APPEAL NO. 990338

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 13, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not timely report her injury to her employer and that she did not have disability within the meaning of the 1989 Act because she did not sustain a compensable injury. In her appeal, the claimant essentially argues that those determinations are against the great weight of the evidence. In its response, the respondent (carrier) urges affirmance.

DECISION

Affirmed.

The claimant testified that she had been an employee of (employer) for about two years, on _____, working as a materials handler, who got orders ready for shipment. She stated that on _____, she was lifting 13-inch televisions, when she felt a strain in her low back. She testified that she completed her shift on _____ and then went to look for Mr. K, her supervisor, to report her injury. She stated that Mr. K had left for the day by the time her shift ended and, thus, she was not able to report her injury on the day it happened. She stated that she was next scheduled to work on October 20th, but she was in so much pain that she was not able to get off the couch. She testified that she asked her son, Mr. T, who also worked for the employer at that time, to report her injury. She explained that Mr. T had to use a pay phone to call Mr. K to report her injury on October 20th because they did not have a telephone at the time. She maintained that Mr. T reported the injury in person to Mr. J, another supervisor, on October 21st, a day Mr. T was also scheduled to work. In his written statement, Mr. T stated that he told Mr. K on October 20th that the claimant "didn't show up for work because she was hurting so bad she couldn't get off the couch" and that he told Mr. J on October 21st that the claimant had not called in to report her absences because she was not "able to get off the couch for a couple of days now and we didn't have a phone for her to call in." On cross-examination, the claimant acknowledged that Mr. T did not indicate in his statement that he told Mr. K or Mr. J that she had been injured at work. Rather, Mr. T only indicated that the claimant was not able to come to work because she was "hurting." The claimant testified that on October 22nd, she called the employer from a pay phone to report her injury. She stated that Ms. B answered the telephone and the claimant told her that she had been injured at work. She stated that Ms. B then paged Mr. K to the telephone and the claimant stated that she told Mr. K that she had injured her low back lifting televisions at work on _____.

In his recorded statement, Mr. K maintained that the claimant never reported a work-related injury to him. Mr. K stated that he understood from the claimant's son that she was sick but that he did not know that the claimant was alleging that she had been injured at work. Mr. J likewise stated that the claimant did not report an on-the-job injury to him. Rather, he maintained that the claimant indicated to him that she was missing work due to

illness and not because of something that happened to her at work. In a written statement, Ms. B also stated that the claimant called in "to notify her supervisor that she was ill." The claimant could not provide an explanation for Ms. B's having stated that she reported an illness, as opposed to a work-related injury.

Section 409.001 requires that an employee, or someone acting on the employee's behalf, notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. An essential element of notice is that the employer be advised of the work-related character of the injury and not just the fact of an injury. DeAnda v. Home Ins. Co., 618 S.W.2d 529 (Tex. 1980).

In this instance, there was conflicting evidence as to whether the claimant advised the employer that she had sustained a work-related back injury. The claimant maintained that she reported her injury to Mr. K on October 23, 1997, and that her son had reported the injury to Mr. K on October 20th and to Mr. J on October 21st. In their recorded statements, Mr. K and Mr. J maintained that they knew that the claimant was ill but that they did not know that she was asserting that she had sustained a work-related injury. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. The hearing officer was acting within his province as the fact finder in rejecting the claimant's testimony that she reported a work-related injury to her employer in favor of the evidence demonstrating that the employer was not advised that the claimant had sustained a work-related injury, as opposed to an illness. Our review of the record does not demonstrate that the notice determination is so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. Therefore, no sound basis exists for us to reverse that determination on appeal. Given our affirmance of the determination that the claimant did not timely report her injury to her employer, we find no error in the hearing officer's determination that the claimant did not have disability because the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer's decision and order are affirmed.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge