APPEAL NO. 94156

This appeal arises under 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 January 25, 1994, with (hearing officer) presiding. The claimant, who is the appellant in this action, appeals the hearing officer's determination that the claimant did not suffer an injury in the course and scope of his employment on (date of injury), and that he failed to give timely notice of injury or establish good cause that would excuse his failure to give timely notice. The carrier responds that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant had been employed as a truck driver with (employer). He stated that on May 23, 1993, while in (state), his truck, which was loaded with countertops, was weighed and found to be overloaded. He said he called his supervisor, (Mr. T), who told claimant that he and his co-driver, (Mr. L), were to stay over and rent another truck the next day to take the overload. The claimant testified that on (date of injury), as he was unloading, some of the countertops fell from the truck and struck his back. He said he called Mr. T that morning and told him he had gotten hurt. Telephone records were introduced into evidence to show that such call was made.

The claimant said he was unable to see a doctor until June 8th because he had to take another load to (state). On June 8th he saw his family doctor, (Dr. A), who took him off work for one week; he said he did not tell Dr. A his back pain was work-related because he was afraid of losing his job. Dr. A's chart dictation of that date stated that the claimant had been having pain in the left flank area "for months" and was tender over the kidney area. (Claimant stated at the hearing that Dr. A had previously treated him for kidney problems and abdominal pain.) He went back to Dr. A on June 15th and got another off-work slip; he said on that visit he told Dr. A how the injury had happened, although Dr. A's notes on that date do not so reflect.

The claimant testified that he called Mr. T about seven days after June 15th to say he needed help with his medical bills, but was told the employer had had to replace him. He stated that he has not worked since June 8th.

Dr. A ordered a CT scan on claimant, the August 11th report of which noted the possibility of a herniation at L5. On November 30th claimant saw (Dr. H) who recorded severe left lower quadrant pain and a family history of diverticulitis. On December 10th claimant saw (Dr. D), whose initial medical report gave a history of cabinets and countertops falling on claimant. Dr. D ordered lumbar and thoracic spine MRIs which disclosed no herniation (although the thoracic spine MRI noted early stage degeneration of the T7-8, T8-9, and T9-10 interveterbral disks). At the time of the hearing the claimant was continuing to see Dr. D and to attend physical therapy.

Mr. T, employer's operations manager, testified that he spoke with claimant on May 23rd, that claimant told him he had been stopped due to an overload, and that he told claimant to rent another truck and take off "several thousand pounds." He also said claimant called him the next day to report that he was "on his way," but that he said nothing about an injury. On June 8th he said claimant brought him an off-work slip and said his side was bothering him and the motion of the truck was aggravating it, but he did not mention a back injury. He recalled that claimant had complained for weeks about not feeling well, and had missed several dispatches as a result. He said claimant left the second off-work slip on his desk on June 15th, then called in July to see if he still had a job; at that time Mr. T told him he had had to fill that slot. He said he first knew the claimant was claiming a work-related injury in July or August of 1993.

A transcription of a statement claimant's co-driver, Mr. L, gave to carrier, said that countertops fell over on the claimant as the two of them were unloading the truck, and that 30 or 40 minutes later claimant said he was beginning to hurt "pretty bad." Mr. L, who was no longer employed by employer, said that claimant called Mr. T after the incident and was told to "go ahead and pull the load," but that he (Mr. L) drove most of the way back.

In his appeal the claimant takes exception to the hearing officer's findings of fact and conclusions of law that claimant did not injure his back in the course and scope of his employment and did not timely notify his employer of such injury nor have good cause for failure to do so. The claimant also objects to the hearing officer's findings concerning the claimant's failure to seek medical attention until June 8th and Dr. A's failure to record any history of a work-related injury, citing evidence in the record to the contrary.

The hearing officer's statement of the evidence made clear that claimant's actions and statements following the alleged injury were often inconsistent and contradictory. The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). While a claimant's testimony alone can establish that a compensable injury occurred, the trier of fact is not bound to accept the testimony of the claimant, as an interested witness, at face value. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). To the extent that claimant's testimony and evidence demonstrated contradictory actions (such as allegedly informing his employer about an injury but stating he was afraid to inform his doctor), the hearing officer is entitled to resolve such conflict in favor or against a party. *See* Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Further, the hearing officer could choose to credit the testimony of Mr. T that claimant spoke of feeling bad but did not specifically identify a work-related incident as the cause. To fulfill the statutory notice requirements (*See* Section 409.001), an employer must know both the general nature of an injury and the fact that it is work-related. DeAnda v. Home Insurance Co., 618 S.W.2d 529 (Tex. 1980).

This panel will overturn the decision of the fact finder only where it is so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. In re

King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Upon our review of the record, we decline to do so in this case.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge