

APPEAL NO. 961033

On April 19, 1996, a contested case hearing (CCH) was held. The CCH 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 CCH were: (1) whether the appellant (claimant) sustained a compensable injury on _____; (2) whether the claimant timely reported his injury to his employer, and, if not, whether good cause existed for failing to timely report the injury; (3) whether the claimant had disability from August 25, 1995 "to the present"; and (4) the claimant's average weekly wage (AWW). The parties agreed that the claimant's AWW is \$292.50. The claimant appeals the hearing officer's decision that he did not sustain a compensable neck, back, or chest injury on _____, that he has not had disability, and that while he timely reported a claimed chest injury to his employer, he did not timely report a claimed neck or back injury to the employer and he did not have good cause for failing to timely report a claimed neck or back injury. The respondent (carrier) requests affirmance.

DECISION

Affirmed.

The claimant's testimony was interpreted by a Spanish-speaking interpreter. According to the evidence, the claimant, who is 39 years of age, had part of one lung removed in 1981, had right knee surgery in 1985, and began working for the employer, (employer) operated by (Firm), in 1993. SM, the general manager of the employer's store at which the claimant worked, testified and gave a recorded statement. According to him, the claimant was transferred from a janitorial job inside the store to a maintenance job outside the store because of harassment complaints of coworkers. He said that the maintenance job, which included lawn care, was later contracted out to a third party and the claimant was given a job as a grocery cart pusher. The claimant would gather carts from the parking lot and take them inside the store. SM said that the claimant was not happy about being assigned to the cart-pushing job. According to the claimant's recorded statement, he started the cart-pushing job on June 7, 1995.

The claimant testified that on _____, he was pushing carts at work when he lifted the carts to straighten them and at that time he stepped on some object. He said his knee went to the side, he felt a pull from his neck to his waist, and he felt a stabbing pain from his neck down. He said he immediately went to SM, who, he said, was with WL. WL testified that he is the general manager of another of the employer's stores. The claimant said that SM and WL do not speak Spanish and there was no interpreter present. He said that he told SM and WL in English that he had a "problem" with his back and that his head and heart were hurting. He also said that they saw that he had a problem with his head because he was sweating and agitated. He said SM and WL turned their backs on him and that he then went to his car and drove to a medical clinic. He said he had no problem operating his car to go to the clinic. He said he explained his "problem" and mentioned his back and blood pressure to a Spanish-speaking employee at the clinic. He said the clinic

called his employer and then the clinic refused to give him treatment and called an ambulance to take him to a hospital. The clinic records of _____, note that the claimant complained of chest pain, shortness of breath, and a pounding head. They also note that the claimant did not give permission for treatment and that he was sent to an emergency room by ambulance for treatment. There is no mention of back or neck pain in the clinic records of June 8th.

The claimant said that the ambulance paramedics determined that he had an inflammation of his back. The ambulance report was not in evidence. He said he told a Spanish-speaking nurse at the hospital on June 8th that he was injured at work and that he had shortness of breath, chest pain, pain in his head, and pain from his waist to his upper back. He said the hospital called his employer and that he was then told that he was fine, that he should rest for two days, and that he should then return to work. Hospital records for June 8th note that the claimant complained of "chest pain at work yesterday" and "pain lifting." A chest x-ray showed "prior thoracoplasty and post inflammatory changes. No active chest disease identified." There is no mention in the June 8th hospital records of back or neck pain. The records note that the claimant should not work for two days.

The claimant testified that he took two days off work and that he then worked from June 10, 1995, to August 25, 1995, when he was fired. He went to another medical clinic on June 20, 1995, and, in response to a question on a form as to what problems he currently has or ever had, noted that he had vision problems, hearing problems, ringing in his ears, shortness of breath, asthma, night sweats, chest pain, irregular or rapid heartbeat, high blood pressure, kidney or bladder problems, numbness in his arms or legs, fainting spells or dizziness, memory change, depression or nervousness, back pain or injury, right knee fracture, temperature intolerance, chronic skin rash when nervous, and lung surgery in 1981. The doctor at that clinic assessed decreased pulmonary function and wrote that the claimant could work with restrictions of no lifting over 20 pounds, no work around excessive dust, and no work involving chemical exposure. No back or neck injury was diagnosed by the doctor the claimant saw on June 20th.

The claimant went to Dr. LF on June 22, 1995. The claimant said that Dr. LF speaks Spanish. Although the claimant said he told Dr. LF that he had a back problem, neither a back nor a neck injury is noted in Dr. LF's reports. Dr. LF reported that the claimant gave "random symptoms that are hard to put together" and that the claimant said that he was either lifting weight at work or pushing carts at work and felt chest pain. Dr. LF reviewed hospital records of June 8th. He noted that two EKG's done at the hospital on June 8th were normal, that the claimant's blood pressure was taken at the hospital three times on June 8th and each time was normal, and that a radiologist had compared the chest x-ray done on June 8th with a chest x-ray done in 1993 and found no significant changes. Dr. LF's assessment was "episodes of chest pain two weeks ago, possibly related to exertion." He recommended stress tests. The claimant returned to Dr. LF on June 30, 1995, at which time Dr. LF noted that the claimant complained of chest wall pain

and that the claimant "wants to relate all of his symptoms of chest wall pain to his work and only to that; no other possibility in his mind." He noted that a treadmill test administered by another doctor was negative. Dr. LF further noted that the claimant did not have any chest wall tenderness, that his heart had a normal sinus rhythm with no murmurs, and that the claimant was not in distress. Dr. LF stated that he had not excused the claimant from work and that he had no reason to do so. He gave the following assessment:

Chest pain by history. Nothing found on exam at this time. No evidence of cardiac disease detected, so far. The pt [claimant] wants to get a certification for work and this was given. He works in [employer] and has been under my care for intermittent chest pain of a muscular nature which allegedly is related to work. I do not know that exactly. I do not know when his pains began. He can return to work today after leaving the clinic.

On August 16, 1995, the claimant returned to the hospital emergency room he visited on June 8th. The only document in evidence from that visit is emergency room follow-up instructions in which someone circled the words "back injuries" next to the instructions for neck and back injuries. Also on that document are the instructions "no heavy lifting, no pushing, off work 2 days." A document indicates that the claimant returned to the hospital on September 8, 1995, but the written follow-up instructions are largely illegible. The claimant next went to Dr. C on November 20, 1995. Dr. C diagnosed a neck sprain and lumbar sprain and noted that the claimant told him that he was pushing a heavy cart at work which was loaded with 60-pound cartons, when he felt neck and low back pain. Dr. C stated that the claimant was to remain off work. On November 20, 1995, a radiologist reported that x-rays of the claimant's cervical spine showed no acute findings other than for some early spondylosis and that x-rays of the claimant's lumbar spine showed an anterior osteophyte at the L-4 end plate, some retrolisthesis at L3-4, and some "spasm or sciatic-type scoliosis noted in the lumbar spine area." The claimant returned to Dr. C on December 4th and 22nd complaining of back and neck pain. Dr. C's diagnoses remained neck sprain and back sprain. The claimant said that Dr. C prescribed crutches, that he continues to treat with Dr. C, and that Dr. C has not released him to return to work. He said that he had not had a heart problem prior to _____.

SM, the general manager, testified that on _____, the claimant told him in English that he was sick and having chest pain and needed to see a doctor, but that the claimant did not say that the sickness or chest pain was work related. He said that sometime after the claimant returned to work after taking two days off, the claimant told him that he could not do the cart-pushing job and that he told the claimant that he could have a medical leave of absence if a doctor said he could not do that job. He said that the claimant's work excuses did not say that he was unable to push carts. He said he met with the claimant on August 25, 1995, about the claimant's tardiness, that the claimant mentioned that he had school in the evenings and delivered pizza for another company, and that the claimant would not tell him when he would be available for work. According to

the claimant, he was fired on August 25th. SM testified that the claimant did not tell him prior to the claimant's termination or at the time the claimant was terminated that he was injured at work. However, in a recorded statement SM stated that the week after the claimant told him that he had chest pains and needed to see a doctor the claimant told him that pushing the carts caused his chest pain. He further stated that the claimant did not tell him that he had injured his back or any other "body part." WL testified that the claimant did not inform him of a work-related injury.

The hearing officer found that the claimant did not sustain harm to his neck, back, or chest on _____, while engaged in an activity that originated in and had to do with the employer's business and that was performed by the claimant in furtherance of the business or affairs of the employer and she concluded that the claimant did not sustain a compensable neck, back, or chest injury on _____, while in the course and scope of his employment with the employer. The claimant had 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 hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. In the statement of the evidence portion of her decision the hearing officer wrote that while the claimant may have overexerted himself at work on _____, and complained of shortness of breath and chest pain, he failed to show that he sustained any physical harm to his chest. She also wrote that the evidence failed to demonstrate that the claimant sustained a neck or back injury at work on _____. We conclude that the hearing officer's decision that the claimant did not sustain a compensable neck, back, or chest injury 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). We find no error in the hearing officer's determination that the claimant has not had disability, because, without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

The claimant contends that a coworker was aware of his injury and requests that he be allowed to present the coworker's testimony. The time to present evidence was at the CCH. If the claimant believes that a coworker's testimony would have benefited him, he should have called the coworker as a witness or presented a written statement from the coworker at the CCH. The claimant contends that the hearing officer did not admit into evidence an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) he offered into evidence. Our review of the record shows that the hearing officer did admit into evidence the TWCC-41 offered by the claimant as well as two TWCC-41's offered by the carrier. The claimant has not shown error in the admission or exclusion of evidence.

There has been no appeal of the hearing officer's determination that the claimant timely reported to his employer, within 30 days of the date of the claimed injury, that he

claimed a work-related chest injury. The claimant appeals the hearing officer's determination that he failed to timely report a _____, back or neck injury to the employer. He indicates in his appeal that his testimony shows that he did timely report a back and neck injury to the employer. While the hearing officer was free to believe SM's testimony over that of the claimant that a neck and back injury were not reported to the employer, and thus sufficient evidence supports the hearing officer's finding and conclusion that the claimant failed to timely report a _____, back or neck injury, it was not necessary for the claimant to report the full extent of his injuries to his employer once timely notice of an injury was given to the employer. Texas Workers' Compensation Commission Appeal No. 951613, decided November 10, 1995.

In other words, if the hearing officer had found that the claimant had sustained a compensable back or neck injury on _____, then a determination that the claimant did not timely report to the employer a back or neck injury resulting from the claimed work-related accident on _____, would not relieve the carrier of liability for the back or neck injury under Section 409.002, because it is undisputed on appeal that the claimant did timely report a claimed _____, injury to the employer and that the claimant claimed that the back and neck injury resulted from the same accident as the chest injury. See Texas Indemnity Ins. Co. v. Bridges, 52 S.W.2d 1075 (Tex. Civ. App.-Eastland 1932, writ ref'd), where the court held that where the employee was injured in an accident at work and timely notified the employer of a foot injury, the employee was not barred from claiming workers' compensation for a back injury sustained in the same accident even though he did not specifically inform the employer of a back injury within the 30-day notice period. See *also* Texas Workers' Compensation Commission Appeal No. 951613, *supra*, where we stated that the Appeals Panel has agreed that the full extent of injury need not be reported to preserve entitlement to workers' compensation where a timely report of injury is made; and Texas Workers' Compensation Commission Appeal No. 941103, decided October 3, 1994, where we discussed the Bridges case.

Thus, under the unappealed finding of timely notice to the employer of a chest injury from the claimed accident of June 8th, the claimant did give timely notice of an injury to the employer as required by Section 409.001, and under the case law and Appeals Panel decisions he was not required to report to his employer the full extent of his injuries once timely notice of injury was given. However, the claimant's nonentitlement to workers' compensation benefits in this case rests on our affirmance of the hearing officer's decision that he did not sustain a compensable chest, back, or neck injury on _____, and thus, even though the claimant did give timely notice of an injury to his employer, he is still not entitled to workers' compensation benefits since there was no compensable injury.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge