

APPEAL NO. 94118

On December 22, 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 hearing officer decided that the appellant (claimant) is not entitled to workers' compensation benefits. The claimant appeals the hearing officer's decision and her findings that he did not sustain a compensable injury on (date of injury); that he does not have disability; and that he did not timely notify his employer, (employer)., of his claimed injury. The respondent (carrier) responds that the hearing officer's decision is supported by the evidence.

DECISION

The hearing officer's decision and order are affirmed.

The claimant testified that he injured his back at work on (date of injury) (all dates are in 1993), when he turned 12-foot steel beams by hand; that he reported the injury to his foreman, (JD), on April 14th; and that he was terminated from his job on April 16th. The claimant first sought medical treatment on May 14th when he went to (Dr. B) and gave a history of being injured at work on (date of injury) when he moved beams. Dr. B diagnosed lumbar strain, disc disease, sacroiliitis, and radiculopathy; prescribed pain medication and physical therapy; and stated that the claimant could not work until further notice. The claimant further testified that he has had continuous back pain since his injury and that he has not been released to return to work. A classmate of the claimant's stated in a recorded statement that the claimant told him about the accident on the day it happened and also told him that the injury had been reported to the foreman.

JD testified that the claimant did not report an injury to him on April 14th; that the beams weighed 62 pounds per foot and were too heavy to be turned by hand so a crane is used; that the claimant was terminated on April 16th because the claimant had not learned his job during the month the claimant worked for the employer; and that it was not until a month or more after the claimant was terminated that the claimant told him about being injured at work. The employer's personnel manager stated in a recorded statement that it was not until the end of June when Dr. B's office called the employer that the employer knew that the claimant was claiming a work-related injury.

The claimant testified that he told two coworkers on April 14th about his injury of (date of injury). The coworkers testified that they did not remember being told about an injury and that they would have remembered if they had been told.

The hearing officer found that the claimant did not sustain a compensable injury; that he does not have disability; that he did not timely report his claimed injury to his employer; and that he did not have good cause for failing to timely report his injury to his employer.

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). The claimant also has the burden to show that he timely reported his injury to his employer. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). Section 409.001(a) provides that for injuries other than occupational diseases, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs. The notice of injury may be given to the employer or to an employee of the employer who holds a supervisory or management position. Section 409.001(b). A claimant that fails to give timely notice of injury to his employer has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). "Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage. Section 401.011(16). Thus, in order to have disability as defined by the 1989 Act, there must be a compensable injury.

The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). Where there are conflicts and contradictions in the evidence, it is the duty of the finder of fact, in this case the hearing officer, to consider the conflicts and contradictions and determine what facts have been established. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.).

Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's findings that the claimant did not sustain a compensable injury; that he did not timely report his claimed injury to his employer; that he did not have good cause for failing to timely report his claimed injury to his employer; and that he does not have disability. We further conclude that the hearing officer's findings and conclusions are not against the great weight and preponderance of the evidence. We observe that, even if we were to conclude that the hearing officer erred in finding untimely notice of injury to the employer, which we do not, it would not entitle the claimant to workers' compensation benefits since the claimant failed to establish that he was injured in the course and scope of his employment.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge