APPEAL NO. 931079

On November 3, 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 a compensable injury on (date of injury); (2) whether the claimant timely reported her injury to her employer or whether she had good cause for failing to do so; and (3) whether the claimant has had disability. The hearing officer determined all issues against the claimant and decided that the claimant is not entitled to workers' compensation benefits under the 1989 Act. The claimant disagrees with the hearing officer's decision and requests that we rule in her favor. The respondent (carrier) responds that the decision is supported by the evidence.

DECISION

The findings and conclusions of the hearing officer that the claimant did not sustain a compensable injury and does not have disability are affirmed. The findings and conclusions of the hearing officer that the claimant failed to give timely notice of injury to her employer are reversed and we render a decision that the claimant gave timely notice of injury to her employer. Since we affirm the determination of no compensable injury, we also affirm the hearing officer's decision that the claimant is not entitled to workers' compensation benefits.

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 she was injured in the course and scope of her 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.).

In the instant case, the claimant testified that she was injured when she dropped a case of soft drinks on her left foot while working in her employer's convenience store on (date of injury). The accident was not witnessed. She said she reported her injury to her supervisor, (NR), the next day, but continued to work until October 29, 1992, when she had surgery on her left foot. The claimant's daughter testified that the claimant told her on (date of injury) that she had dropped a case of soft drinks on her foot at work. A friend of the claimant's testified that the claimant called her a few days after the accident to inquire about

workers' compensation procedures, even though the claimant acknowledged she had sustained two work-related injuries in 1990 for which her medical expenses had been paid.

During 1991, the claimant had been treated by (Dr. S) for foot problems. In describing her previous foot problems, the claimant said her toes and feet would "jump" a lot and that she was advised to wear "pads." The claimant said she first went to Dr. S for her injury of (date of injury), on October 7, 1992, and both the claimant and the claimant's daughter testified that the claimant told Dr. S about being injured at work when the case of soft drinks fell on the claimant's foot. However, Dr. S's records reflect that no mention was made of a work-related injury until November 17, 1992, which was several weeks after Dr. S performed surgery on the claimant's left foot on October 29, 1992. For example, in a "Physician's Statement of Disability" dated October 29, 1992, Dr. S wrote "no injury involved" when asked to give the date of injury. Also, in a patient note dated November 17, 1992, Dr. S wrote that the claimant "is now claiming the problems were caused by injury in the store." And, in a report dated April 6, 1993, Dr. S stated that it was not until November 17, 1992, that the claimant reported to him that she had dropped a case of Cokes on her foot "which resulted in her undergoing surgery." We note that between Dr. S's notations for a July 1991 visit and the October 7, 1992, visit, the word "accident" is written to the side of his patient notes; however, the handwriting does not resemble Dr. S's handwriting and no mention was made at the hearing about the word "accident" appearing where it does in Dr. S's patient notes. There is no mention of an accident or injury at work in Dr. S's notations for the October 7th visit nor the five visits to him between October 7th and November 17th. Having reviewed the record, we conclude that the hearing officer's finding of no compensable injury on (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 or manifestly unjust. Johnson, *supra*, Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ).

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).

It is undisputed that NR was the claimant's supervisor. The claimant testified that the day after her accident on (date of injury) she reported to NR that she dropped a case of soft drinks on her foot and was hurt. In a written statement dated October 30, 1992, NR stated that in (month year), the claimant told her that while stocking the cooler she had dropped a case of soft drinks on her foot and was hurt. At the hearing, NR testified that the claimant reported a work-related injury to her in (month year), and she thought the report was given the day after the claimant said she had the accident. NR said she completed an accident report within three or four days of the report of injury; however, the employer could not account for the accident report at the hearing.

In a written statement, a coworker said she saw NR make a written report of the claimant's claimed work-related accident during the first week of October 1992, and another witness stated in a written statement that sometime in (month year), he saw NR make a written accident report concerning the claimant's claimed accident at work. Although NR indicated at the hearing that when she quit work in March 1993, she was not on the best of terms with the employer because the employer wanted to change her job responsibilities against her wishes, which could be taken into consideration when judging the credibility of her testimony at the hearing as it may have been influenced by bias, her written statement of October 30, 1992, was not shown to be in any way affected by subsequent events leading to her quitting her job.

Having reviewed the record, we conclude that the hearing officer's finding that the claimant did not report her injury to anyone in a supervisory capacity within 30 days of her alleged injury and her conclusion that the claimant failed to timely report her alleged injury to her employer to be so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and the finding and conclusion are reversed and a decision rendered in regard to the notice of injury issue that the claimant timely notified her employer of her alleged work-related injury. However, our decision in regard to timely notice of injury does not mean that the claimant is entitled to workers' compensation benefits because we have concluded that the hearing officer's finding of no compensable injury is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

"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 did not sustain her burden of proving that she had a compensable injury, she could not have disability as defined by the 1989 Act and the hearing officer did not err in determining that the claimant has not had disability.

The hearing officer's decision that the claimant is not entitled to workers' compensation benefits is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge