APPEAL NO. 990142

On January 8, 1999, 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 respondent (claimant) sustained a compensable injury on _____; (2) whether claimant reported an injury to his employer not later than the 30th day after the injury, and if not, whether good cause existed for failing to report the injury timely; and (3) whether claimant has had disability. Appellant (carrier) requests reversal of the hearing officer's decision that: (1) claimant sustained a compensable injury on _____; (2) good cause existed for claimant's failure to report the injury timely; and (3) claimant had disability from September 8, 1998, through the date of the CCH. No response was received from claimant.

DECISION

Affirmed.

On _____, claimant was working as a tire technician for (employer). He testified that on that day he injured his lower back at work when he lifted a heavy truck tire from the floor to a tire-changing machine. He said that on _____, he told DL, the employer's manager, that he hurt his back lifting the tire. Claimant said he did not think that his back pain was a "big deal," that he thought it would go away, and that he did not go to a doctor until September 18, 1998, when he could no longer stand the pain, because he was afraid all the employees would lose their safety bonus. Claimant continued to work at his regular job until September 18, 1998. Claimant testified that on September 17, 1998, he reported his back injury to BM, the employer's assistant manager. In a recorded statement, claimant said that he reported his injury to the employer on September 17th when he reported it to BM and that he did not report it until then because he thought he just had pain that would go away with medication and he was afraid everyone would lose their safety bonus.

Claimant was seen by Dr. F on September 18, 1998, and Dr. F reported that claimant told him that he had hurt his back on _____, when he picked up a large tire. Dr. F diagnosed claimant as having a lumbar strain and prescribed rest, medications, and physical therapy. Dr. F noted on September 18th that claimant would be released to light-duty work on September 21st with no lifting, bending, twisting, stooping, kneeling, pushing, or pulling. Claimant said that he did not return to Dr. F or get physical therapy because carrier would not pay for treatment. Dr. F wrote on October 1, 1998, that on September 18, 1998, claimant complained of back pain, that claimant said his injury occurred on _____ when he lifted a big tire, that a diagnosis of lumbar strain is consistent with the injury described by claimant, and that "it seems evident that this injury is job related." Claimant went to a hospital emergency room on October 28, 1998, with complaints of lower back pain and reported that he had hurt his back at work when he picked up a heavy tire. The doctor at the hospital diagnosed claimant as having lower back pain secondary to trauma, prescribed medications, and noted that claimant could return to light-duty work with no lifting over 10 pounds.

Claimant said that in August 1998 he had a second job at a flea market where he was self-employed on Saturdays painting vehicle brake drums with cans of spray paint. He described that job as being easy and said that he worked there two times after his injury of _____. Claimant said that at the flea market, others took the tires off of the vehicles and that the vehicles were up off the ground; however, he said that he could not continue to work at the flea market after September 18th because his back hurt every time he bent over. He said he did not hurt his back at the flea market. Claimant testified that he has not worked anywhere since September 18, 1998, and that he hopes he can work light duty if he can get medical treatment.

DL testified that claimant did not report an injury to him on _____, and that he first learned that claimant was claiming a back injury when BM told him on September 18, 1998, that claimant went to a medical clinic because his back was hurting. DL filled out an injury report on September 21, 1998, and he said that when he filled out the report claimant told him that he hurt his back lifting a heavy tire. He said that claimant came back to the workplace and told him he had been released to light duty, but that there was no light duty job for claimant. DL described the employer's safety bonus program.

BM testified that he first learned that claimant was claiming a back injury on September 17, 1998, when claimant told him his back was hurting, but that claimant told him it was not work related. He said that claimant did not show any sign of a problem while working. Claimant said he did not tell BM that his back injury was not work related.

Claimant said that J, whose last name he does not know, RB, and JA saw him get hurt at work, that all three are or were tire technicians, and that JA is his uncle. Claimant said that he saw RB sign the typed statement dated December 4, 1998, that is in evidence. The December 4th statement states that RB witnessed claimant get hurt on _____ at work when claimant lifted a heavy tire and that he knows that claimant "told" DL. Another typed statement dated October 1, 1998, with essentially the same language as in the December 4th statement and purportedly bearing RB's signature, is also in evidence. Claimant said that his wife typed the October 4th statement and that RB signed it. However, below the typed statement dated October 1st is a handwritten statement dated October 27, 1998, which states RB's name and also states that the information above the handwritten statement is not true, that that statement is not RB's, and that it is not RB's signature. DL testified that he saw RB sign the handwritten statement of October 27th and that RB told him that the information at the top of the page (the typed statement of October 1st) is not true and that it was not his signature.

In a sworn written statement dated December 4, 1998, JA stated that he heard claimant tell "B," the assistant manager, on _____, that he, claimant, hurt his back on the job and that claimant got hurt when he lifted a heavy tire. BM, the assistant manager, said he did not start working at the store claimant worked at until early September 1998.

SJ, who is not otherwise identified, stated in a written statement that claimant never complained to him about his back hurting but that claimant once complained about leg pain

and that that was from working "at his other job." JJ stated in a written statement that he was a senior assistant at the employer's store until August 17, 1998, and that claimant never approached him about an injury nor was it mentioned by any other employee.

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). Claimant also had the burden to prove he has had disability, which is defined as the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). With respect to the injury and disability issues, the hearing officer found that on _____, claimant lifted a tire as part of his job duties for employer and sustained a back injury and that, due to his _____, injury, claimant has been unable to obtain and retain employment at his preinjury wage from September 18, 1998, through the date of the CCH. The hearing officer concluded that claimant sustained a compensable injury on _____, and that he had disability from September 18, 1998, through the date of the CCH. The carrier states that claimant is not credible, argues that he should be able to work at his job at the flea market, and contends that the hearing officer's findings and conclusions are in error and that his decision is against the great weight and preponderance of the evidence.

Generally, in workers' compensation cases the issues of injury and disability may be established by the testimony of claimant alone. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). Apparently, the hearing officer found claimant's testimony concerning his injury at work and his disability to be credible. We conclude that sufficient evidence supports the hearing officer's decision that claimant sustained a compensable injury on _____, and that he has had disability from September 18, 1998, through the date of the CCH, and that his decision is not against the great weight and preponderance of the evidence.

Section 409.001 provides that 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 occurred, and Section 409.002 provides a good cause exception for failure to provide notice in a timely manner. A good faith belief on the part of a claimant that his injuries are not serious constitutes good cause for failing to give timely notice. 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 apparently did not believe claimant's testimony that he reported the injury to DL as a work-related injury on _____ because the hearing officer found that claimant first reported his _____ injury as a work-related injury when he reported it to BM on September 17, 1998, which was more than 30 days after the date the injury occurred. The hearing officer found that claimant did not report his injury as a work-related injury until September 17, 1998, because he thought the injury might go away and because he and his coworkers would receive a reduced safety bonus. However, the hearing officer did not base his good cause determination on a fear of receiving a reduced bonus; instead, he

found that claimant acted as an ordinarily prudent person in delaying reporting the injury until September 17th because he hoped the injury would go away, which is supported by claimant's testimony that he did not think the injury was a big deal and thought the pain would go away. From that testimony, the hearing officer could reasonably infer that claimant did not think his injury was serious. That inference is supported by the fact that claimant was able to work until September 17th, at which time he said he could no longer stand his pain. The hearing officer concluded that good cause existed for claimant's failure to report the injury timely.

Carrier contends that since the hearing officer did not believe claimant's testimony that he reported the injury to DL on _____, then the hearing officer must have found claimant not to be credible and cannot accept the remainder of claimant's testimony, and that the hearing officer erred in determining claimant had good cause for not reporting his injury until September 17th. As the finder of fact, the hearing officer resolves conflicts and inconsistencies in the evidence and is privileged to believe all, part, or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). We conclude that the hearing officer's decision that claimant had good cause for failing to report the injury timely is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

The hearing officer's decision and order are affirmed.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Tommy W. Lueders
Appeals Judge