APPEAL NO. 93656

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on July 2, 1993, to determine the issues of whether the claimant sustained an injury in the course and scope of his employment on or about (date of injury); whether he provided his employer with timely notice of the injury; and whether the claimant has disability as a result of the alleged work-related injury. The appellant (hereinafter claimant) seeks our review of hearing officer (hearing officer)' determination that the claimant did not injure his back in the course and scope of his employment. (The hearing officer also found that claimant had good cause for his failure to timely report the alleged injury; he did not make any determination on the issue of disability.) The respondent (hereinafter carrier) basically contends that the evidence supports the hearing officer's decision and that it should be affirmed except for the finding of fact and conclusion of law regarding good cause for failure to timely file. However, because carrier's pleading was not timely filed as a cross-appeal, we will not consider timely notice to be an appealed issue. *See* Texas Workers' Compensation Commission Appeal No. 92193, decided July 2, 1992.

DECISION

We affirm the decision and order of the hearing officer.

The claimant, who was employed as a mechanic for (employer), testified that on the afternoon of Wednesday, (date of injury), while lifting a tire, he felt a "pulling sensation" in his back. He did not report it to anyone at work and continued to work the rest of the week. On Sunday morning, as he bent over a sink to wash his face and hands, he either coughed or sneezed and felt immediate, severe pain. He called employer the following day, October 5th, to say he was going to the doctor because of back pain; he initially said nothing about the incident at work either to the employer or to his doctor, (Dr. S). The claimant was referred for a CT scan which showed a moderate-sized herniation at L4-5 and a large herniation at L5-S1. He was also seen by (Dr. H), a neurosurgeon, who on October 12th recommended conservative treatment but raised the possibility of surgery. On October 16th Dr. S released claimant to sedentary work as of October 19th, with the restrictions of no standing/walking more than four hours and no bending or squatting. The claimant said he brought the release to his employer but they had no work he could do.

Claimant said that on October 19th he asked Dr. S whether a cough could cause the herniations and was told that it could not. He said Dr. S asked what he had been doing over the previous two weeks, and claimant then remembered the pulling sensation when he lifted the tire. He testified that he called the Texas Workers' Compensation Commission the next day and was sent forms to fill out. On November 2nd he said he called back and was told to get in touch with his employer. On that day, he called (Ms. LK) in personnel and reported his injury.

Ms. LK testified at the hearing that she handles insurance benefits for employer. She said claimant called her in mid-October to say he had hurt himself at home and to ask about

health insurance. She said that in November he came into the office asking about workers' compensation benefits. She said the two of them filled out the Employer's First Report of Injury and, to complete the form, they "picked out a date" based on claimant's estimate of when the incident at work happened.

(Mr. W), employer's service director, said he took the call from claimant wherein claimant said he hurt his back when he sneezed while bent over the sink. He said he next talked to claimant when he brought in the doctor's work release; at that time, Mr. W said he commented upon the unusual cause of claimant's injury and claimant said his doctor told him "it happens all the time." Similar testimony was given by claimant's supervisor, (Mr. N), although claimant said he did not remember such discussions. Both Mr. W and Mr. N indicated it was unlikely that claimant did little work on the Thursday and Friday following the incident in which claimant lifted the tire.

Claimant testified that he had been involved in an automobile accident the previous May, but denied that he had missed any time from work. He also said he "might have" mentioned the accident to Dr. S. Mr. N recalled claimant missing a few days after the accident, and coming back to work "pretty black and blue" and "barely [able to] walk."

An Initial Medical Report (Form TWCC-61) signed by Dr. S on November 11, 1992, gives claimant's date of injury as "(date)" and gives the following history of claimant's injury: "[Claimant] strained lower back while working on a car at work; thought nothing of it at the time until later when he coughed and felt a sharper pain which caused progression of symptoms."

Also in the record was a deposition of (Dr. D), an orthopedic surgeon who reviewed claimant's medical records but who did not examine claimant. Dr. D stated, in answer to questions, that an individual could sustain a lower back injury including an injury to a lumbar intervertebral disc while engaging in non-strenuous activities such as sneezing or coughing while in a bending position, and that he believed, based upon claimant's history and records, that claimant sustained the back injury in question while bending over the sink.

The claimant contends in his appeal that the hearing officer erred by giving Dr. D's opinion "presumptive weight" in the face of the medical opinion of doctors who actually had treated claimant. However, the 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence presented at a contested case hearing as well as of its weight and credibility. Section 410.165(a). As trier of fact, the hearing officer judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Further, with regard to Dr. S's Initial Medical Report, a doctor's recitation of an injury as reported to him by a claimant, although admissible to show the basis of a doctor's opinion as to the cause of the claimant's problems, is not competent evidence that the injury in fact occurred on the date alleged by the claimant. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ).

The claimant also contends that the hearing officer erred in his recital of evidence wherein he states that according to the claimant, the selection of the injury date of (date of injury) was the result of the necessity to put some date on the form; this mistaken recital of facts, the claimant contends, led the hearing officer to find against claimant and make erroneous findings concerning the fact of his injury and his knowledge of the date of injury. The claimant's final point of appeal is that the hearing officer erred in the application of the burden of proof to the claimant, and that claimant's testimony and evidence met all prerequisites of law for a compensable claim.

The claimant in a workers' compensation case has the burden to establish that he suffered an injury in the course and scope of his employment; the insurance carrier has no burden to establish that the injury did not occur as the claimant contended. Johnson v. Employers Reinsurance Corporation, 531 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In addition, the claimant's own testimony, as an interested witness, was not binding but raised fact issues for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. App.-Amarillo 1978, no writ). Our review of the record indicates that claimant, on cross-examination, denied telling Ms. LK that he basically came up with an incident on (date of injury) just to put down a date; Ms. LK, however, testified otherwise. The hearing officer was entitled to resolve such conflicting testimony, Garza v. Commercial Insurance Co. of Newark. N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ), and we do not find that the above misstatement in the hearing officer's recitation of facts, standing alone, is sufficient grounds for reversal. (We note that in Finding of Fact No. 3, the hearing officer found no injury "on or about" (date of injury).) Only if the hearing officer's decision is so contrary to the great weight and preponderance of the evidence as to be manifestly unfair and unjust, will we overturn that decision. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We decline to do so in this case.

The decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge