APPEAL NO. 91126
FILED FEBRUARY 28, 1992

On November 5, 1991, a contested case hearing was held in (City), Texas, with (hearing officer) presiding as hearing officer, and evidence was adduced on the sole disputed issue, to wit: whether respondent's injury occurred within the course and scope of her employment. The hearing officer determined the issue in respondent's favor and ordered appellant to initiate the medical and weekly income benefits to which respondent was entitled under the Texas Workers' Compensation Act. TX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Sup. 1992) (1989 Act).

Appellant contends the evidence is insufficient to support the hearing officer's decision since respondent, a home health care provider, deviated from her assigned duties at the client's house by helping the client hang a wooden bedroom door. Appellant also asserts the absence of evidence to prove "an injury of sufficient duration to accrue income benefits" and the absence of documentation of the back injury including its "type" and "extent." Appellant asks us to reverse the decision of the hearing officer and render a decision denying respondent benefits under the 1989 Act.

DECISION

We affirm. The evidence is factually sufficient to support the findings of fact, conclusions of law, and decision of the hearing officer.

Before discussing the merits of this case, we comment on the time that has elapsed since the hearing on November 5, 1991. The hearing officer signed his Decision and Order on November 27, 1991, and, on December 5, 1991, the Decision and Order was mailed to the parties by the Texas Workers' Compensation Commission (the Commission). Appellant's written request for review, dated December 20, 1991, was received at the Commission's central office in Austin, Texas, on December 23 1991, and thus met the filing place and date requirements of Article 8308-6.41 (1989 Act) and Tex. W.C. Comm'n., 28 TEX. ADMIN. CODE, §§ 102.5(h) and 143.3 (TWCC Rules). However, the Commission's Appeals Panel returned appellant's request for review by letter dated February 10, 1992, because neither the request itself nor the certificate of service thereon were signed by the party or its representative. The Commission received appellant's appeal and certificate of service, both duly signed, on February 19, 1992, which date was within the time period extended to the appellant to correct the defects. No response to the appeal was filed by the respondent.

At the hearing below and before this panel, appellant contended that respondent "deviated" from her duties and thus removed herself from the course and scope of her employment. Appellant asserted below and on this appeal that respondent has given differing versions of exactly how she was injured, apparently referring to respondent's statements at the benefit review conference preceding the contested case hearing. Respondent testified, without controversion, that in May 1990 she became employed by

(Employer) as a home health care provider whose duties generally included housecleaning, cooking, laundry services, escorting, assistance with hygiene, and so forth for elderly, ill, or disabled clients of the Employer depending upon their individual needs; that respondent had done similar work previously for another employer and was experienced; that in (month/year) she was assigned by the Employer to provide home health care services including cleaning, laundry, and meal preparation for client (Mr. F); that the Employer advised respondent that Mr. F had a severe heart problem and, though not bedridden, was totally disabled and was not supposed to undertake any strenuous activity nor "pick up anything heavier than a teacup;" that respondent met her supervisor, (E.A.), at Mr. F's home at the outset of his care and was then given the tasks she was to perform for Mr. F; that these tasks were not explained to respondent in any detail by E.A. because respondent was regarded as experienced; and, that the Employer did not provide her with any initial training or orientation upon commencement of her employment, nor were any restrictions placed upon respondent's activities in the homes of the Employee's clients.

According to respondent, on (date of injury), while she was in Mr. F's kitchen preparing lunch, Mr. F called to her to come assist him. Mr. F had a wooden door he wanted to attach to its hinges in a back bedroom to help control air flow in the house and he asked respondent to assist him with this task. Respondent then helped Mr. F hold the door upright while Mr. F hooked it to a fastener similar to a screen door hook. Mr. F and respondent were on opposite sides of the door. Apparently Mr. F then left to get a hammer without telling respondent and respondent didn't realize the door was not yet attached to its hinges. She let go of the door and began to pick up some trash she noticed on the floor. She glanced up and saw the door falling towards her. She got up to catch the falling door. That activity involved her rising, twisting and turning to the right with her arms above her head to catch the door and prop it back up. According to respondent, that activity injured her lower back. In performing that motion, respondent felt pain in her back "like fire" and knew she was hurt. She testified that her back injury did not occur while she was helping Mr. F hold the door upright. Respondent testified that Mr. F did not see the door fall but knew she was hurt. She testified that Mr. F was old and scared and would not provide a statement because the Employer had led Mr. F to believe he would have to pay for respondent's medical expenses. Respondent's daily shifts with Mr. F were from 11:10 a.m. to 1:10 p.m. Her injury occurred at about 12:45 p.m. on (date of injury). Respondent called her supervisor that day at approximately 2:15 p.m. and advised her of the injury. Respondent testified that she considered her assisting Mr. F with the door as a part of her job because Mr. F was a heart patient whom she was told needed assistance with everything.

(Mr. G), a quality assurance supervisor for the Employer, testified in general to the various duties of the employer's home health care providers. However, not being present, Mr. G couldn't say what such providers are told <u>not</u> to do at the client's homes when being given their specific tasks for such clients by their supervisors.

Though not reflected as a witness in the evidence portion of the hearing officer's

Decision and Order, appellant also called respondent's supervisor, E.A., for testimony. According to E.A., she met respondent at Mr. F's house and advised respondent of the tasks to be performed for Mr. F. E.A. stated that sometimes employees will call the Employer for advice on matters such as lifting a client without assistance, washing curtains, etc. However, E.A. did not mention any such call for advice from respondent nor did she testify to any specific instructions or restrictions she gave respondent concerning the tasks respondent was to perform for Mr. F. E.A. thought it was two or three days after (date of injury) before respondent told E.A. about her back injury and about helping Mr. F with the door. Respondent insisted, however, that she called E.A. on the same day she was injured at about 2:15 p.m. E.A. also testified she had spoken with Mr. F who told her that while respondent had helped him with the door, he didn't think respondent had hurt her back then and didn't see how she could have done so by merely holding the door. Respondent contended that her back injury occurred not from merely holding the door upright for Mr F, but rather as she quickly rose up from picking up trash on the floor, turning and twisting to catch the door as it was falling toward her.

Appellant introduced a document written by E.A. at the request of Mr. C which purported to be her memorandum of the telephone conversation with respondent during which respondent stated she was aware that helping Mr. F with the door wasn't a part of her tasks but that she felt she should help Mr. F because of his heart condition and his having no one else there to assist him. When pressed, E.A. wasn't certain respondent has used those exact words. E.A. testified that respondent shouldn't have helped Mr. F with the door and she feels respondent knew that. Respondent, on the other hand, testified that she violated no policy of the Employer in assisting Mr. F with hanging the door because she was never made aware of any such policy.

On her job application respondent listed a prior injury to her back, shoulder and arm which occurred on (prior date of injury), in a vehicle accident and which resulted in a worker's compensation claim. She said she had recovered from those injuries.

Respondent testified she went to Dr. M's office on the day she was injured and the doctor wouldn't see her then because the Employer would not provide information on respondent's insurance coverage. She said that no one would tell her who the carrier was. According to respondent, she was given a sleeping pill and a tagamet (because of her ulcer) on that day at Dr. M's office. Respondent testified that Dr. M (apparently later) had her get a "CAT scan" and told her she had a "pinched nerve" and "three bulging discs." Dr. M wanted respondent to consult with a neurosurgeon but she can't afford to because she is on "AFDC" (Aid to Families With Dependent Children) and can't get more testing done under medicaid. Respondent stated that she still needs to see a doctor and that the carrier's adjuster has told her to go to another doctor as the adjuster doesn't like Dr. M.

The hearing officer took "official notice" of the Benefit Review Conference Report (rather than simply making it a hearing officer's exhibit); however, the report was of no evidentiary value. Attached to the report was an Interlocutory Order signed by the Benefit Review Officer on September 17, 1991, ordering the payment of temporary income

benefits effective "02-19-91." Having determined that appellant should pay temporary income benefits to respondent, the benefits review officer erroneously determined that such benefits were due retroactively to February 19, 1991. Such benefits were due retroactively to February 21, 1991, pursuant to Article 8308-4.21 (1989 Act).

Leaving aside for now a discussion of the evidence that respondent suffered an "injury" as that term is defined in the 1989 Act, we decide that the hearing officer correctly concluded that respondent's "injury" occurred in the course and scope of her employment. The hearing officer made the following findings of fact:

> "4. On (date of injury) the Claimant was injured at the home of a client to which she was assigned.
>
> 5. The client in question was a heart patient who was not to engage in strenuous activity.
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> 6. The injury occurred after the client had requested the Claimant's assistance to hold a door steady as he attempted to place the door on its hinges.
>
> 7. At the moment of the injury, the Claimant was picking up trash.
>
> 8. House cleaning was part of the Claimant's job responsibility with this client."

The evidence in support of these findings was uncontroverted. Respondent was the sole source of the evidence as to how her injury occurred and was an obviously interested witness. Nevertheless, respondent's testimony could raise issues of fact for the factfinder. Gonzalez v. Texas Employers Insurance Ass'n, 419 S.W. 2d 203, 208 (Tex. Civ. App. - Austin 1967, no writ). As the sole judge of the credibility and weight to be given the evidence, the hearing officer accepted her testimony as he was free to do. Article 8308-6.34(e) (1989 Act); Taylor v. Lewis, 553 S.W. 2d 153, 161 (Tex. Civ. App. - Amarillo 1977, writ ref'd n.r.e.).

There was some corroboration of respondent's testimony, albeit hearsay, from E.A. who testified that she had spoken to Mr. F who verified that respondent had helped him with the door but said he didn't see the incident. This evidence tends to support respondent's statement that unbeknownst to her Mr. F had left the door to go get a hammer and respondent then turned her attention to picking up trash on the floor nearby. Respondent didn't testify that she regarded the task of hanging the door as unfinished nor that she was aware that the hinge bolts remained to be inserted by Mr. F. From respondent's testimony, however, it may reasonably be inferred that she believed she had completed assisting Mr. F with the hanging the door and then commenced the opportunistic task of picking up trash from the floor in that area, a task well within her assigned duties. Further corroboration is found in respondent's report of the injury to her

supervisor. Appellant complains on appeal about the several versions of this incident previously given by respondent apparently adverting to another version--possibly given at the benefit review conference--which would have respondent injured while still assisting Mr. F with the door. However, at the hearing respondent did not testify to another version of the facts and her credibility was a matter for the hearing officer. We cannot say that the hearing officer's findings in this regard were against the great weight and preponderance of the evidence and therefore will not disturb them. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 (1951).

Respondent may well feel it disingenuous of the hearing officer to find that the injury occurred after respondent's assistance with hanging the door because the respondent would not, presumably, have then been in that part of the house and have been exposed to the falling door had she not left the kitchen to help Mr. F. Even if we were to view respondent's act of picking up the trash as a connected part of an uninterrupted chain of events commencing with respondent's assisting Mr. F with the door, we would not find respondent's assistance with the door a "deviation" from the furtherance of the Employer's business and outside the "course and scope of employment." *See* Article 8308-1.03(12) (1989 Act).

The Texas courts have provided guidance on the concept of such "deviation." The court in Ranger Insurance Company v. Valerio, 553 S.W. 2d 682, 684 (Tex. Civ. App. - El Paso 1977, no writ) stated that "[c]overage under the compensation law ceases during deviations by the employee from the course and scope of his employment and injury sustained during a deviation is not compensable. (Citations omitted.)" In Lesco Transportation Company, Inc. v. Campbell, 500 S.W. 2d 238, 241 (Tex. Civ. App. - Texarkana 1973, no writ), the court stated the following:

> ". . . the rule is that when an employee abandons and turns aside from the course and scope of his employment, such deviation defeats a claim for compensation. Such deviation occurs if at the time of injury the employee is engaged in and pursuing personal work or objectives that do not further the employer's interest. An injury received under such circumstances is not from a hazard that has to do with and originates in the employer's business, work, trade or profession." (Emphasis supplied.)

See generally Texas Employers Insurance Association v. Blessen, 308 S.W. 2d 127 (Tex. Civ. App. - Amarillo 1958, ref'd n.r.e.), in which the court reviews a number of related cases.

The facts here show that respondent was on duty at the time and place where she was supposed to be, that she understood her client was a heart patient who was not to undertake any strenuous activity, that she understood she was to assist Mr. F by performing the general tasks assigned to her, and that she assisted Mr. F when he called to her for help with the door because no one else was present. Notably, there was no evidence that in assisting Mr. F with the door respondent violated any specific work rule or

policy of which she had been made aware. Respondent's helping with the door did not constitute the pursuit of respondent's own personal objectives nor was such activity something wholly foreign to respondent's employment. Indeed, respondent's assistance of the client was a "Good Samaritan" type of activity calculated to create goodwill towards and thus further the interests of the Employer. *See generally* 75 Tex. Jur. 3d *Work Injury Compensation*, § 175 (1991); 1 Nations & Kilpatrick, Texas Workers' Compensation Law, § 3.02 (1991); and 1 Larson's Workman's Compensation, § 27.0, Desk Edition (1991).

In addition to its contention that the evidence established that respondent deviated from her job duties, appellant asserts that respondent presented no evidence of "an injury of sufficient duration to accrue income benefits," and, that "there was no documentation of an injury, the type of injury or the extent of the injury . . . ."

The 1989 Act defines "compensable injury" as "an injury that arises out of the course and scope of employment for which compensation is payable under this Act," and defines "injury" as meaning "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm . . . ." Articles 8308-1.03(10) and (27).

If an employee is shown to have suffered a "compensable injury," such employee is entitled to the medical benefits provided for in the 1989 Act and, unlike income benefits, such medical benefits are payable from the date of the injury. Article 8308-4.61 (1989 Act). For initial entitlement to medical benefits the 1989 Act does not require any particular documentation of the nature and extent of the injury. Respondent testified that on (date of injury), at approximately 12:45 p.m., she hurt her lower back while rising up from near the floor and twisting and turning to the right with her hands above her head to catch a falling door. She testified that she felt a sharp pain in her lower back "like fire." Respondent visited her doctor on the day of the injury but apparently couldn't get more than perfunctory treatment because she couldn't obtain insurance information from her Employer. At some later time, however, Dr. M obtained test results showing that respondent had a pinched nerve and three bulging discs and recommended she consult a neurosurgeon.

No medical reports nor other documents concerning respondent's injury were adduced at the hearing. We note that the file forwarded to the Appeals Panel contained the oral deposition of the respondent taken by appellant on October 22, 1991, certified by the reporter on November 1, 1991, and forwarded to the Commission's (City) office by letter dated November 8, 1991. The file also contained two Deposition Transcript Certificates. These certificates indicate that the written depositions of the custodians of the records of Dr. E and Dr. M were taken on November 11 and 21, 1991, respectively, for appellant. Neither the oral deposition of respondent, nor the written depositions of the records custodians of Drs. E and Mr, nor the medical records of those doctors pertaining to respondent were adduced at the hearing. Accordingly, such documents may not be considered by us. Article 8308-6.42(a) (1989 Act). The record developed below does not indicate whether any of these documents were exchanged by the parties prior to the hearing. *See* Article 8308-6.33(d) (1989 Act); Rule 142.13 (TWCC Rules).

As we stated earlier, respondent's testimony alone may be sufficient to raise a fact issue. The hearing officer was not bound to accept respondent's testimony at face value. Long v. Knox, 155 Tex. 581, 291 S.W. 2d 292, 297-298 (1956). It was for the hearing officer as fact finder to determine the weight and credibility to be given respondent's testimony. Appellant adduced no evidence which controverted any of respondent's testimony concerning the injury to her lower back. We do not substitute our judgment for that of the hearing officer when the challenged findings are supported, as here, by some evidence of probative value. Texas Employers' Insurance Association v. Alcantara, 764 S.W. 2d 865, 868 (Tex. App. - Texarkana 1989, no writ). We find there is some evidence of probative value to support the hearing officer's findings and do not find them so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660, 662 (1951); Pool v. Ford Motor Co., 715 S.W. 2d 629, 635 (Tex 1986).

Finally, appellant asserts that the "Order" of the hearing officer is "vague, in that it does not specify the type of payments, or their duration." That "Order" states as follows:

> "CIGNA Insurance Company of Texas is hereby ORDERED to initiate medical benefits and pay weekly income benefits to the Claimant in a manner consistent with both this decision and the Texas Workers' Compensation Act."

An employee who has sustained a compensable injury is entitled to "all health care reasonably required by the nature of the compensable injury as and when needed. Medical benefits are payable from the date of injury arising out of and in the course and scope of employment . . . ." Article 8308-4.61(a) (1989 Act). Respecting income benefits, the 1989 Act provides that such are to be paid without order from the Commission as a weekly basis, as and when they accrue and accrual is tied to the employee's being disabled from the injury for a period of at least one week. Articles 8308-4.21 and 4.22 (1989 Act).

Article 8308-6.34(g) (1989 Act) provides the following:

> "The hearing officer shall issue a written decision that includes: (1) findings of fact and conclusions of law; (2) a determination of whether benefits are due: and (3) an award of benefits due . . . ."

See also Rule 142.16 (TWCC Rules).

We find that the hearing officer's decision awarding benefits due respondent meets the requirements of the 1989 Act and the Commission's rules.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge