APPEAL NO. 93761

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 3, 1993, in (city), Texas, (hearing officer) presiding as hearing officer. The issues at the CCH were whether the respondent (claimant) sustained a back injury in the course and scope of employment on (date of injury), and, if so, whether the claimant timely reported this injury to his employer. The appellant (carrier) urges on appeal that the claimant did not meet his burden of proof as to the existence of an injury and that the traditional "liberal" standard of notice of injury afforded to employees by the Texas Workers' Compensation Commission (Commission) should not obtain in a case like this where the employer has conscientiously implemented a comprehensive system to make employee reporting easier. Claimant counters that the findings of the hearing officer are "accurate and correct."

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm the hearing officer's decision.

Claimant worked as a truck driver. His duties included loading cargo. On (date of injury), he was dispatched to a customer's plant to pick up a load of drums. He questioned this job with his dispatcher because the truck he was assigned required that the drums be loaded by means of a hand-operated dolly. He was assured that there would be help at the pick-up site. When he got there, there was no one to help him. He loaded approximately 75 drums himself and estimated that 45 of them weighed over 750 pounds. He wrote on the service order that it took over an hour to load the drums and that the weights of three drums picked at random were 585, 685 and 710 pounds. While loading the drums, he noticed back pain and a burning sensation in his leg. He delivered his load and stayed overnight at the destination. He felt better the next morning and returned to work. There was no work for him that day, so he went home for the weekend and came back to work the following Monday. His back was still bothering him. The claimant testified that on Monday, March 1, 1993, he spoke with the dispatcher, (Mr. A) (who described himself as the claimant's first level supervisor) and told him how heavy the drums were and that his back hurt. He also testified that he spoke the same day with his second level supervisor, (Mr. E) to complain about the heavy drums and no help in loading them. He testified that he told Mr. E: "I just about threw my back plumb out." On March 4th or 5th, claimant states he told Mr. A that his back "was about to kill me" since the drum pick-up on (date of injury). At this time he thought it was a strain which would work itself out. On (date), after finishing delivery on two of three loads for which he was scheduled, he told Mr. A that his back hurt too much and he could not deliver the third load. On March 12, 1993, he began a series of evaluations with several chiropractors who excused him from work for various periods of time. He was diagnosed as having lumbosacral pain with radiculitis myositis. He returned to work from March 23 to 26, 1993, until again taken off work by a chiropractor. His last day at work was March 26, 1993. His back kept getting worse until on March 29, 1993, he was referred for an MRI. The MRI showed disc protrusion at the L3-4, L4-5 and L5-S1

levels consistent with herniation; a bulge at the L1-2 level; stenosis at L1-2; and vertebral spurring. (Dr. S), claimant's treating doctor, is quoted by his assistant on May 5, 1993, as stating that the claimant's degenerative disc disease was "asymptomatic until the injury on (date of injury) which strained his lower back and exacerbated the underlying problem. [Dr. S] feels that his pain and disability were directly caused by [this] incident." Because of increasing pain, the claimant underwent a lumbar myelogram on July 9, 1993, which confirmed the earlier MRI and showed significant herniation and lateral spurs on the right at L3-4 and on the left at L1-2. Surgery was recommended, but not yet elected.

On cross-examination, the claimant admitted he has had back problems for a long time and that he had regularly seen chiropractors for treatment. He also admitted that he was involved in an on-duty traffic accident in 1990 that injured his back. Nonetheless he insisted that his past back problems were never to this degree. He reported his condition to (Mr. H), the safety manager, on April 1, 1993. In this conversation, he discussed with Mr. H the benefits of filing a worker's compensation claim verses a group health claim, and said he did not want to submit a worker's compensation claim unless he had to do so. He also admitted he had received training in his employer's procedures for reporting injuries, but has never filled out an employer-provided reporting form. At Mr. H's request, claimant completed a statement on April 1, 1993, which recounted what had happened and became the basis for the Employer's First Report of Injury or Illness (TWCC-1) to the Commission on April 2, 1993. Mr. A testified about conversations he had with the claimant on (date) and March 1st as follows: Claimant told him he was highly upset about having to load the drums without help. On (date), he never said loading the drums hurt his back. Mr. A admitted, however, that the claimant also complained about discomfort in his back on March 1st and he may have related this to the drum-loading incident, but Mr. A does not precisely recall if he did or not. He knew the claimant had a history of back problems and thought that this was just another complaint about aches on the job. The claimant never told him he wanted to make a claim of an on-the-job injury.

Mr. E testified that he did not recall any conversation with the claimant on March 1st. He does not recall the claimant telling him he threw his back out. He recalls a conversation on (date) with the claimant which led him to believe that the claimant was just mad at having to load the drums. He did not mention a problem with his back, but said he wanted to go home because he was tired and worn out. Mr. E also said that it was normal to load these drums with a hand-operated dolly. He explained the employer's procedures for reporting incidents and affirms that he never got any formal report from the claimant.

Mr. H also testified concerning the employer's injury reporting procedures and insisted that he knew nothing of the claimant's alleged injury until the conversation on April 1st. Their discussion indicated to him that the claimant was having only a few aches and pain, and he said he did not realize how bad the situation was until the MRI testing was done. Until then, the claimant was using his group insurance and he wanted Mr. H to advise

him on how best to treat this claim. Mr. H testified that he told claimant that workers' compensation benefits were greater than group health benefits. Mr. H also discussed the special procedures in place for reporting injuries and for training employees in these procedures.

The hearing officer, as fact finder, is the sole judge of the relevance, materiality, weight and credibility of the evidence. Section 410.165. The decision of a hearing officer will be set aside on appeal only if it is so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer's decision will not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The fact of an injury may be established solely by a claimant's testimony and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the ability from common knowledge to find a causal connection. Gee v. Liberty Mutual Insurance Company, 765 S.W.2d 394 (Tex. 1989); Texas Workers' Commission Appeal No. 92083, decided April 16, 1992.

Regarding the fact of an injury, the claimant testifies to a specific incident and more or less contemporaneous pain. Medical evidence establishes disc injury. In response, the carrier points only to anecdotal evidence about the claimant's general sore back, about an auto accident two years previous and to medical evidence of vertebral spurs and degenerative disc disease that have progressed to such a point that they had to exist before the claimed injury. The carrier also points to the statement of (Dr. R), claimant's long-term treating chiropractor in a letter of June 23, 1993, to the carrier that claimant's symptoms were a "reacerbation (sic) of previous symptoms treated from 8-20-91 to 5-16-91, at which time [claimant] was released from care, and [a]ccording to our records, [claimant] did not mention that his current symptoms were do (sic) to a new injury"[1] to support its this position that the claimant's pain and current medical condition are the result of a pre-existing condition. It is well established that a claimant bears the burden of proof that a compensable injury occurred in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A carrier who seeks to avoid liability based on a pre-existing condition has the burden of proving that condition was the sole cause of the present injury. Texas Workers' Compensation Commission Appeal No. 91038, decided November 14, 1991. In the case under consideration, the carrier simply disputed that an injury occurred on (date of injury).

[1]We note that there is no evidence in the record that Dr. R treated claimant after February 22nd.

Under these circumstances, the hearing officer found the claimant credible in his assertions about his activities on (date of injury), about his account of the onset of unusual pain and that he was in fact injured as claimed. In so doing, he discounted carrier's contention that a pre-existing condition was the cause of the claimant's current condition and Dr. R's conclusions that the claimant's current pain and injury is an exacerbation of a previous condition.[2] In considering all the evidence in the record, we cannot agree that the findings are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust or that the claimant failed to meet his burden of proving a distinct injury on February 22nd.

