APPEAL NO. 91066
FILED DECEMBER 4, 1991

On October 7, 1991, a contested case hearing was held. The issues at the hearing were whether appellant (claimant below) suffered an injury in the course and scope of his employment with (Employer) and whether appellant gave timely notice of his injury to Employer. The hearing officer made no determination on whether appellant was injured in the course and scope of his employment because he concluded that appellant failed to give timely notice of his injury to Employer. The hearing officer decided that appellant was not entitled to benefits under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN., arts. 8308-1.01 through 11.10 (Vernon Supp. 1991). Appellant contests certain findings of fact and conclusions of law made by the hearing officer, and requests that we render a new decision in his favor or, in the alternative, remand the case for another hearing. Respondent is Employer's workers' compensation insurance carrier.

DECISION

Finding the evidence of record sufficient to support the hearing officer's decision, we affirm his decision denying benefits to appellant.

The challenged findings of fact are:

3. On or before (30th day after alleged injury), Claimant did not tell or otherwise notify anyone holding a supervisory or management position that he claimed an injury to his back lifting concrete forms for the Employer.

4. No evidence was offered that the Employer or any other person in a supervisory or management position had actual knowledge of the injury on or before (30th day after alleged injury).

5. No evidence was offered that good cause exists for failure to give notice in a timely manner.

The challenged conclusions of law are:

3. Claimant did not notify the Employer of an injury on or before the 30th day after the date on which the injury was alleged to have occurred.

4. Under Article 8308-5.01(a), an employee or a person acting on the employee's behalf shall notify the employer of an injury not

later than the 30th day after the date on which the injury occurs.

5. Under Article 8308-5.02, an employee's failure to notify the employer as required under Article 8308-5.01(a) relieves the employer and employer's insurance carrier of liability under the 1989 Act.

At the hearing, appellant claimed that he injured his back at work on _____, lifting a form used to repair cattle feed bunks and that his back injury was then aggravated and made worse while driving a truck at work. Appellant's original Notice of Injury and Claim for Compensation (NICC) was not in evidence. However, the hearing officer took official notice of appellant's NICC which was dated and filed the same day as the hearing. The NICC alleges that appellant suffered a herniated disc lifting a steel form used to pour cement on _____.

Appellant testified that he works as a general maintenance man and relief truck driver for Employer. His job includes repair of cattle feed bunks. The form which he used to repair the bunks was made of tubing, sheet metal, and metal clamps, was five to seven feet long, and weighed about 200 pounds. Cement was poured into the form.

Appellant testified that about 10:30 a.m. on _____, while he was lifting the form to slide it on to a truck, he felt something in his back pull or pop. He felt a sharp, quick pain in his lower back and left hip. He was alone at the time. He then went and asked a co-worker, RM, to help him move the form. They moved it right before lunch break. Appellant stated that he told another co-worker at lunch that his back hurt and that his supervisor, DH, was in the lunch room at the time. He then took some tablets from a medical kit. Appellant said that after lunch, he cut the form apart and took the pieces to the junk pile.

Appellant further testified that he did not report his injury to anyone on the day it happened because he thought it was only a pulled muscle and was "not that bad of a deal." He stated that during the following weekend, he drove a feed truck for Employer and that his condition got "bad." He said that he had to get in and out of the truck a lot and that it was a "pretty rough vehicle." Appellant stated that on Monday following that weekend he told his supervisor, Mr. DH, that his back and hip were bothering him, that he had hurt his back "messing with the cement" or "messing with the forms," and that he thought that driving the truck caused his back to hurt, and that he needed to go to the doctor.

Appellant further testified that he left work on Wednesday (several days after alleged date of injury) to see Dr. SK after telling his supervisor that he was going to see a doctor. He stated he went to the doctor because "it got so bad" and he "could not take it anymore." He said Dr. SK prescribed Tylenol 3 and medication for bursitis or arthritis. Appellant said he visited Dr. SK again on Thursday or Friday of that same week because he was still in pain. He said Dr. SK prescribed more medication and possibly took x-rays. Appellant stated that Dr. SK referred him to Dr. S, who took x-rays and an MRI. He saw Dr. S two or

three times over the next few weeks. Dr. S referred appellant to Dr. B. Appellant testified that sometime around the end of May, it got to a point where he could no longer work. He said he had surgery for a herniated disc on June 17, 1991, and was released to light duty work around July 15, 1991. No medical records or reports were offered in to evidence.

Appellant testified that, sometime after he saw one of his doctors (he was not sure which one), but after he was no longer working, he talked to LM, Employer's manager. Appellant did not know the date of the conversation. He said Mr. LM asked him "what he had been doing." Appellant said he took this to mean what had he been doing when his injury occurred, so he told Mr. LM he had been pouring cement out in the yard. Appellant said Mr. LM asked him, "how I wanted to file" and asked appellant about his activities outside of work. Appellant further stated that when Mr. LM asked him where it happened, he, appellant, became frustrated and said "Well, I don't know where I did it then." Appellant testified that he did not hurt his back away from work.

Appellant stated that he reported his injury to Mr. LM as soon as he became aware of how serious the injury was, but admitted that he did not bring up the incident involving lifting the form until the benefit review conference in August 1991. A transcript of appellant's statement to respondent's adjuster on June 20, 1991, which was in evidence, reflects that appellant, at that time, alleged he suffered a back injury while driving Employer's truck. He did not mention the incident of _____, to the adjuster. Appellant explained that he had just been released from the hospital and was still on medication when he gave his statement to the adjuster.

AB, appellant's ex-wife with whom he lives, testified that she remembered appellant complaining about being hurt at work sometime during March or April 1991, that appellant told her he thought he pulled a muscle in his back, and that he may have taken her pain medication. She said he was on a truck the next weekend and that he told her his back hurt more. She said he started limping and went to a doctor. Ms. AB testified that appellant had not complained about back pain prior to this time.

RM testified that about the middle of April 1991, appellant asked him to help move a form that weighed 200 to 300 pounds. He said appellant told him that he, appellant, had hurt his back trying to pick up the form by himself. He also said that appellant said he had told Mr. DH, the supervisor, about the incident. Mr. M stated that, after this, he saw appellant humped over and limping. Appellant also complained to him about climbing in and out of the truck.

DH testified that he was appellant's supervisor in April 1991. He stated that he does not remember appellant telling him that driving the truck was rough on his back, and that appellant was working regular hours and had no problem doing his normal job duties when appellant started seeing a doctor. He said appellant never told him "to his face" that he had hurt his back or that he injured his back at work. He did recall that appellant told others in the break room that his leg hurt and that it might be a pinched nerve in his back sometime after appellant's first visit to a doctor.

LM, the Employer's manager, testified that appellant told him that his back was hurting and that he was going to a doctor. Mr. LM said he asked appellant how he hurt his back and appellant told him that he, appellant, did not know. Mr. LM did not remember the date of the conversation. He said that appellant did not tell him that he hurt his back at work. Mr. LM testified that he first learned that appellant was claiming he was hurt at work when appellant came back from seeing Dr. B. Dr. B had given appellant a written statement expressing his, Dr. B's, opinion that appellant suffered an on-the-job injury which was caused by driving a truck. Mr. LM did not remember the date he saw the doctor's written opinion, but said it was sometime in June just before appellant's surgery on June 17, 1991. He said that as soon as he was informed that Dr. B thought appellant had suffered an injury at work, he contacted respondent and handled the matter as he would regularly do.

Mr. LM further testified that the first time he learned that appellant was claiming that he was injured while lifting the form was at the benefit review conference on August 26, 1991. He did not recall anyone mentioning to him that appellant was hurt at the feed bunks prior to the conference.

The hearing officer took official notice of the Employer's First Report of Injury. The report, signed by Mr. LM and dated June 7, 1991, reflects that "how the accident/injury occurred" was "unknown" and that the accident was reported on June 7, 1991.

As correctly reflected in Conclusions of Law 4 and 5, an employee must notify the employer of an injury not later than the 30th day after the date on which the injury occurs, and failure to so notify the employer relieves the employer and the employer's insurance carrier of liability under the 1989 Act [unless the employer has actual knowledge, or good cause exists for failure to give timely notice, or the claim is not contested]. Articles 8308-5.01(a); 8308-5.02. The purpose of the notice provision is to give the insurer an opportunity to immediately investigate the facts surrounding an injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). To fulfill the purpose of the notice provision, the employer need only know the general nature of the injury and the fact that it is job related - more details of the occurrence will be supplied by the claim. DeAnda, supra. The notice of injury must give notice to the employer that the condition is work related. Mathes v. Texas Employers' Insurance Association, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). Where the claimant testifies that his supervisor was notified of the injury, but the supervisor testifies he was not notified, a question of fact exists for determination by the trier of facts. 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.). A bona fide belief of a claimant that injuries are not serious is sufficient to constitute good cause for delay in giving notice of injury. Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). The claimant must show that good cause for failure to notify the employer continued up to the date of notice. See Weigle v. Great American Insurance Company,

434 S.W.2d 373 (Tex. Civ. App.-Amarillo 1968, no writ) (where the court held that claimant must prove that good cause for failure to file a claim continued up to the date of filing).

In the instant case there was no evidence that RM, the co-employee who testified that appellant told him of appellant's accident on the day it happened, held a supervisory or management position. Therefore, notice to Mr. RM cannot be considered as notice to Employer. Article 8308-5.01(c). There is also no evidence that Mr. RM notified anyone in a supervisory or management position of appellant's accident. There is no evidence that the employee appellant talked to at lunch on the day of the accident was in a supervisory or management position, or that, if she was, that he told her that his back injury was work related. Consequently, appellant's conversation with that employee cannot be considered as notice of injury to Employer. Article 8308-5.01(c), Mathes, supra.

Appellant's testimony that he told his supervisor and the manager that his back condition was work related was controverted by the supervisor's and manager's testimony that he did not tell them his back condition was work related. This raised a fact issue to be decided by the trier of fact. Escalera, supra. We cannot conclude that the hearing officer's finding that appellant did not notify anyone in a supervisory or management position of a work related injury to his back on or before (30th day after alleged injury), was against the great weight and preponderance of the evidence. Furthermore, notice to the supervisor or manager of his back condition without notice that the condition was work related generally would not be sufficient. Mathes, supra.

The earliest date that the evidence shows notice to Employer of a work related injury is June 7, 1991. This date was more than 30 days after the date the injury is alleged to have occurred. While we disagree with the hearing officer's finding that no evidence was offered that good cause existed for failure to give notice in a timely manner - appellant's testimony that he believed the injury was only a pulled muscle is some evidence that he believed the injury was not serious - it is our opinion that such error is not cause for reversal in this case in light of other evidence of record. The evidence we allude to is appellant's own testimony that he decided to see Dr. SK on the Wednesday of the week following the week of the alleged accident because "it got so bad" and "he could not take it anymore." We note that Wednesday of that week would have been (several days after alleged date of injury). Considering appellant's stated reason for going to the doctor, it is our opinion that there is sufficient evidence for the hearing officer to have found that appellant's bona fide belief, if any, that his injury was not serious did not continue to be reasonable after deciding to see Dr. SK. We believe that appellant had a reasonable period of time within the 30-day notice period to notify Employer by (30th day after alleged injury), that his back condition was work related after the date the evidence indicates that a reasonable person would not have held a bona fide belief that the injury was not serious.

It is also our opinion that the hearing officer was correct in finding that no evidence was offered that the Employer had actual knowledge of the claimed injury on or before (30th day after alleged injury).

We conclude that the complained of fact findings are not so against the great weight

and preponderance of the evidence as to be manifestly erroneous or unjust and that the findings support the hearing officer's conclusion that appellant did not give timely notice of his injury to Employer.

The decision and order of the hearing officer are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge