APPEAL NO. 93704

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 7, 1993, with the record closing on July 14, 1993, (hearing officer) presiding. The issues at the CCH were whether the respondent (claimant) was injured in the course and scope of employment on (date of injury); whether the claimant timely reported this injury to his employer; and, if so, whether he suffered any disability as a result. The hearing officer found for the claimant on all these issues and determined that his disability began on March 24, 1993, and was still continuing as of the date of the hearing. The hearing officer ordered the appellant (carrier) to pay temporary income benefits from the beginning of disability until the disability ends or until the claimant reaches maximum medical improvement.

The carrier appeals arguing that there was insufficient evidence on the issues to meet the claimant's burden of proof. The claimant responds that the decision of the hearing officer is "accurate and fair and should be upheld."

DECISION

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

The claimant worked as a truck driver and loader/unloader for a freight shipping company. He alleged that he came to work about 9:00 or 9:30 the morning of (date of injury). As he was unloading a truck at the dock about 10:00 a.m., a package estimated to weigh between 200 and 300 pounds fell on him. He attributed this to improper loading of the truck and load shift during shipment. As the package fell he diverted it, causing him to fall partially between the dock and the truck and severely scraping his right shin and causing pain in his right hip. There were no witnesses to the accident, but claimant stated that he told another employee working across the dock that he had just gotten "a face full" of freight. He went to his truck to get a bandage and dressed his leg injury himself. He continued working the rest of his shift and the rest of the week when he was notified that effective with the end of his shift, Friday, (date), he would be laid off for economic reasons unrelated to the injury. He has not worked since (date).

The claimant asserts that he notified the terminal manager, (GW), about the accident on the day after it happened. This notice was in the form of a handwritten letter, dated a (date). When the claimant went to the office to give GW the letter, he was on the phone. For this reason, the claimant says he put the letter in GW's in-basket and that was the last he saw of it. He produced a copy for the Benefit Review Conference and for the CCH.

In April (date), claimant applied for and received unemployment compensation. He confirms that he certified on these forms that he was able to work, because he thought he was not injured to a degree that precluded work. In May (date), he was recalled to work,

but for reasons unclear, either a lack of communication or claimant's choice, he never returned to work and was terminated in June (date). During the summer of (date) and winter of 1993, he sought work. Believing he had a good possibility of being hired by another trucking company, and knowing he would have to pass a Department of Transportation (DOT) physical examination, he went to see (Dr. S) on March 24, 1993, because of concerns that his right hip was bothering him enough to jeopardize his chances of passing the DOT physical. Dr. S found severe muscle spasm in the lumbar area. An X-Ray showed a narrowing of the disc space at L5 and Dr. S recommended an MRI. He advised claimant not to return to work until the testing was completed. The claimant declined the further testing and medication because he could not afford it. He has not seen Dr. S since this one visit.

Realizing for the first time how serious his condition was, the claimant sought assistance from the Texas Workers' Compensation Commission. His first Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) was dated March 5, 1993.[1] On March 31, 1993, the carrier provided Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), disputing the claim.

The carrier strongly protests the claimant's version of events and contends that injury and notice were fabrications of the claimant devised only after his meeting with Dr. S. A copy of the claimant's time cards for the week of his alleged accident were admitted into evidence and explained by the testimony of GW. The claimant's time card, as interpreted by GW, shows that the claimant reported for work on (date of injury), at about 11:15 a.m. Because this was 15 minutes before the start of the normal 11:30 shift, the supervisor initialed the card to permit the claimant to start work early. Thus, carrier argues the claimant was not at work when he claimed the accident happened. GW also states that records showed that the fellow employee whom the claimant referred to at the time of the accident was not working at that terminal on the day in question. In response, the claimant contends that there was lax enforcement of the rules for punching in on time clocks and that in the past, when he failed to punch in, a supervisor would annotate the time card appropriately. GW conceded that once or twice a month someone, including claimant in the past, would fail to punch in. The time card in question bore no indication of a supervisor's annotation in lieu of an imprint from the time-clock. The carrier further argues that the injury did not happen as claimed because if the injury to the shin was as severe as described he would have sought medical attention but he failed to do so.

With regard to whether a notice was given on March 25, (date), carrier argues that there were procedures in place to process injury claims. If GW received the notice[2], it

[1]The apparent discrepancy in the date of this form and the date of the appointment with Dr. S, which was the motivating factor in the claim, is not explained.

[2]In his testimony, GW says that he has no recollection of whether or not he

would have, in accordance with standard procedures, caused a response to the claimant and been filed in the claimant's personnel file. It was not found in his files. In response, the claimant stated it was not his responsibility to file the document and does not know why it was not treated according to established procedure.

Finally, as to disability, the carrier contends that the claimant suffered no disability, as evident primarily by the claimant's failure to get medical attention for a year and the claimant's ability to work the rest of the week until he was laid off. Carrier also points to the claimant's statements in connection with his application and receipt of unemployment compensation and his non-response to an offer to return to work, urging that he was not disabled or prevented from working. Carrier also argues that the testimony of the claimant, concerning his hobby of training horses (including amateur rodeo riding), with the other evidence, creates enough of a question about the claimant's account of the cause of his injuries to establish that he did not meet his burden of proof in this case.

In reviewing a sufficiency of the evidence point, contradictory evidence may be considered. However, rules of appellate review apply. Section 410.165(a) provides that the CCH officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, who in this case observed the demeanor of the witnesses as they testified, 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 Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witness or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). 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 Company, 715 S.W.2d 629, 635 (Tex. 1986).

As to the existence of an injury, the carrier contends that its evidence "clearly contradicts" the claimant's own account. We have held that an injury may be proven by the testimony of the claimant alone. See Texas Workers' Compensation Commission Appeal No. 92083, decided on April 16, (date), and Texas Workers' Compensation Commission Appeal No. 92515, decided on November 5, (date). Clearly, and not unexpected in a

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received the notice, not a recollection that he did not receive the notice.

contested hearing, there were discrepancies in the evidence and different inferences to be drawn. The hearing officer was not only able to review the documentary evidence but was also able to observe the witnesses. The hearing officer found the claimant credible and we do not conclude on review, that the hearing officer's finding of injury or timely reporting of the injury were against the great weight and preponderance of the evidence as to be clearly in error and manifestly unjust.

As to the issue of disability, the carrier asserts that the claimant was able to work at all times from the date of the injury in (date). Carrier's evidence goes only to the period up to the time of the claimant's examination by Dr. S. The hearing officer found disability beginning on the date of this examination in 1993. Dr. S's report clearly states that the claimant is unable to work pending further tests. The testimony of the claimant alone can establish disability. Texas Workers' Compensation Commission Appeal No. 92285, decided on August 14, (date) and Texas Workers' Compensation Commission No. 92167, decided on June 11, (date). In the present case, the testimony of the claimant as to both injury and disability, together with Dr. S's report provide some probative evidence and preclude us from setting aside the findings of the hearing officer on this issue.

Finding no reversible error and that the hearing officer's decision is not so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge