself in an August 1992 incident working for another employer.

The employer testified that she was about to terminate the claimant at the time she resigned because of several concerns including the claimant and others switching shifts without permission. She also testified that the claimant was not working with the patient she claimed to be working for on (date) and that the patient she claimed she was helping from a wheelchair was not a wheelchair patient but was an ambulatory patient. She also testified that it is mandatory to report any incident where a patient falls or slips and that

nothing was reported by the claimant.

The administrator for the claimant's former employer (claimant left this employment in September 1992) testified that the claimant came in to see her in late February 1993, was very belligerent, and stated that she was injured on the job in August 1992 when she and another employee were assaulted by a patient. The claimant wanted to be paid for medical bills. The administrator testified that an investigation did not uncover any records of evidence or any injury or incident and that such an incident would have to be reported. According to the claimant the incident involved the patient putting the claimant into a hammerlock around the neck. The claimant testified that her neck was stiff for sometime but that she got over it. She also said one of the doctors told her that the August 1992 incident was not the cause of her current problem.

Medical records introduced reflect a variety of ailments over a lengthy period of time, from flu to chest pain to numbness all along her left side. Following the alleged incident on either (date) or (date), the earlier medical records do not mention an on-the-job injury. A History and Physical dated January 29, 1993, from a (Dr. O) reflects that "[t]he patient tells me that in August of 1992, when she was working at a nursing home, she was grabbed around the head and neck by a blind large woman (patient) and her head was struck with the lady's fist" and that over the ensuing six days the claimant had a "stiffness of her neck but this disappeared." A report dated March 1, 1993, from a (Dr. K) indicates that "[o]n (date) while working as a private sitter for a wheelchair bound patient, she was transferring the patient to a commode" and that the patient slipped while holding on to the claimant's neck and that claimant "felt an immediate ache, but continued to work." The report reflects that the next morning the claimant was "shaking on the left side," and was "nauseated and had a headache." The report also reflects that on January 17, 1993, x-rays were taken of the cervical spine and that they were within normal limits.

The adjuster for the carrier testified that he filed the original Notice of Refused or Disputed Claim, TWCC-21, on February 22, 1993, citing failure of timely notice of injury by the claimant. He testified that they only had limited medicals at the time. An exhibit introduced by the carrier indicated that the carrier orally brought up an issue of course and scope at the benefit review conference (BRC) but that another TWCC-21 was not filed until April 20, 1993, setting forth a dispute or refusal on this ground.

As stated, the hearing officer found that the claimant was not injured in the course and scope of employment and that the claimant, without good cause, failed to timely notify the employer of her injury. He also found that the carrier was barred from contesting the claim on the ground that the claimant was not injured in the course and scope of her employment since it did not timely assert this ground in writing. We find there is sufficient evidence to support the essential findings and conclusions of the hearing officer. Regarding the limitation on the carrier's grounds for disputing or refusing the claim, Sections

409.021 and 409.022 provide that where a carrier refuses to initiate compensation for a claim not later that the seventh day after receiving written notice of the injury, it must notify the Commission and the employee in writing, and the grounds for refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability. Further, the carrier waives its right to contest compensability if it does not contest the compensability of an injury on or before the 60th day after notification of the injury unless there is a finding of evidence that could not reasonably have been discovered earlier. Here, the carrier failed on both bases to subsequently raise a course and scope defense. Although there was apparently some oral mention of the "expanded" defense at the time of the BRC, a new or amended TWCC-21 was not filed until April 20, 1993, with the information required by Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 124.6. Although the carrier established that it might not have had various medical reports or reports and information from the employer at the time of its original TWCC-21, it did not satisfy the second prong, i.e., establishing that such evidence could not have been discovered earlier. Failure to diligently investigate a claim of injury does not give rise to a later, newly discovered evidence claim.

Although there is sufficient evidence to support the hearing officer's determination that the claimant was not injured in the course and scope of employment, given all the conflicts and inconsistencies in the evidence and testimony, the case must turn on the failure of timely notice issue since the hearing officer determined the carrier had waived this defense of the injury not being in the course and scope. Regarding timely notice, Section 409.001 provides that "[a]n employee or person acting on the employee's behalf shall notify the employer of the employee of an injury not later than (date) day after the date on which the injury occurs." The failure to so notify relieves the employer and its carrier from liability unless, among other things, the Commission determines that good cause exists for failure to provide notice in a timely manner. The hearing officer determined that there was a failure by the claimant to give timely notice of injury and that no good cause existed for such failure. Although the claimant acknowledged that she did not give notice of her injury until after 30 days, she testified that she was not sure what her injury was. However, she also testified that during the days following her injury she started hurting, that her "left body, arm and leg had shooting pains" and that by January 11th, she was "hurting bad." Nonetheless, she did not report any on-the-job injury or incident and did not even mention it when she later resigned and had her exit interview. Under the circumstances, the hearing officer determined there was no timely notice and no good cause shown. We cannot say, under these circumstances, that the great weight and preponderance of the evidence is so against his determinations as to make them clearly wrong or manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex 1951). *See* Texas Workers' Compensation Commission Appeal No. 93466, decided July 19, 1993; Texas Workers' Compensation Commission Appeal No. 93498, decided July 26, 1993; and Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991.

Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge