

APPEAL NO. 980019

This appeal arises pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). On September 16, 1997, a hearing was held. She (hearing officer) determined that appellant (claimant) has not shown that she was injured in the course and scope of employment on _____, and had no disability. Claimant asserts on appeal that the hearing officer's decision was mailed to "the wrong address," that she did hurt her low back at work and asks that she receive disability payments. The respondent (carrier) replies that the claimant was untimely in appealing but states that if the appeal is considered, the decision of the hearing officer should be affirmed.

DECISION

We affirm.

The claimant's appeal was dated December 22, 1997, and indicated that she received the hearing officer's decision on December 22, 1997. The appeal was received on January 5, 1998. While the hearing officer's decision was distributed on September 5, 1997, it was sent to claimant at (address 1), even though the record reflects that claimant recited her address as having changed to (address 2). In addition, the hearing officer at that time changed claimant's address on the Texas Workers' Compensation Commission (Commission) copy of the notice provided for the hearing to reflect claimant's correct address as (address 2) (this correction of claimant's address was included as part of Hearing Officer's Exhibit No. 1).

Texas Workers' Compensation Commission Appeal No. 92199, decided June 26, 1992, found an appeal timely when the Commission sent the hearing officer's decision to the claimant at an address different from that last provided by the claimant (which was also provided at a hearing). That decision said that the deemed date of five days after mailing provided by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) would not be applied when the Commission had not followed Rule 102.5(a), which called for sending the copy of the decision to the address supplied by the claimant. While claimant had a lawyer at the hearing, she did not upon appeal, and there is no information provided as to the length of the attorney-client relationship. In these circumstances, the claimant's appeal was timely filed.

Claimant testified that she worked for. (employer) on _____. She said she was doing inventory in a warehouse when a forklift struck a pallet of cans of oil by which she was standing, which then struck her causing injury to her back. Testimony of the supervisor to whom she reported the event indicated that claimant did not say what part of her body was injured or even that she was hurt, but merely that a forklift had struck a pallet which backed into her. The driver of the forklift, (Mr. S), said that he had all but stopped the forklift when it bumped the pallet; he said he had turned to observe the pallet as he backed

up and could see claimant standing behind the pallet but did not see the pallet strike claimant and heard claimant make no sound.

Claimant said she worked the rest of the day and went to an emergency room (ER) two days after the incident on _____. The ER records are very brief but do indicate that claimant may have had abdominal pain; the record provided does show that an antibiotic shot was given and the antibiotic was stated to be effective in regard to respiratory and genital (urinary) infections. While claimant was not said to have presented with a urinary tract infection, a statement by claimant dated April 15, 1997, indicated that when the forklift struck the pallet, boxes on it "bumped my stomach"; she said she was knocked backward but did not fall. She added that at the ER she was told she had an infection in her "ovaries or fallopian tubes."

On April 1, 1997, claimant first saw (Dr. K). An initial medical report, in its attachment, indicates that claimant presented with pain in the low back, the neck, and the pelvis. It indicates an injury when a forklift hit a pallet, striking her pelvis. X-rays were ordered, which were reported as normal, except for a reference to curvature in the neck. An electromyogram report in April 1997 indicated an impression of cervical and lumbar strain.

The hearing officer, as fact finder, is the sole judge of the weight and credibility of the evidence. See Section 410.165. In assigning weight to the evidence, the fact finder does not have to believe all the testimony of the claimant in regard to the injury alleged. See Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ) and Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). In the case under review, she could question whether claimant was injured by the pallet when a witness noted no outcry and claimant was said to have stated that she was alright. While Dr. K noted a "contusion of trunk" on April 1, 1997, the hearing officer could choose to give more weight to the ER record of (two days after injury), which, while abbreviated, indicated no such contusion, but addressed instead a possible infection. The hearing officer could conclude that there were not two separate problems, an infection and a contusion/strain, and, as fact finder, believe that claimant had sustained no injury even though an accident of some type occurred. See Texas Workers' Compensation Commission Appeal No. 94453, decided May 25, 1994.

The hearing officer's Statement of Evidence indicates that claimant's testimony contained some inconsistency; she also wrote that she considered an incident to have occurred at work but concluded that no injury was shown. This determination is sufficiently supported by the evidence. With a determination of no compensable injury that has been found to be affirmable, there can be no disability under the 1989 Act. See Section 401.011(16).

Finding that the decision and order are sufficiently supported by the evidence, we affirm. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Alan C. Ernst
Appeals Judge