As to timely notice of injury, Section 409.001 provides that an employee shall notify the employer of an injury "not later than the 30th day after the date on which the injury occurs." The notice may be given to anyone who holds a supervisory or management position with the employer. Absent actual knowledge of the injury, failure to notify the employer within 30 days, unless excused for good cause, relieves that employer and carrier of liability. Section 409.002. In this case, the employer contends that it first received notice of the injury on April 1st, more than 30 days after the injury when the claimant met with Mr. H. It argues that the earlier conversations, recounted above, between the claimant and Mr. A and Mr. E, did not in fact constitute the required notice because they dealt only with a generalized complaint about aches and pains, typical of this claimant, and were really intended by the claimant to express, not an injury, but how mad he was that there was no one there to help him load the barrels.

According to the Supreme Court of Texas, the purpose of timely notice of an injury is:

> to give the insurer an opportunity immediately to investigate the facts surrounding an injury. [Citation omitted.] It is well established that this purpose can be fulfilled without the need of any particular form or manner of notice . . . the employer need only know the general nature of the injury and that is job related.

DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980); Texas Workers' Compensation Commission Appeal No. 93387, decided July 2, 1993. Whether or not a claimant provided his employer with the statutorily required adequate notice is a question of fact to be determined by the hearing officer based on his evaluation of whether the facts and circumstances in evidence "would lead a reasonable man to conclude a compensable injury had been sustained." Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. Appeals-Beaumont 1972, writ ref'd n.r.e.). The court in Cadengo v. Compass

[2]The aggravation of a pre-existing injury can be a compensable injury. Texas Workers' Compensation Commission Appeal No. 92654, decided February 22, 1993.

insurance Company, 721 S.W.2d 415 (Tex. Civ. App.-Corpus Christi 1986, no writ) opined that a claim satisfied notice requirements

> if it in some measure contained the following information: the name of the employee and some indication that he or she has been injured; some indication of the nature of the injury; some indication as to when and where the injury happened and adequate information to identify the employer.

Prior decisions of both the Appeals Panel and various courts of appeal have affirmed findings of fact as to the existence of notice if there is some evidence in the record from which a hearing officer can infer that the employer was or should have been on notice of the injury. *See for example*, DeAnda, *supra*, Texas General Indemnity Company v. Thomas, 428 S.W.2d 463 (Tex. Civ. App.-Tyler 1968, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92154, decided June 4, 1992; Texas Workers' Compensation Commission Appeal No. 93387, decided June 2, 1993; and Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991.

The hearing officer in the case under review specifically found that the claimant gave the required notice to Mr. A within two weeks of the accident. The testimony of the claimant is some evidence of probative force that he connected his activities on (date of injury), to his back problems and told this to both Mr. A and Mr. E. This evidence, at least as to conversations with Mr. A, was found by the hearing officer to have been sufficient to have constituted reasonable notice that an injury in the course and scope of employment was being claimed. There being sufficient evidence in the record to support this decision, we will not disturb it on appeal.

In its request for review, carrier describes "Texas authority" as allowing the "finder of fact to construe notice liberally." It contends that such liberal construction in favor of a claimant should not apply in cases such as this where an employer takes the time and effort to institute a comprehensive notice scheme to prevent on-the-job injuries from going unreported. In support of this contention, it introduced evidence at the CCH of the various accident reporting forms and procedures in place and, in effect, urges the Appeals Panel to require employees under these circumstances to use that system in a timely manner or lose their rights under the 1989 Act. In Texas Workers' Compensation Commission Appeal No. 92348, decided September 8, 1992, the Appeals Panel held that an employer's rules concerning notice does not change the requirements of the statute. In this case, we hold that an employer cannot bind a claimant to stricter requirements than those contained in the 1989 Act. The Act does not provide that employers may require notice in a special format under penalty of loss of rights for noncompliance with that format. The requirement in the 1989 Act is one of notice in fact reasonably calculated to provide the employer with

information that the employee has been injured in the course and scope of employment.[3] The employer may, of course, adopt any additional record keeping or internal procedures it wishes, but any failure of the claimant to comply with the employer's own notice procedures in this case does not in itself constitute failure to comply with the 1989 Act.

For the above stated reasons, the decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge

[3]Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.1(a) lists suggested, not mandatory, contents of an employee's notice of injury.