APPEAL NO. 93609

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001, *et seq*. (1989 Act). On June 18, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issues at the hearing were: 1. whether the respondent (claimant herein) sustained a back and neck injury in the course and scope of employment on (date of injury); 2. whether the appellant (carrier herein) is relieved from liability under TEX. LAB. CODE ANN. § 409.002 because of the claimant's failure to notify his employer pursuant to TEX. LAB. CODE ANN. § 409.001; 3. whether the carrier had waived its right to contest the claimant's alleged injury in the course and scope of employment under TEX. LAB. CODE ANN. § 409.021; and 4. whether the claimant suffered disability as a result of a (date of injury), injury to his back and neck. The hearing officer ruled that on (date of injury), the claimant did injure his neck and back in course and scope of his employment, that the carrier is not relieved from liability under TEX. LAB. CODE ANN. § 409.002 because he did give notice to his employer as required by TEX. LAB. CODE ANN. § 409.001, that the carrier had waived its right to contest compensability of the claimant's injury under TEX. LAB. CODE ANN. § 409.021, and that the claimant has had disability since August 31, 1992, due to his injury. The carrier appeals arguing that the hearing officer's rulings in regard to injury, timely reporting and waiver are not supported by sufficient evidence. The claimant files no response to the carrier's request for review.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The claimant testified that he was employed as a checker driver for (employer) on (date of injury), and it undisputed from the evidence that he had worked for the employer since June 5, 1968. According to the testimony of the claimant, on (date of injury), the claimant and several other employees were trying to stand upright a crate weighing approximately 3000 to 4000 pounds that had fallen off a trailer. After failing to stand the crate upright using a forklift, several workers, including the claimant, attempted to lift the crate manually. The claimant testified that during this process he slipped and fell on his right knee while feeling a pinch in his back. The claimant testified that he got up immediately after slipping, as the crate had fallen twice earlier and he did not want to be crushed should it fall again.

There is considerable controversy over whether claimant ever represented that any of the other workers who were lifting the crate saw him fall. The claimant testified that he had stated at an earlier benefit review conference (BRC) that he thought some of the other workers "might have" seen him fall. The adjuster hired by the carrier to handle the case, (Ms. L), testified that the claimant stated at the original BRC (she testified that she had attended two BRCs in this case) that there were several witnesses to his injury. When cross-examined as to why the benefit review officer (BRO), who presided over the BRC, stated that the claimant said the other workers "might have seen" the fall, she stated that

she didn't know about the use of the words "might have." The carrier also called an insurance investigator who testified as to his recollection of statements that the claimant made concerning witnesses to the accident from an unrecorded interview. The claimant testified that he couldn't say whether or not the other workers saw him slip, but that they could confirm the incident of lifting the crate. In any case, several of the workers involved in the crate lifting incident were called and testified that they did not see the claimant fall or injure himself while they were trying to raise the crate.

The claimant testified that he mentioned his injury to (Mr. G), a supervisor, on July 29, 1992, but since he did not think it was serious he continued to work until August 28, 1992. Mr. G denies that claimant ever reported the injury to him on July 29, 1992, or at any other time. The claimant testified that he mentioned the injury to another supervisor, (Mr. Gr), on August 26, 1992. Mr. Gr confirmed in his testimony that the claimant had mentioned his injury of "about a month ago" to him on August 26, 1992. Mr. Gr testified that the claimant asked him if he remembered the injury and when he stated that he did not, the claimant replied that he must have reported it to Mr. G.

The claimant testified that after Friday, August 28, 1992, he could no longer work as a result of his injury. He testified that on Monday, August 31, 1992, he spoke to (Ms. Mc), who is the employer's secretary and handles injury reports and who sent the claimant to (Dr. R), who the claimant testified was the company doctor on August 31, 1992. The claimant was seen by Dr. R, who sent the claimant for an EMG which was abnormal, showing right L5 radiculopathy. A lumbar MRI on September 14, 1992, showed a herniated disc at L5-S1. The claimant testified that Dr. R referred the claimant to (Dr. B), who ordered a cervical MRI which revealed a disc herniation at C3-4. Dr. B recommended spinal surgery, and approximately two weeks before the CCH the claimant had neck surgery.

The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated October 22, 1992, reflecting that the carrier paid weekly benefits from August 31, 1992, through October 12, 1992, but which indicated that the carrier was suspending benefits because it was disputing the claim. In the TWCC-21 the carrier states:

The carrier initiated benefits in good faith, however, subsequent investigation reveals that this is not a compensable claim for the following specific reasons:

1.The employee did not timely report this alleged occurrence to his employer. On August 31, 1992 (sic) the employee for the first time alleged that he had been injured on (date of injury).

2.The employee alleged that four co-workers witnessed his accident and had knowledge of his accident and injury. Interviews with the four co-workers, (Mr. N), (Mr. T), (Mr. F) and (Mr. Fl) reveal that they did

not witness any accident involving the employee and have no knowledge of any injury to the employee.

The carrier after a thorough investigation is now controverting this claim and suspending temporary income benefits and medical payments.

Section 409.021(c) provides:

If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The initiation of payments by an insurance carrier does not affect the right of the insurance carrier to continue to investigate or deny the compensability of an injury during the 60-day period.

Section 409.022 provides in relevant part:

(a)An insurance carrier's notice of refusal to pay benefits under Section 409.021 must specify the grounds for the refusal.

(b)The grounds for the refusal specified in the notice constitute the only basis for the insurance carrier's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered evidence that could not reasonably have been discovered at an earlier date.

Further, Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 (Rule 124.6) provides in relevant part:

(a)A carrier that refuses to begin paying temporary income, lifetime income, or death benefits shall notify the commission and the claimant or representative, on a form TWCC-21 and in the manner prescribed by the commission. The notice shall contain the following information:

* * * *

(9)a full and complete statement of the grounds for the carrier's refusal to begin payment of benefits. A statement that simply states a conclusion such as "liability is in question", "compensability in dispute", or "under investigation" is insufficient grounds for the information required by this rule.

The hearing officer concluded as a matter of law that the statement in the carrier's

TWCC-21 in the present case failed to sufficiently give notice that the carrier was controverting the compensability of the claimant's injury on the ground that the injury did not arise in the course and scope of employment and, therefore, also concluded that the carrier had waived its right to contest compensability on that ground. Carrier contends that the language in its TWCC-21 is sufficient to give notice that it was contesting that claimant's injury took place in the course and scope of employment and met the requirements of Rule 124.6(a)(9).

We hold that the TWCC-21 is insufficient to notify the claimant that the carrier was contesting that his injury took place in the course and scope of employment. The first reason for controversion listed in the TWCC-21 clearly goes to the issue of timely notice only. The second reason merely states that the claimant stated that four coworkers witnessed or had knowledge of his injury and the coworkers stated they did not. While it was factually contested at the CCH as to whether the claimant ever stated that the four coworkers witnessed his injury or whether they merely witnessed the raising of the crate, even if proven absolutely true it does not establish that the claimant was not injured in the course and scope of employment. That is to say, if the claimant stated that others had witnessed his accident and it was proven that they did not witness the accident, this does not establish that the accident did not take place. It merely proves that the claimant was mistaken at best or impeaches his credibility at worst. Further, the statement that the four coworkers did not witness the accident could be interpreted to go to the issue of actual knowledge (notice) rather than course and scope. Thus, this statement fails to notify the claimant that the carrier is contesting that the injury took place in the course and scope of his employment and does not meet the requirements of Rule 124.6(a)(9). *See* Texas Workers' Compensation Commission Appeal No. 92468, decided October 12, 1992; Texas Workers' Compensation Commission Appeal No. 93202, decided April 28, 1993.

The hearing officer found as a matter of fact, based on the evidence before her, that the claimant was injured in the course and scope of his employment. The carrier challenges this finding and argues that the failure of the coworkers to see the injury even though they were close to the claimant when it happened, the fact that the claimant continued to work for a month after the injury and maintain above average productivity, and the claimant's delay in seeing a doctor is evidence that he was not injured on (date of injury). The claimant testified that he was injured in the course and scope of his employment, that the coworkers were concerned with lifting the crate and their own safety at the time of the incident and that he, even though bothered by the injury, delayed seeking treatment because at first he did not think the injury was serious. All of this testimony constitutes a conflict in the evidence concerning whether the claimant was injured in the course and scope of his employment.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight

and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Further we have held that the testimony of the claimant alone, if believed by the hearing officer, is sufficient to support a finding that the claimant was injured in the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 92107, decided May 4, 1992; Texas Workers' Compensation Commission Appeal No. 93181, decided April 19, 1993. Applying this doctrine and the above standard of review, we uphold the finding of the hearing officer that the claimant was injured in the course and scope of his employment.

The above standard of appellate review also applies to the finding of the hearing officer that the claimant timely reported his injury to the employer. Here again the hearing officer could have chosen to believe the testimony of the claimant. In regard to this issue the hearing officer's finding was not only supported by the testimony of the claimant by his supervisor Mr. Gr, who testified that the claimant mentioned his injury to him on August 26, 1993.

We affirm the decision of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I do not agree with the majority that the carrier's TWCC-21 was insufficient to notify the claimant that the carrier was contesting that the injury occurred in the course and scope of employment. Despite the fact that those exact words were not used, I believe, as this panel has stated in a previous case, that "a fair reading of the grounds listed, when considered together, encompass a controversion or dispute on the basic issue that an injury was not suffered within the course and scope of employment." Texas Workers' Compensation Commission Appeal No. 92145, decided May 27, 1992. However, I agree with the majority that the record below contains sufficient evidence to support the hearing officer's determination that the claimant injured his neck and back in the course and scope of his employment and that he timely reported such injury.

Lynda H. Nesenholtz
Appeals Judge