APPEAL NO. 94028
FILED FEBRUARY 14, 1994

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On December 9, 1993, a contested case hearing (CCH) was held. The issues to be resolved by the hearing officer were:

(1) whether claimant sustained a compensable injury on (date of injury);

(2) whether claimant reported an injury to employer on or before the 30th day of the injury, and if not, does good cause exist for failing to report the injury timely; and

(3) whether claimant had disability from August 17, 1993 to the present resulting from the injury sustained on (date of injury).

The hearing officer determined that the claimant suffered an injury that arose out of and in the course and scope of his employment on (date of injury), that claimant gave timely notice to the employer of his (date of injury), and that claimant had disability because of his injury beginning on August 17, 1993, and continuing thereafter.

Appellant, carrier herein, contends that the hearing officer misapplied the facts, the law, and the argument presented regarding the issue of notice and requests that we reverse the hearing officer's decision and remand this case for another CCH. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Although there were three issues presented to and decided by the hearing officer, both parties agree that the key issue, and the only appealed issue, was whether the claimant timely notified his employer of his injury. By way of background, it is undisputed that claimant was working the "graveyard shift" (6:00 p.m. to 6:00 a.m.) as an "A" operator for (Employer), employer herein, on (date of injury) (all dates are 1993 unless otherwise noted). It is undisputed that at that time and date, claimant was working with (JB), another "A" operator with more seniority with the employer than the claimant. Both claimant and JB testified that claimant was opening valves on a rail car when claimant stated he "felt something pull in his back." JB testified he observed this incident and heard claimant say "I think I pulled something in my back." Claimant received chiropractic treatment for low back pain from June 18th until July 30th, when a CT scan revealed a herniated disc at the L5-S1 level. Claimant subsequently reported his low back diagnosis to his unit supervisor, (NG), on August 3rd. Claimant continued to work until August 17th when the employer instructed

him to remain home until his back healed. Claimant's orthopedist ordered claimant off work and claimant had not been released to work to the date of the CCH.

The crux of the case was whether JB was an employee who held a supervisory or management position for purposes of receiving notice of injury. It is undisputed that NG, the regular foreman or supervisor, was not present on the day of the incident, or for several days thereafter. Both claimant and JB testified that the "A" operators substituted for the unit foreman when the foreman was not available and that the senior "A" operator was regarded and obeyed as the substitute for an absent foreman. A job description of the "A" operator, admitted into evidence, lists, among other duties:

> 2. Directs and supervises B, C, and Trainee Operators.
>
> 3. Substitutes for Foreman. In the Foreman's absence, has the ability to complete routine paperwork (KP's, Time Cycles, Absence Reports, etc.). Assists Foreman in preparing equipment for maintenance.
>
> 5. Is the primary trainer. Can handle different personalities and trains others in all areas (processing, safety, environmental).
>
> 7. Makes non-routine decisions and accepts the responsibility for his decisions.

Carrier argues this is a December 1983 job description and has been changed. The employer's human resources supervisor testified he could not identify the source of the written operator job description admitted into evidence but it was claimant's unrefuted testimony that NG, the regular supervisor, had given claimant the written job description only a few months previously. Both claimant and JB testified they used the job description as the guide to how they performed their job. Both claimant and JB testified that claimant asked JB not to report the injury to anyone else because claimant believed he would be penalized on his safety record. Claimant testified he had previously "got busted back" from an "A" merit operator and had incurred a $3,000.00 pay differential between A merit and A basic pay for a safety violation. Claimant conceded he did not report the injury to the first aid station and that there were other supervisors in the plant, including the fire chief, to whom a report could have been made on the day and time in question. It is undisputed that neither claimant nor JB notified management officials of the injury until August 3rd when claimant told NG. Carrier maintains another unit foreman (the fire chief) was present on the day in question and the fact that JB did not tell anyone of claimant's injury, thus violating employer's procedures, "suggests that [JB] did not hold a supervisory or management position."

The hearing officer determined in pertinent part:

FINDINGS OF FACT

6. [JB] was a substitute foreman when he observed the rail car incident and claimant told him that he pulled his back on (date of injury), because the unit foreman was absent, and [JB] was the senior "A" operator in the unit pursuant to the "A" operator written job description and the workers' long-term compliance with this job description.

CONCLUSIONS OF LAW

4. Claimant gave timely notice to employer of his (date of injury), injury.

Carrier challenges the above quoted determinations as being contrary to the credible evidence.

Section 409.001(b) of the 1989 Act provides that notice of an injury may be given to:

(1) the employer; or

(2) an employee of the employer who holds a supervisory or management position.

A similar provision is found in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.1(c) (Rule 122.1(c)). Clearly, the job description of an "A" operator states the "A" operator "directs and supervises B, C and Trainee Operators" and "substitutes for Foreman." The job description is silent regarding situations where there are two (or more) "A" operators on a unit although the testimony was unrefuted that it was a long-standing practice that the workers would look to the senior "A" operator on duty, in the absence of the foreman, for direction and supervision.

Texas Workers' Compensation Commission Appeal No. 92694, decided February 8, 1993, is an Appeals Panel decision which is factually very similar to the instant case. In Appeal No. 92694, the employee, a night stocker, testified he believed the lead frozen foods clerk was a supervisor to whom he could report an injury, and did so the day following his injury. As in the instant case, the employee told the lead frozen food clerk "not to mention the injury to upper management because he [the employee] was in fear of losing his job." In that case there was testimony that the lead clerk "had no authority to hire, fire, terminate or discipline." Testimony to that effect is absent in the instant case although it may be inferred by the absence of any such duties in the job description. In that case the hearing officer found the lead clerk to have been a supervisor within the meaning of Section 409.001(b). The Appeals Panel held in Appeal No. 92694 that "the 1989 Act does not require that there be a direct supervisory chain, only that the person to whom a report is made holds a supervisory or management position." Clearly in the instant case JB supervised and directed B, C and Trainee Operators. And the unrefuted testimony was that JB also supervised junior "A" operators. Appeal No. 92694 also stated: "Here, it was

appropriate, under the circumstances, for the hearing officer to give a less grudging reading and application of Article 8308-5.01(c) (since codified as Section 409.001(b)) to the facts."

Appeal No. 92694 also addressed the issue that the claimant asked the lead clerk (or JB in the instant case) not to tell upper management about the injury for fear of being terminated (in the instant case "being busted" or penalized on his safety record). The Appeals Panel expressed concern with that fact but held:

> Clearly, this thwarts one of the very purposes of making timely notice: to afford the employer and carrier the opportunity to promptly and timely investigate an alleged injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). It is a factor that can appropriately be taken into account by a fact finder. However, it seems axiomatic that once a supervisor has been advised of an injury, it is incumbent upon him in fulfilling his responsibility to management to take required actions.

The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire and Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The hearing officer determined that JB was a substitute foreman when he observed the incident and claimant told him that he pulled something in his back. We believe that the determinations of the hearing officer were not so against the great weight and preponderance of the evidence to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge