APPEAL NO. 931022

On October 6, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of 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*.). The issues at the hearing were: (1) whether the appellant (claimant) sustained an injury to his left little finger in the course and scope of his employment on (date of injury); and (2) whether the claimant notified his employer, (employer), of an injury no later than 30 days after (date of injury). The hearing officer determined that the claimant sustained an injury to his left little finger that arose out of and in the course and scope of his employment on (date of injury), but that he failed to give timely notice of his injury to his employer and failed to establish good cause for his failure to give timely notice. Consequently, the hearing officer decided that the respondent (carrier) was relieved of liability for claimant's injury and thus denied the claimant's claim for workers' compensation benefits. The claimant contends that the evidence establishes that he gave notice of injury to his employer within 30 days. The carrier responds that the evidence supports the hearing officer's determination that the claimant did not give notice of injury to the employer within 30 days.

DECISION

The decision of the hearing officer is affirmed.

The employer picks up freight for customers and takes the freight to carriers for shipment. On (date of injury), the claimant was working as the station manager of the employer's (city) office. His supervisor, (JC), works in the employer's (city) office. The claimant testified that on (date of injury), while he was picking up freight at (Customer A) with (BM), who was a driver for the employer, he cut the little finger on his left hand. BM stated that the claimant did cut his finger at Customer A on (date of injury). The claimant testified that he did not seek medical treatment right away as he had had worse finger cuts and that he continued to work until he was terminated on June 16, 1992. The claimant said his finger got infected and he went to see (Dr. W) on June 16, 1992. The claimant said that he did not realize the seriousness of his injury until he went to see Dr. W on June 16th. On June 24, 1992, Dr. W performed surgery on the claimant's finger to repair the flexor profundus tendon. On June 7, 1993, (Dr. B) performed further tendon surgery on the claimant's finger. The claimant said that Dr. B told him he would need two more operations on his finger. The hearing officer's finding that the claimant sustained an injury to his left little finger in the course and scope of his employment on (date of injury), has not been appealed.

The claimant appeals the hearing officer's determination that the claimant did not timely notify his employer of his injury. The claimant asserts that the overwhelming evidence shows that the claimant did notify JC of his injury within 30 days of the injury.

Section 409.001(a) provides that for injuries other that occupational diseases, an employee or a person acting on the employee's behalf shall notify the employer of the

employee of an injury not later than the 30th day after the date on which the injury occurs. Section 409.001(b) provides that the notice of injury may be given to the employer or to an employee of the employer who holds a supervisory or management position. Section 409.002 provides that failure to give timely notice of injury relieves the employer and the employer's insurance carrier of liability unless (1) the employer, a person eligible to receive notice, or the carrier has actual knowledge of the employee's injury; (2) the Commission determines that good cause exists for failure to provide notice in a timely manner; or (3) the employer or the carrier does not contest the claim. The claimant has the burden to show timely notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ).

In regard to the notice issue, the claimant testifed on direct examination that sometime in May 1992, after he cut his finger at work, he went to (city) to discuss business with JC and while JC was driving him back to the airport he, the claimant, gave JC a tape of piano music that the claimant had recorded (he didn't indicate when the recording took place) and JC asked him if he could still play piano "like that," to which the claimant responded "well, since I hurt my finger at [Customer A], I don't think so." On cross-examination the claimant said that when JC asked him if he could "still play like that," he, the claimant, said to JC "I doubt it with the way this finger is, the finger that I cut at [Customer A]." When the hearing officer asked the claimant to tell her the "exact contents" of the May 1992 conversation with JC, the claimant responded "I gave him a tape of some music when I played piano and we were listening to it and he asked me `can I still play that way' and I said `I doubt it because of the way my finger is now.'" The hearing officer then asked the claimant if he said anything other than "the way my finger is now," to which the claimant said "no." The claimant said that he did not have any further discussions with JC regarding his finger injury. The claimant further testified that JC called him around June 16, 1992, and fired him without giving a reason.

JC did not recall when the claimant visited him in (city), but he did remember driving the claimant to the airport and getting a tape from the claimant. He said he did not notice anything about the claimant's finger and said he did not recall ever asking the claimant if he could still play the piano like he used to. When JC was asked on direct examination if the claimant informed him of an on-the-job injury, JC responded "I do not recall anything like that -- nothing about an injury." When JC was asked whether the claimant had at any time prior to termination told him about an on-the-job injury, JC said "no." On cross-examination, when JC was asked whether he was testifying that the conversation "about the finger and about the playing of the piano" never happened or was he testifying that he didn't recall it, JC answered "I don't recall it." When the hearing officer asked JC whether it was possible that the claimant told him that he cut his finger at Customer A but he, JC, didn't recall the conversation, JC said "Oh, its possible, yes." But then on redirect, JC testified that if the claimant had told him he could no longer play a musical instrument due to a cut on his finger, he, JC, would have considered that a "significant comment" and one which he would have remembered, and he reiterated that he recalled no such comment.

JC further testified that on June 16 or 17, 1992, he went to (city) to fire the claimant

for allegedly forging company checks; that when he reached the claimant by telephone he told the claimant he needed to see him immediately; that the claimant said he was in the hospital or at a doctor's office but didn't inform JC of the reason he was being treated and JC didn't ask; that the claimant never returned to work and had another employee return the company car to the employer; and that when the claimant did not show up on June 16th or 17th, he, JC, pressed criminal charges against the claimant in regard to forging company checks. JC further testified that he first learned that the claimant was claiming an on-the-job injury when he received forms from the carrier in August or September 1992. JC also testified that the employer did not receive any requests from health care providers regarding authorization for treatment for a work-related injury.

The hearing officer found that the claimant's conversation with JC in May of 1992 did not constitute sufficient notice of a work-related injury to the employer and that the employer did not receive notice of the claimant's left finger injury until September 1992. Thus, the hearing officer decided that the carrier is relieved of liability because the claimant failed to give timely notice of injury to the employer. The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). A claimant's testimony is that of an interested party and it only raises an issue of fact for the fact finder to determine. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer may believe all, part, or none of the testimony of any witness, and may believe one witness and disbelieve others. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Where there are conflicts and contradictions in the testimony, it is the duty of the finder of fact, in this case the hearing officer, to consider these conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). In the instant case, when the hearing officer asked the claimant for the "exact contents" of the claimant's conversation with JC, the claimant testified that he told JC he had injured his finger, but the claimant failed to relate, in response to the hearing officer's question, that he told JC the injury happened at Customer A or that it was in any way connected with work. While JC testified that it was "possible" that he had a conversation with the claimant regarding the claimant's injury and ability to play piano, he also testified that such a conversation would have been "significant" and if it had occurred, he would have recalled it, but he didn't. Having reviewed the record, we conclude that the hearing officer's finding that the claimant did not timely notify his employer of the injury is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

A claimant who fails to give the employer timely notice of injury has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). In the instant case, the hearing officer concluded that the claimant had failed to establish good cause for his failure to give timely notice of injury to his employer. That conclusion and the underlying fact finding have not been challenged on appeal, thus we do not review the evidence in regard to the determination of the claimant's failure to establish good cause. The claimant only asserts on appeal that he did notify his employer within 30 days of his injury and we have

determined that the evidence sufficiently supports the hearing officer's determination that he did not do so.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge