APPEAL NO. 94038

On December 2, 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). The issues at the hearing were: (1) whether the appellant (claimant) sustained a compensable back injury on (date of injury); (2) whether the claimant timely reported his claimed injury to his employer, and if not, whether good cause existed for his failure to timely report the claimed injury; (3) whether the claimant timely filed a claim for compensation with the Texas Workers' Compensation Commission (Commission), and if not, whether good cause existed for his failure to timely file a claim for compensation; and (4) whether the claimant has had disability from January 20, 1993, to the date of the hearing. The hearing officer found that the claimant did not sustain a back injury on (date of injury); that the claimant had good c ause for failing to timely report his injury to his employer; that the claimant did not have good cause for failing to timely file a claim for compensation; and that the claimant did not have disability. The hearing officer decided that the claimant is not entitled to workers' compensation benefits for the claimed back injury of (date of injury). The claimant disagrees with the hearing officer's determinations of no compensable back injury, no disability, and untimely filing of his claim for compensation, and requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) responds that the hearing officer's decision is supported by the evidence and requests affirmance.

DECISION

The hearing officer's decision and order are affirmed.

This case involves a claimed back injury from an accident at work on (date of injury). By way of background, the claimant had previously filed a claim for compensation for injuries sustained at work on (date of injury), when some dirt hit him in the face. At the request of the claimant, the hearing officer took official notice of the records of the hearings on the (date of injury), injury. At hearings held on January 8 and April 23, 1993, a hearing officer determined that the claimant injured his face and neck in the (date of injury), accident but did not injure his back. The hearing officer also determined with regard to the (date of injury), injury that the claimant reached MMI on September 11, 1993, with a zero percent impairment rating.

At the hearings on the (date of injury) injury, the claimant testified that the accident at work on (date of injury) could have injured his back, but he said he did not know if it did. The claimant also testifed at those hearings that he had a back injury in 1986 for which a laminectomy was performed at the L3-4 level and that he has had intermittent low back pain over the years. He further testified that in July 1990 a truck he was driving hit a light pole and his head hit the rear window of the truck.

In regard to the issue at the prior hearings as to whether the claimant injured his back in the (date of injury) accident, the carrier argued that the claimant's back problems

may have been caused by the 1986, 1990, or (date of injury), accidents, but acknowledged it did not have medical evidence to substantiate its argument. As previously mentioned, the hearing officer who presided at the hearings on the (date of injury) claim found that the claimant failed to prove that he injured his back at work on (date of injury).

The Appeals Panel initially remanded the hearing officer's decision in the first case for further consideration and development of the evidence in Texas Workers' Compensation Commission Appeal No. 93092, decided March 18, 1993, and then, after a hearing on remand, the hearing officer again determined that the claimant failed to prove that he injured his back at work on (date of injury), which decision was affirmed in Texas Workers' Compensation Commission Appeal No. 93397, decided July 5, 1993. In his decision, the hearing officer found that the claimant had injured only his face and neck on (date of injury), and that the sole cause of any problems related to the claimant's lower back are the result of "something other" than the injury of (date of injury). The hearing officer made no finding that the cause of the claimant's back problems was the accident

of (date of injury). On August 26, 1993, the claimant filed a claim with the Commission claiming that he injured his low back in the work-related accident on (date of injury).

Concerning the accident on (date of injury), the claimant testified that on that day he was standing beside a 30-foot long, eight-inch steel pipe which was being lifted by a winch truck when the chain holding the pipe slipped and the end of the pipe hit him at an angle on the head and knocked him down. He was wearing a hard hat at the time. The claimant said that the force of the blow knocked his hard hat off, but that the pipe stopped falling at the point it hit him because it came to rest on another pipe which was at the same height. A coworker saw the pipe hit the claimant, knock him down, and knock his hard hat off.

The claimant was somewhat inconsistent as to what physical problems he experienced after the accident on (date of injury) and when they occurred. He initially testified that he could not tell "right off" if he was injured or not. He later testified that on the day of the accident he felt like he was hurt and that he thought his "whole spine was hurt," but also testified that his back didn't hurt any more than it had over the past few years. However, he also said that he told a supervisor that he almost got killed by the pipe. Still later, the claimant testified that he had no back symptoms until his later accident of (date of injury), when he was hit in the face with dirt. The claimant then explained that he didn't have severe back symptoms until the (date of injury), accident.

In any event, the claimant continued to work until his (date of injury), accident and did not seek medical treatment until the (date of injury) accident. The claimant has not returned to work since (date of injury), and was paid income benefits for the (date of injury), injury from July 1, 1992, to January 20, 1993. The claimant said he first realized that the accident of (date of injury), may have caused his back problems when he was asked at the hearing in January 1993 (for the (date of injury), injury) whether it was possible that he hurt his back on (date of injury).

The claimant was in the hospital for three days following his (date of injury) accident and then began treatment with (Dr. D). At some point after the (date of injury) accident, an MRI scan of the claimant's lumbar spine was done which revealed a herniated disc at the L5-S1 level, as well as spondylolysis and disc degeneration. In an affidavit dated September 24, 1993, Dr. D stated that in his opinion it is not unusual for the onset of symptoms from a herniated disc to be insidious, and that in reasonable medical probability the claimant's herniated disc was a result of the (date of injury), incident rather than the later incident on "(date) (sic), (year)." Dr. D further stated that the delayed onset of the symptoms for a period of three weeks from the causative trauma is well within the realm of reasonable medical probability.

The hearing officer found that a pipe hit the claimant in the head on (date of injury), but that the claimant did not injure his back in that accident. The hearing officer did not make any finding that the claimant's back problem was caused by the (date of injury) accident. As previously noted, it had previously been determined that the claimant's back problem did not result from the accident of (date of injury). Appeal No. 93397. The claimant has the burden to prove that he was injured in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). We have previously observed that entitlement to workers' compensation does not arise from accidents, but from compensable injuries. Texas Workers' Compensation Commission Appeal No. 92276, decided August 5, 1992. Whether the claimant's herniated disc was caused by the accident on (date of injury), was a factual question to be determined by the hearing officer. The determination of that issue hinged in large part on the credibility of the claimant. In his discussion of the evidence, the hearing officer stated that he did not find the claimant to be a credible witness, and, among other things, pointed to inconsistencies in the claimant's testimony concerning back pain following the accident of (date of injury).

The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). It has been held that even the uncontradicted testimony of a claimant, who is an interested party, only raises an issue of fact for the trier of fact to determine. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The trier of fact may disbelieve a witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). Concerning Dr. D's opinion that the accident of (date of injury) probably caused the claimant's herniated disc, it has been held that the opinion evidence of expert medical witnesses is but evidentiary, and is not binding on the trier of fact. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e). And, as the finder of fact, the hearing officer judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company

v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The hearing officer's decision should not be set aside merely because different inferences may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Having reviewed the record, we conclude that the hearing officer's finding that the claimant did not injure his back in the accident of (date of injury), is not against the great weight and preponderance of the evidence. Since the claimant did not sustain a compensable injury on (date of injury), he could not have disability, as defined by Section 401.011(16), from that claimed injury. Texas Workers' Compensation Commission Appeal No. 931006, decided December 17, 1993.

Concerning the issue of whether the claimant timely filed his claim for compensation with the Commission, we observe that Section 409.003 provides that for injuries other than occupational diseases, a claim for compensation shall be filed with the Commission not later than one year after the date on which the injury occurred. The claimant filed his claim for compensation on August 26, 1993, which was more than one year after the claimed date of injury of (date of injury). However, it is the claimant's position that the limitation period for filing his claim was tolled until the employer filed its first report of injury on September 2, 1993. Section 409.005 provides, in part, that an employer must file a written report with the Commission and the employer's insurance carrier if an injury results in the absence of an employee from work for more than a day (for an occupational disease the report must be filed if the employee notifies the employer of an occupational disease under Section 409.001). Section 409.008 provides, in part, that if an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Section 409.003 does not begin to run against the claim of an injured employee until the day on which the report required under Section 409.005 has been furnished.

In the instant case, the hearing officer found that the claimant reported his claimed injury of (date of injury) to his employer on July 7, 1992, and that the claimant had good cause for failing to timely report the injury. That finding has not been appealed. However, the hearing officer also found that the "employer did not file and was not required to file an E-1 for an alleged date of injury of (date of injury), until claimant notified employer he intended to pursue that date of injury," and concluded that "the time period for claimant to file his claim for compensation was not tolled due to employer's failure to file an E-1 . . . . " The claimant appeals the finding and conclusion regarding filing of the employer's first report of injury and tolling of the time period for filing his claim for compensation. The claimant testified that he first lost time from work due to his claimed injury of (date of injury), on or about January 21, 1993, when the carrier stopped paying income benefits for his injury of (date of injury), and that the carrier knew that his lost time from work after January 21, 1993, resulted from his injury of (date of injury). The carrier responds that it never knew that there was any lost time from the claimed injury of (date of injury).

We agree with the claimant's contention that the hearing officer misstated the law in regard to what triggers the requirement to file a first report of injury. In accordance with Section 409.005, for injuries other than occupational diseases, the report of injury is to be filed if the injury results in the absence of an employee of the employer from work for more than one day. The reporting requirement is not triggered, as found by the hearing officer, when the claimant notifies the employer that he intends to "pursue that date of injury." However, although the hearing officer misstated the law with respect to the employer's report of injury, we do not conclude that such error amounted to reversible error under the particular facts of this case because, even if the claimant had timely filed a claim for compensation for the alleged injury of (date of injury), the claimant would still not be entitled to workers' compensation benefits for the claim since he failed to prove that he sustained a compensable injury as claimed. Also, since the claimant did not sustain a compensable injury on (date of injury), the claimed injury did not result in his absence from work.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge