APPEAL NO. 93699

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §401.011 *et seq*. (1989 Act). At a contested case hearing held in (city), Texas, on June 29, 1993, the hearing officer, (Hearing officer)., considered the following disputed issues unresolved at the benefit review conference (BRC): 1. Was the appellant (claimant) injured in the course and scope of his employment on (date of injury); 2. Did claimant give timely notification of any such injury to (employer); 3. What is claimant's correct statutory average weekly wage (AWW); and 4. What period of disability, if any, has claimant had since (date of injury). The parties stipulated to the correct AWW. The hearing officer found that claimant was not injured on or about (date of injury), while disposing of trash bags, that he did not aggravate any such injury on (date) by stacking or restocking canned goods, and that he was not injured on (date) while moving or stacking tables and chairs in the course of his duties. The hearing officer further found that claimant first reported a work-related injury to employer on January 11, 1993. Based on these findings, the hearing officer concluded that claimant did not sustain an injury on or about either (date of injury) or (date) which was compensable under the 1989 Act, but that he did give timely notice of an injury allegedly sustained on (date). Claimant's request for review forwards a record of (Dr. K) not introduced at the hearing, asserts he amended his injury date to (date) upon the instruction of the Texas Workers' Compensation Commission (Commission) Ombudsman who assisted him at the hearing, and, in essence, challenges the sufficiency of the evidence to support the hearing officer's decision. In its response, the respondent (carrier) contends that claimant's failure to serve carrier with his request for review, in effect, defeated the jurisdiction of the Commission Appeals Panel over the appeal, alternatively asserts the inadequacy of claimant's request for review, and seeks affirmance.

DECISION

Finding the evidence sufficient to support the findings, we affirm.

While claimant was required to serve a copy of his request for review on respondent (Section 410.202(a)), his failure to do so did not defeat our jurisdiction. *See* Texas Workers' Compensation Commission Appeal No. 92080, decided April 14, 1992. Also, we view claimant's request for review as sufficient for the reasons stated in Texas Workers' Compensation Commission Appeal No. 92081, decided April 14, 1992.

In September 1992, claimant went to work for employer as a food service unit manager and had responsibility for operating one of employer's food service units in an office building. The unit he managed had vending machines and a small cafeteria for the building's occupants, and claimant supervised two food service handlers, (Ms. H) and (Ms. S). Claimant performed that job until January 11, 1993, when he was terminated by his supervisor, (Mr. F), for poor performance.

Claimant testified that on (date of injury), while "pulling trash bags" (apparently lifting full trash bags by one arm and holding them out to his side) he felt "a pinch" in his mid-back

area between his shoulder blades. He described it as "very minor" and said he thought nothing more about it. The next day when stocking gallon cans in a supply closet, he again felt "a pinch." On (date), claimant, Ms. H, Ms. S, Mr. F, and several other persons all moved the tables and chairs to set up a buffet line in the cafeteria for a special occasion luncheon. Claimant said the table bases weighed 60 pounds and that he hurt his back moving the tables. He said he complained to both Ms. H and Ms. S about his painful back and that Ms. S on one occasion massaged it. According to Ms. H, claimant began to complain around Christmas time about hurting from a pinched nerve and said he thought he had done it carrying out trash. Ms. H also testified to claimant's poor reputation for veracity, and to helping claimant do the paperwork required of his managerial position indicating he demonstrated an unwillingness or inability to do it. Ms. S said she was unaware of claimant's having injured himself on the job and denied massaging his back. On January 11, 1993, claimant said that Mr. F came to the unit, that he told Mr. F he had hurt his back on (date of injury) pulling trash, that he intended to seek medical treatment at the Clinic, and that Mr. F then terminated his employment. Claimant said he saw Dr. K on January 18th but failed to keep a January 25th follow-up appointment due to a lack of funds.

In a statement to carrier's adjuster on February 8, 1993, claimant said he was injured on "(date of injury)" when he was pulling a trash bag out of a bin and felt "a very good pinch" in the middle of his back. He said he also felt the pinch the next day when moving gallon cans in the storage room. He said he continued to work and felt the "little pinch" when lifting, that the pain really began to get worse the week after Christmas when his back area felt hot and swollen, that he planned to tell Mr. F about it if it didn't get better, that he "never thought of workmans comp" until talking with a friend, after he was terminated, who suggested he contact the Commission, and that he did contact the Commission in March 1993. Claimant never mentioned an injury on (date) moving tables during his February 8th interview. Claimant said he again sought medical treatment on May 5, 1993, when he saw (Dr. C).

According to the BRC report, a BRC was held on April 27, 1993, to consider the above referenced disputed issues. The issue respecting whether claimant sustained a compensable injury, as framed by the benefit review officer, did not state a date of injury. At the hearing, claimant introduced an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41), which he signed on "1-13-93," stating he injured his back on "(date of injury)" when he was "pulling trash bags," "felt a pull" on his back, and "thought it was a pulled muscle." He also introduced another TWCC-41, which he signed on "5-5-93," (after the BRC) stating he injured his back on"(date)" when he "moved 40 tables and 160 chairs." Claimant had written "amended" on the latter TWCC-41. He explained that at some time, which he did not specify, he came to realize it was the moving of tables on (date), and not the trash pulling on (date of injury), or the stocking of cans on (date of injury), that caused his back problem. He also said that at the BRC, he became aware there was an issue concerning whether he had provided his employer with timely notice of his (date of injury) injury. He conceded that he first provided such notice on January 11, 1993, when he spoke to his supervisor, Mr. F, who had come to the cafeteria to terminate

him for poor performance. Claimant also introduced an Employer's First Report of Injury or Illness, which he said he signed on behalf of the employer on January 20, 1993, reflecting an injury date of "(date of injury)" and describing the injury as follows: "On or about (date of injury) while pulling trash bags I felt a pinch in my mid back. Next day while putting up cases of canned goods a more severe pinch occurred." In notes attached to that exhibit claimant wrote that at first he thought he had just pulled a muscle but that it proceeded to get worse, that on the Monday after Christmas the pains in his back and arm were worse, and that on January 11th he told Mr. F. Claimant represented to the hearing officer that he was effectively abandoning his claim for the (date of injury) injury and insisted that that injury was just a "very minor pinch" which resolved. In his appeal claimant asserts he amended his claim at the suggestion of the Commission ombudsman who assisted him at the hearing.

Mr. F testified that he assisted with moving the tables and chairs on (date), that claimant reported no injury to him at that time, gave no indication of having been injured, and reported no injury prior to their January 11th meeting. On that occasion, Mr. F said that when claimant came over to sit down and talk he moved his arm in a circular motion and Mr. F asked him "what was wrong." Claimant responded that he had hurt himself "pulling trash about a month and a half ago," and that he intended to go to the K-Clinic for treatment because the first visit was free. According to Mr. F, claimant never mentioned having been injured on (date) moving the tables. Mr. F said he had come to the job site earlier on January 11th to terminate claimant for poor job performance, including his unsatisfactory accomplishment of the paperwork, but was called away. When he returned later that day, Mr. F advised claimant of his termination.

Claimant's first sought medical treatment when he saw Dr. K on January 18th. According to Dr. K's report of that visit, claimant said he was injured on (date of injury) when he pulled trash out of the trash can and felt a sharp pain in his neck, mid-back and lower back. He presented to Dr. K with complaints of such pain. Dr. K diagnosed cervical, dorsal and lumbar "sprain/strain," ordered x-rays and a CT scan, took claimant off work until further evaluation, scheduled a return visit for January 25th, and prescribed medication. Claimant stated he did not return on January 25th due to lack of funds, and also said he had not worked since he was terminated. At the time of the hearing he said he felt weak and still had pain. In a letter of May 10, 1993, Dr. C wrote that claimant injured his back "in early (date of injury)," experienced pain after moving tables and chairs, that an MRI showed disc desiccation at L5-S1 but no bulge or herniation, and that claimant "will do fine" with anti-inflammatories and exercise. Claimant testified that sometime after this letter was written he returned to Dr. C and had the letter annotated as follows: "CORRECTION: Date of injury was (date of injury)."

The hearing officer found that claimant was not injured while disposing of trash bags on or about (date of injury), that he did not aggravate any injury of (date of injury) when stacking canned goods on or about (date of injury), that he was not injured while moving or stacking tables and chairs at work on (date), that although claimant told Ms. H he was experiencing problems with his arm or a pinched nerve, prior to (date of injury), he did not

actually experience such symptoms but was making excuses to have Ms. H do his paperwork for him, and that he reported a work-related injury to employer on January 11, 1993. Based on these findings, the hearing officer concluded that claimant did not sustain a compensable injury on or about either (date of injury) or (date), that he failed to give timely notice of the alleged (date of injury) injury but did give timely notice of the (date) injury, and that he did not have disability since he sustained no compensable injury.

Whether claimant was injured in the course and scope of his employment was an issue of fact for the hearing officer to determine. Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses, the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports the findings and they are not so against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951).

The hearing officer obviously found claimant's credibility to be wanting. Indeed, the carrier argued at the hearing that claimant's credibility was lacking given the inconsistencies between his testimony and that of Mr. F, Ms. H, and Ms. S, the inconsistencies among claimant's own statements to Mr. F, to carrier's adjuster, and to the doctors, and the inconsistencies on the several forms he signed and filed with the Commission. The evidence is sufficient to support the hearing officer's determination that claimant failed to prove he sustained a compensable injury on either (date of injury) or (date). The hearing officer was free to reject claimant's testimony. Since claimant failed to prove he sustained a compensable injury, the hearing officer's conclusion that claimant did not have disability is also correct. The very definition of "disability" in the 1989 Act (Section 401.011 (16)) requires a compensable injury, and we have previously observed that a finding of a compensable injury is a threshold issue and a prerequisite to consideration of the issue of disability. Texas Workers' Compensation Commission Appeal No. 92217, decided April 13, 1992.

The conclusions respecting the provision of timely notice are problematical. Respecting the conclusion of untimely notice of the (date of injury) injury, both Mr. F and

claimant testified that claimant told Mr. F on January 11th of the (date of injury) injury pulling trash. While that notice did exceed the 30 day notice requirement of Section 409.001(a) by a matter of days, claimant's evidence, unrefuted, established that he held off notifying Mr. F because he thought his injury was minor and would improve. A finding of "good cause" may relieve a claimant of the consequences of untimely notice to the employer of the injury. *See* Section 409.002. We have many times had occasion to discuss the "trivialization" of an injury and "good cause," and have just as frequently observed that an issue of "good cause" is subsumed in a disputed issue of timely notice of injury. The hearing officer, however, failed to make any finding respecting the existence of "good cause." However, since the hearing officer determined that claimant did not sustain a compensable injury on or about (date of injury), a conclusion sufficiently supported by the evidence, the failure to determine whether claimant had good cause for not timely reporting such injury does not require us to remand for further findings.

The conclusion that claimant did give timely notice of his (date) injury is patently unsupported by the evidence. However, since the carrier has not appealed, we need not take corrective action.

Claimant attached to his request for review a Report of Medical Evaluation (TWCC-69) signed by Dr. K on March 29, 1993, which commented on claimant's failure to return for the January 25th follow-up visit and on Dr. K's unsuccessful efforts to follow up with claimant, and which also certified that claimant reached maximum medical improvement on "3-15-93" with "zero percent" impairment. Claimant asserts that the Commission Ombudsman and not claimant handled his exhibits at the hearing. Our review is limited to evidence developed at the hearing. *See* Section 410.203(a). Not only has claimant failed to show that the TWCC-69 could not have been obtained and introduced at the hearing, but its consideration by the hearing officer would probably not have resulted in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 92444, decided October 5, 1992, and Texas Workers' Compensation Commission Appeal No. 92549, decided October 12, 1992.

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge