APPEAL NO. 931072

On November 4, 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 in the course and scope of his employment on (date of injury); and (2) whether the claimant timely reported his alleged injury to his employer, and, if not, whether the claimant had good cause for failing to timely report his injury to his employer. The hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment on (date of injury), and that the claimant did not timely report his injury to his employer and failed to establish good cause for failing to timely report his injury. The hearing officer decided that the claimant is not entitled to workers' compensation benefits. The claimant disagrees with the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

It was undisputed that the claimant injured his back on (date) and (date), while working as a maintenance person for his employer, the (employer). The hearing on November 3, 1993, was held to consider the issues of whether the claimant also injured his back on (date of injury), while working for his employer and whether he timely reported his injury to his employer, or, if he failed to do so, whether he had good cause for not timely reporting the injury.

The claimant testified that on (date of injury), while working for his employer he injured his back when he picked up a portable masonry saw. He said that on (date), he telephoned (Ms. FL), who he identified as his supervisor in his claim for compensation, and (Ms. RF), the employer's administrative assistant, and told them that he injured his back at work on (date of injury). The claimant indicated at the hearing that he was not relying on good cause for failing to timely report his injury because he had timely reported his injury to his employer.

Ms. RF testified that the claimant told her on (date) that he would not be coming to work that day "because of his back," but that the claimant did not mention being injured at work on (date of injury). Ms. RF said she assumed the claimant missed work because of his (date) the injury and she filed a supplemental report to that effect with the Texas Workers' Compensation Commission (Commission) on August 5, 1991. Ms. FL did not testify at the hearing and there was no indication that either party requested that a subpoena be issued to compel her attendance. Ms. RF said that Ms. FL told her that she could not recall any telephone call from the claimant concerning an injury of (date of injury). Ms. RF said that the employer first learned that the claimant was claiming he was injured on (date of injury), during an October 1992 benefit review conference for one of the claimant's earlier injuries.

The claimant testified that he first sought treatment for his (date of injury) injury on September 13, 1991, when he saw (Dr. S). Dr. S's report of September 13, 1991, reflects that the claimant reported being injured on (date) and (date), but does not mention an injury of (date of injury). In fact, Dr. S reported that since the claimant had had some back pain on (date), he had not had difficulties with his back or legs. The first mention in a medical record or report of an injury of (date of injury) was in a January 17, 1992, report from (Dr. M).

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). The hearing officer 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 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.).

Section 409.001(a) provides that for injuries other than 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. Notice of injury may be given to the employer or to an employee of the employer who holds a supervisory or management position. Section 409.001(b). 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).

The outcome of this case hinged on the claimant's credibility. The hearing officer, as the fact finder, apparently did not believe the claimant's testimony concerning being injured at work on (date of injury) and having reported his injury on (date). Having reviewed the record, we find no basis for disturbing the hearing officer's decision and we conclude that the hearing officer's determination of no injury in the course and scope of employment on (date of injury), and his determination that the claimant failed to timely report his injury to his employer are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Johnson, *supra*, Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App. - Waco 1980, no writ).

In his appeal, the claimant requests that we subpoena Ms. FL. The claimant's request to subpoena Ms. FL should have been directed to the hearing officer before the

hearing under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.12(d) (Rule 142.12(d)). As previously noted, there is no indication in the record that either party requested the hearing officer to issue a subpoena for the attendance of Ms. FL at the hearing. Thus, the claimant's request is improper and untimely.

The claimant also asserts in his appeal that "I think that it is very unfair that I cannot be represented by an attorney." There is nothing in the 1989 Act or Commission rules which prohibit a claimant from being represented by an attorney. At the outset of the hearing the claimant represented to the hearing officer that he had decided to proceed without an attorney. The claimant was assisted by an ombudsman at the hearing. The claimant's assertion provides no basis for disturbing the hearing officer's decision.

The decision of the hearing officer is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge