APPEAL NO. 950081
FILED FEBRUARY 24, 1995

On December 14, 1994, a contested case hearing was held. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB CODE ANN. § 401.001 *et seq*. (1989 Act). The appellant (claimant) disagrees with the hearing officer's decision that he was not injured in the course and scope of his employment with his employer, and that he did not timely notify his employer of his alleged injury. The claimant requests that we reverse the hearing officer's decision and render a decision in his favor. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

On _____, the claimant was working for the employer as a laborer. He testified that on that day he and two coworkers, (CE) and (RQ), were breaking up concrete and loading the concrete into wheelbarrows. He said he injured his back when he lifted a 70 pound piece of concrete. CE gave a recorded statement in which he denied any knowledge of the claimant's injury, and RQ gave a written statement in which he denied any knowledge of the claimant's injury. The claimant said that (FG) was his immediate supervisor and that he reported the injury to him on the day of the injury. FG gave a sworn statement that he was the claimant's supervisor and that sometime in March 1994 the claimant reported to him that he had been injured lifting concrete. A personnel record indicated that FG was terminated on March 24, 1994, because he "told one of the employees to falsify accident report." (AW), the employer's vice-president, testified that FG worked as a laborer and was not a supervisor. The claimant testified that he reported his injury to (JB), whom he also identified as a supervisor, two weeks to a month after the injury. He said he continued to work for about a month after the injury and that when he reported the injury to JB, he was terminated and no reason was given for his termination. JB gave a recorded statement in which he stated that he was the claimant's supervisor and that the claimant did not report an injury to him and that he first heard that the claimant was claiming an injury around the beginning of May 1994. AW, the employer's vice-president, testified that JB was the claimant's supervisor and that the claimant and two or three other employees were terminated when they walked off the job before their work shift was completed because of personality conflicts with JB. A personnel record indicated that the claimant was terminated on April 14, 1994, when he caused other people to walk off the job with him. (LB) gave a recorded statement in which he stated that he was the crew lead man and that he first heard about the claimant's injury after the claimant had been terminated and had gone to a doctor.

The claimant said he did not seek medical treatment during the month he continued to work after his injury because he could not afford it. In a medical report dated April 27,

1994, (Dr. B) reported that he initially saw the claimant on April 27th and that the claimant told him that on March 16th he was breaking up concrete at work and injured his back when he leaned forward to pick up a large rock. Dr. B diagnosed thoracic strain, lumbar strain, lumbar disc disease, lumbar facet arthropathy, sacroiliitis, and lumbosacral radiculopathy. He reported that it was unknown when the claimant would be able to return to work and he has continued to treat the claimant since the date of the initial visit.

With respect to the issues at the hearing, the hearing officer determined that the claimant did not sustain a compensable injury in the course and scope of his employment with the employer and that the claimant did not notify his employer of an injury within 30 days of the date of the claimed injury and no good cause existed for the failure to give timely notice.

The claimant has the burden to prove that he was injured in the course and scope of his 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.).

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 to 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.). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others, and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694 (Tex. 1986). The claimant was an interested witness and the hearing officer was not required to believe his testimony that he suffered an injury on _____. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App. - Texarkana 1977, no writ). Since the credibility of the recitation of the history of the injury as reported in Dr. B's report was manifestly dependent upon the credibility of the information the claimant imparted to Dr. B, the hearing officer was not bound to accept such recitation as evidence that an injury in fact occurred on the date alleged. *See* Rowland v. Standard Fire Insurance Company 489 S.W.2d 151 (Tex. Civ. App. - Houston [14th Dist.] 1973, writ ref'd n.r.e.); Presley, supra. We conclude that the hearing officer's decision is supported by sufficient evidence and that

it is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge