APPEAL NO. 980040

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 15, 1997, a contested case hearing (CCH) was held. The issues were whether the appellant/cross-respondent (claimant) sustained a compensable injury on or about _____; whether he timely reported his injury to his employer on or before the 30th day following that injury; whether he made an election of remedies thereby precluding him from receiving workers' compensation benefits; and whether he had disability from his compensable injury.

The hearing officer held that the claimant injured his back, that the injury was timely reported to his supervisors, that he did not make a binding election of remedies, and that he had disability, but only from November 11, 1997, to the date of the CCH.

The claimant has appealed the determination as to disability, arguing that he worked against (Dr. G) recommendation that he stay off work, and he was therefore "disabled." Claimant argues that he was in an "off work status" as of his last day of work. The respondent/cross-appellant (carrier) responds that claimant demonstrated prior to August 4th that he was able to work, and that he was unemployed after that date primarily due to his termination. The carrier argues that the fact determination of the hearing officer on this issue should be affirmed.

The carrier has appealed the decision that the claimant injured himself as claimed. The carrier also appeals the determination that timely notice was given, although the argument is couched more in terms of whether there was a compensable injury to have given notice about. The carrier also appears to take issue that claimant informed his supervisors the on the date of the alleged injury (although the notice to the general manager within 30 days is not mentioned in this point of appeal). The carrier further argues that the hearing officer erred by not finding a binding election of remedies. Finally, the carrier generally argues that there is no disability because claimant had no compensable injury.

DECISION

Affirmed on all appealed points, not being against the great weight and preponderance of the evidence.

Claimant was employed as a line cook by (company name) (employer). Information was developed that health insurance benefits did not begin until either three months or six months after the employment. Claimant was first employed in April 1997. Claimant continued to work until August 4, 1997, when he either quit or was fired, and on that day he called the general manager to report his work-related injury.

This is a case where the hearing officer was frankly faced with sorting out conflicting evidence between witnesses and contradictory testimony and evidence for each witness. Sworn testimony, rather than unsworn statements to the adjuster, will be summarized first. Claimant's supervisors, (Mr. O) and (Mr. J) testified before he did, and their testimony indicated that the claimant's contended injury involved lifting a fifty-pound box of potatoes in the freezer area. Mr. J said that there would be no reason for the claimant to do this, given his duties, and that raw potatoes were not in the freezer. Mr. O, who was not present in the hearing room to hear Mr. J's testimony, stated, however, that claimant might be called upon to remove items from the freezer, that raw potatoes were stored in fifty-pound boxes but not in the freezer, and that frozen French fries, which were in the freezer, were kept in 30-pound boxes. When claimant testified about the incident he contended he hurt his back, he stated that he went to the freezer to get potatoes and fish, and, as he leaned down, he heard a pop in his back. No testimony was developed as to whether he lifted or carried any boxes.

The claimant said he was hurt on _____, a Friday, and he was not scheduled to go in to work either of the next two days. It was pointed out that _____ was a Thursday. (The issue over the date arose because there were some documents in which a July 16th date of injury was listed.) The claimant said when his back popped, at the time of the day when he would have been setting up for lunch, he mentioned it to Mr. O. Claimant said he became visibly worse during the day, with growing numbness in his leg and pain, and that Mr. O told him to leave, and that he was later given an off-work slip and several prescriptions. The claimant testified both that he understood that his employer would likely pay for his injuries, since Mr. O told him to go to the doctor, and that he did not understand that the employer would pay, so he consequently provided Dr. G's office with his Medicaid coverage information (which is how he had paid Dr. G previously) because he could not afford to pay himself. Claimant said he understood that Medicaid was not supposed to pay for work-related injuries. Claimant stated that he told Dr. G's nursing assistant that he was hurt at work, and definitely did not tell her he had pain for the previous four days although that is what was recorded in Dr. G's records.

There was conflicting evidence about whether the claimant played softball on a regular basis. Both Mr. J and Mr. O said that he did. Claimant denied that he did. Mr. J recalled that claimant had brought in the doctor's note on a day when he was not regularly scheduled to work, and was dressed in shorts with dirt on his leg. He denied that he was told at this time that claimant had hurt his back at work. Then, he recalled that claimant said he pulled a muscle. When it was pointed out that Mr. J told the adjuster, on October 13, 1997, that he overheard claimant tell Mr. O that he hurt his back lifting something at work, he agreed that he probably told the adjuster this if that is what the statement said. In his statement, Mr. J indicated that this was well before a softball-related injury of which he was aware. In the statement and during his testimony, Mr. J was unable to recall when claimant had brought the doctor's note.

Mr. O testified that claimant told him on _____ that he was having problems squatting down. Mr. O agreed that he told claimant he should see a doctor. Claimant brought back an "off work" note from the doctor later that day, according to Mr. O, but claimant said that he could not take off time and would have to work because he had bills to pay.

Claimant left work on or about August 4th after a confrontation with Mr. O over scheduling of work. Mr. O said that the argument resulted from the claimant's dissatisfaction with not being able to attend physical therapy for a softball-related injury he sustained the week before, outside of work. Claimant indicated that the dispute arose over the failure of others to lend expected assistance. Mr. O said that claimant left and did not return; claimant said he was told the next day, when he called in to report that he would be late, that he was told he was fired. Claimant said he would have continued to work if he had not been fired. Everyone agreed that claimant reported the injury that day to general manager (Mr. S). Claimant also identified August 4th as the day that he found out that Medicaid coverage had run out and would no longer pay Dr. G. He also testified that it was on or about that day when he first found out that the employer carried workers' compensation coverage, and he had assumed up until that date that they did not.

Claimant said that he did not see Dr. G after August 6th, went without medical treatment for several weeks, and then began treating with (Dr. H). There was no testimony concerning the claimant's ability to work after that date to the date of the CCH. Claimant generally testified that his leg and back pain had continued from his date of injury.

In Mr. S's statement to the adjuster, he stated that he understood that the injury reported to him in August had happened over the weeks prior to that date, from claimant not lifting properly. Mr. S said that he was not told a specific date of injury at that point but that _____, was the date that claimant said he had gone to the doctor. Mr. S began thereafter to investigate the claim.

Medical notes from Dr. G indicate that claimant was treated for lumbar radiculopathy and trauma on _____. On August 6th, Dr. G recorded that claimant had been taken off work until July 28th, but had not taken the time. In his notes, Dr. G stated that claimant should not work until a scheduled follow-up appointment on August 18th. Dr. H's initial report on November 11, 1997, found that claimant continued to have low back pain which radiated into his hip and groin and that he would begin treatment and physical therapy. Claimant was then taken off work until further notice.

A statement taken from coworker (Mr. P), who did not testify at the CCH, recalled that claimant complained about hurting his back at work, when Mr. P asked why he was in apparently obvious pain. Mr. P could not recall the date of this conversation, but told claimant to talk to his supervisor.

A videotape taken of claimant on October 13, 1997, shows him bending over the railing of his apartment building for long periods of time smoking cigarettes, emptying a garbage can into a dumpster, and bending into the driver's side window of his car.

First of all, we agree with the hearing officer's determination that no election of remedies was made. The cases cited by the carrier do not mandate a different result although they do stand for the proposition that election of remedies is not a favored doctrine. Second, it is important to emphasize that the hearing officer is the sole judge of the weight and credibility of the evidence. The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was the hearing officer's responsibility to sort out the numerous contradictions in all the evidence, and her resolution of those conflicts in favor of injury and notice to the employer (especially in light of undisputed notice of a work-related injury that was given to Mr. S, within 30 days) are sufficiently supported by the evidence.

Because the claimant's appeal does not mention the definition of disability under the 1989 Act, we must emphasize that the concept of the type of disability which triggers payment of income benefits is not purely one of physical injury anymore, but is also an economic definition. A claimant has disability if he is unable to obtain and retain employment equivalent to his preinjury wage as a result of a compensable injury. Section 401.011(16). Regardless of whether his doctor advised that he be off work the claimant continued to demonstrate "ability," and to earn his wages, up to August 4th. He testified that he would have continued to work but for the firing. The hearing officer gave the claimant the benefit of the doubt once he began treatment with Dr. H on November 11th, but we do not agree that she was similarly required to ignore claimant's performance in his job, and that he would have continued in that job but for the termination, for periods of time prior to that date, or the videotape showing him functioning fairly well on October 13, 1997. In any case, her determination that claimant had disability only beginning November 11, 1997, is not so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

We affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Judy L. Stephens
Appeals Judge