APPEAL NO. 931044

On October 19, 1993, a contested case F 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 a compensable injury on or about (date of injury); (2) whether the claimant has disability; and (3) whether the claimant had good cause for failing to timely notify his employer of his claimed injury. The hearing officer determined that the claimant was not injured in the course and scope of his employment, the claimant does not have disability, and the claimant, without good cause, failed to timely report his alleged injury to his employer. The hearing officer decided that the claimant is not entitled to workers' compensation benefits. The claimant disagrees with the hearing officer's decision and requests that we reverse it and render a decision in his favor. The respondent (carrier) responds that the decision is supported by the evidence and requests affirmance.

DECISION

The decision of the hearing officer is affirmed.

Although the parties agreed that the first issue to be determined at the hearing was whether the claimant sustained a compensable injury on or about (date of injury), the claimant testified that his injury actually occurred on (date of injury), and that the benefit review conference report misstated the date of injury. Upon questioning by the hearing officer, the parties represented that the claimant's claim for compensation and the carrier's notice of dispute of the claim referenced a date of injury of (date of injury). Thus, the hearing officer in his decision references the alleged date of injury as (date of injury), and not (date of injury).

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this subtitle." Section 401.011(10). The claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). A finder of fact may believe that a claimant has an injury, but disbelieve the claimant's testimony that the injury was received in the course and scope of employment. Johnson, *supra*. The hearing officer, as the finder of fact in a contested case hearing, is the judge of the weight and credibility to be given to 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 Company, 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, the claimant testified that he injured his back on (date of injury), when he was twisting and turning in order to install a sprinkler valve in a closet while working for the employer, (employer). However, in a letter to his employer dated June 10, 1993, the claimant stated that he could not recall how he injured his back and that his back had been hurting for about three weeks prior to going to a doctor on May 17, 1993. He continued to work until May 17, 1993, when he first saw a doctor who took him off work for three days. The claimant said he stopped working due to back pain on May 28, 1993, and saw another doctor on June 2, 1993, who took him off work until June 7th and recommended an MRI scan. The claimant did not mention a work-related injury to his doctors. The claimant went to a hospital on June 16th and was prescribed bed rest for one to two weeks. An MRI scan done on August 6, 1993, showed a small disc herniation at L5-S1 and minimal disc bulges at the L3-4 and L4-5 levels. Surgery was not recommended. About August 10, 1993, the claimant quit his job with the employer and started working for another company. The president of the employer said in a written statement that May 28, 1993, was the claimant's last day of work and that the claimant advised the employer that he was sick with the flu and diabetic reactions. Having reviewed the record, we conclude that the hearing officer's finding that the claimant was not injured in the course and scope of his employment on or about (date of injury), is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Johnson, *supra*; and Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ).

"Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since the claimant failed to establish that he sustained a compensable injury, he could not have disability as defined by the 1989 Act.

In regard to the notice of injury issue, the parties stipulated that the claimant did not give notice of his claimed injury to his employer within 30 days as required by Section 409.001(a). In order to constitute notice the employer need only know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). 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.). It has been held that an employee's bona fide belief that his or her injuries are not serious affords good cause for not giving notice until learning that they are serious. Baker v. Westchester Fire Insurance Company, 385 S.W.2d 447 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.); Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ).

In the instant case, the claimant said that he did not have "significant pain" from his injury until May 17th and that is when he went to a doctor. He said that on May 17th he

assumed his injury was work related and called and told the employer that he was going to a doctor for back pain. The claimant could not recall if he told his employer on May 17th that his back pain was due to an on-the-job injury. The president of the employer said that the claimant did not mention an on-the-job injury on May 17th and that it was not until he received the claimant's letter dated June 10th that he learned of the claim of a work-related injury. On cross-examination, the claimant testified that although he knew on May 17th that he was injured at work on (date of injury), he didn't report the injury to the employer until June 10th, which was over three weeks from when he had first been taken off work for back problems. The evidence on good cause for failure to give timely notice presented a fact question for the hearing officer to resolve. We do not believe the hearing officer was compelled to find that the claimant had good cause to delay reporting his injury until June 10th considering that the claimant had been taken off work twice by doctors prior to that date. Having reviewed the record, we conclude that the hearing officer's determination which was adverse to the claimant on the issue of good cause for failure to timely report his injury is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge