

APPEAL NO. 931052

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), (formerly V.A.C.S., Article 8308-1.01 *et seq.*) TEX. LAB CODE ANN. § 401.001 *et seq.* On August 9, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant was injured at work on (date of injury), timely notified his employer, had good cause for late filing of his claim, and had disability from June 2nd through July 28, (year). Appellant (claimant) asserts that he has had disability to the present. Cross-appellant (carrier) contends that there was no injury on (date of injury), that claimant did not timely notify the employer, that claimant "did not meet the test for good faith for the late filing," and that claimant has no disability since there was no injury.

DECISION

We affirm.

Claimant worked for (employer). In assembling aircraft, claimant at times had to lift heavy items. He also moved heavy items that were hard to pull or push. The parties stipulated that in 1986 claimant had back surgery for an on the job injury. Claimant testified that while sitting in a cramped cockpit on (date of injury), he had to turn to do some wiring. It was difficult for him to turn back and he could not pull himself out of the cockpit. Two other workers assisted him out. The two other workers provided statements to that affect, with one adding that claimant did not walk straight after leaving the cockpit. The testimony of the claimant and the statements of the two who helped him out of the cockpit provide sufficient evidence to uphold the decision of the hearing officer that an injury occurred in the course and scope of employment on (date of injury).

Claimant testified that he left work after exiting the cockpit, thinking that he just strained his back. He tried to return to work three days later but could not perform. (Dr. W), who claimant had been using prior to (date of injury), to obtain prescriptions, took him off work on June 11, (year), until claimant could see him on June 18, (year). Claimant again attempted a return to work on June 26th, but has not returned to work since June 28, (year).

Claimant further testified that after June 11th, when Dr. W took him off work, he was called at home by the general foreman, (Mr. I), who was claimant's supervisor's supervisor. Claimant stated the conversation took place on or before June 15th. Claimant asserted that he told Mr. I that he had hurt himself at work on (date of injury) and testified that he told Mr. I he would be off work for a "couple of weeks." Mr. I did not testify, and no statement from him was offered in evidence. The testimony of claimant provides sufficient evidence that timely notice was given to the employer.

Claimant testified on cross-examination that he knew he had injured himself, but thought that "it was a flare-up . . . from my original injury." (The "original injury" was discussed in the testimony as occurring in 1986.) He testified that he did not personally file the claim made for the 1986 injury, for which he later received a settlement which included medical care for a period that expired in (year).

Claimant further testified that the safety office of employer told him that he had to file with Aetna for disability because he had settled his prior claim and "was not entitled to Workers' Comp. benefits." He stated that he was in the safety office in July (year) when an employee there called carrier and was told by "C" that this could not be filed on workers' compensation because that claim had already been settled. He testified that in late (year) he learned that he had a "new" injury from an attorney and filed his claim then. (The claim was filed on (year).) Claimant had earlier testified that when he saw (Dr. B) in 1993, that doctor thought the injury of (date of injury), was a new one.

Other evidence touching on the issue of late filing of the claim included the claim itself in which claimant recites the problems he encountered in trying to file a claim for workers' compensation in (year); his claim added that after that frustrating time he was severely depressed. The medical records of claimant from both Dr. W and (Dr. A), a chiropractor he started seeing right after having seen Dr. W on June 18, (year), do not indicate that claimant recognized his lower back pain of (date of injury) as distinct from the earlier injury of 1986. With the carrier only attacking claimant's explanation related to depression as not meeting "the test for good faith" in regard to the question of late filing of the claim, no appellate issue is raised as to whether the hearing officer abused his discretion in finding good cause for late filing. In finding good cause the hearing officer had noted that claimant learned what his injury was in (month) or December of (year) and that employer had told claimant that his injury "was not compensable as a work-related claim."

The hearing officer limited the period of disability to June 2nd through July 28, (year), after finding that the (date of injury), incident was a compensable injury. In addition to Dr. W providing the work release statement applicable to parts of June (year) as referred to above, Dr. A also provided a work statement that said claimant could return to work on July 22, (year). (Dr. W later provided a letter dated May 5, 1993, which said that claimant's MRI of (year) "could be the result of an additional injury . . .") Thereafter the hearing officer accurately notes that Dr. A records on (month), (year), that claimant was sitting on the edge of a boat when in adjusting his position, he had a "sharp severe pain - immobilized him completely for 8-10 seconds - pain is getting worse . . ." Dr. A also recorded that on (month) claimant had severe back pain after moving furniture and cleaning a garage. Then on (date), (year), Dr. A noted that claimant's "back has hurt" from lifting his mother who had broken her hip. Next, Dr. A recorded that in May (year) claimant hurt his low back when he lifted a mattress.

Medical records in evidence include a letter from Dr. A, dated February 3, (year), which refers to claimant "complaining of symptoms that originated in an injury some 5 years ago, and they were acutely exacerbated." He adds that claimant had his symptoms in "varying degrees" for five years. He does not mention injury on either (date of injury), (month), (year), or (month), (year). Dr. A stated, in February (year), that claimant was not able to perform his normal work duties. (Claimant attached to his appeal an insurance report of Dr. A dated August 19, (year), which cannot be considered because it was not offered at the hearing; it would not necessarily change the decision if considered because Dr. A merely refers to "total disability" from July 1, (year), to August 19, (year), but ascribes

it to the accident of 1986.)

Dr. B, who claimant first saw in 1993, referred to an MRI of 1987 as showing desiccation changes at L3-4 and L4-5 that were moderately advanced with minimal changes at L5-S1. He then said that the MRI of (year) showed more extensive desiccation at L3-4, L4-5 and L5-S1. He added that the (year) MRI shows a herniated disc at L2-3 more pronounced anteriorly than posteriorly. He also saw herniated discs at L4-5 and L5-S1 that were not present in the 1987 study.

The (year) MRI report merely states, "Degenerative changes involving the lower lumbar discs from L2-3 through L5-S1. Increasing lipping and bulging of the L2-3, L4-5, and L5-S1 discs is noted Since the last examination of March of 1987 there has been some slight progression and degenerative change." Medical records also show that a CT scan was done in 1988, which indicated minimal bulging at L4-5 and "slightly right bulging annulus and/or herniated nucleus pulposus at the L5-S1 level." An MRI in 1989 shows L5-S1 as normal; mild to moderate disc degeneration and mild bulging at L4-5; and a disc bulge also was seen at L2-3.

The medical evidence reflects a series of events after which claimant reported back pain to Dr. A. The hearing officer is correct in saying that no doctor found that claimant could not work because of the (date of injury), event after July 22, (year). While claimant indicated that he could not work because of the (date of injury), incident, he acknowledged that all the other instances in which he hurt his back in (year) and (year) occurred. The date picked by the hearing officer as ending disability is logical in that on the next day Dr. A reported that claimant hurt his back while on a boat. While Dr. B believes that claimant's back has significantly changed for the worse since 1987, neither Dr. W's or Dr. A's records, including other physician's interpretations of tests from 1987 through (year), reflect that degree of change. Neither Dr. W nor Dr. A places claimant's inability to work, after July (year), on the (date of injury), injury. Dr. W in his letter of May 5, 1993, states that changes noted on the (year) MRI "could be the result of an additional injury" Dr. A in a letter dated April 27, 1993, merely says that claimant's symptoms of low back pain and numbness in his legs that he complained of on June 19, (year), originated in an injury five years before but were "acutely exacerbated" by his job injury of (date of injury).

The evidence of record sufficiently supports the hearing officer's determination that disability (the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury) was not shown to continue past July 28, (year). The Appeals Panel will not reverse a factual finding of a hearing officer unless it is against the great weight and preponderance of the evidence. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1952).

The findings of fact and conclusions of law are sufficiently supported by the evidence and the decision and order are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge