

APPEAL NO. 990378

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 11, 1999, a hearing was held. The hearing officer determined that the appellant (claimant) sustained a work-related repetitive physical trauma injury to his neck on _____, but did not report that injury to the employer until August 10, 1998, without showing good cause for the late notice. He also found that no election of remedies had been made and that claimant was unable to work at various times because of the injury. Claimant asserts that he did timely notify his employer of the injury, stating that both a company nurse, Mr. G, and his supervisor, Mr. F, were notified by February 20, 1998. Respondent (carrier) replied that the decision should be affirmed.

DECISION

We affirm.

Claimant worked for (employer) on _____. He testified that he has a neck strain and bony growths in his neck causing him pain which he noticed at work building computer systems. He first went to the employer's nurse on February 13, 1998, but testified at least twice that he knew his neck pain was related to his work on _____, although he first sought medical care on February 19, 1998, with Dr. E of Sports and Spine Associates. Claimant testified that he told the employer's nurse, Mr. G, no later than February 20, 1998, that the injury was related to work. He also said that both his group leader, Mr. F, and the nurse were told his injury was related to work.

Claimant also said that he told Dr. E on February 19, 1998, that his condition was related to work. Claimant stressed various forms, which were provided by Mr. G, and others that he and Dr. E filled out. Mr. G wrote a form note (Occupational Health Notice) to claimant's supervisor on February 13, 1998, which said that "claimant complained of pain to the right and left neck and shoulder muscles. Part of his duties are having to reach above shoulder in repetitive fashion. Gave Motrin, ice, and muscle cream. If condition persists by Tuesday [illegible, but may be "have him return"] back to occupational health clinic." On February 19, 1998, claimant then filled out a Medical Certification Statement in the upper portion of that form, indicating that he released any medical information to employer; a check mark was made by the word "No," indicating not work related, but claimant said he did not make that check mark. This form went to Mr. F. At the bottom Dr. E signed it and also noted on it that claimant could return to work on March 16, 1998. Mr. G next filled out another Occupational Health Notice on February 20, 1998, which addressed claimant and was sent to Mr. F, saying, "According to M.D. patient is totally disabled for two weeks. FIV [follow-up visit] appointment March 10 at 8:30. Will start P.T." Claimant thereafter filled out two more medical certification statements in which neither "yes" nor "no" was checked in regard to work related. No information about causation was on these forms, only restrictions placed there by Dr. E.

As stated, the hearing officer found a work-related injury; the only question is notice. Claimant does not assert any good cause for late notice; his position is that his notice was timely given. The carrier provided a statement of Mr. G dated December 9, 1998, in which he says that on February 13, 1998, when he provided his first report of claimant's symptoms, cause was not determined. He added that on February 20, 1998, claimant brought medical documents to him from Dr. E. Mr. G then says that he recalls asking claimant if he knew what caused the problem and according to Mr. G, claimant replied that he thought it may be sports related. Thereafter, Mr. G's December 9, 1998, memo only refers to updating claimant's supervisor, and getting information from claimant's supervisor, as to medical reports as to whether claimant could work or could not without restrictions.

Claimant's testimony was that he gave notice to Mr. G and that Mr. F received notice (it is not clear whether this notice to Mr. F was meant to be from Mr. G or that claimant told Mr. F himself). At any rate, there was no testimony by claimant as to the specific words he used to tell anyone of an injury at work. Claimant on appeal cites the forms discussed above as giving notice and also cites the Employer's First Report of Injury or Illness (TWCC-1) (Claimant's Exhibit No. 3) provided on August 4, 1998, which filled in block 29 "date reported" with the numbers, "2-20-98." However, Section 409.005 provides for filing an injury report with the Texas Workers' Compensation Commission (Commission) and the carrier, but in Section 409.005(c), it specifically says that a report required to be filed "under this section" may "not be considered to be an admission by or evidence against" an employer or carrier in a proceeding before the Commission in which the facts set out in the report are contradicted by the employer or carrier.

The hearing officer is the sole judge of the facts and credibility of the evidence. See Section 410.165. The hearing officer pointed out in his opinion that the claimant states that everyone had notice of a work-related injury on _____, but no one treated it as work related. The doctor, Dr. E, charged claimant's health insurance, claimant collected disability insurance, and the employer did not file a report until August. The hearing officer also refers to the lack of evidence of notice. He could certainly consider that Mr. F was neither a witness nor provided any statement in this matter. Since the burden of proof is on the claimant, the carrier had no duty to obtain evidence from Mr. F. While the hearing officer could have given more weight to the reports of Mr. G written at the time of claimant's visits which showed no indication that claimant said his injury was nonwork-related, the hearing officer could choose to give more weight to the report of Mr. G written several months later.

When there is conflicting evidence, the hearing officer, as fact finder, determines which evidence is to receive more weight. In this regard he could give more weight to the December 1998 report of Mr. G and to Mr. G's earlier health reports to the supervisor which did not say that the claimant's condition was work related or that claimant said it was work related, than he did to the testimony of claimant that he did tell Mr. G the condition was work related. The determination that claimant did not report a work-related injury within 30 days as is required, unless good cause or actual knowledge is shown, is not against the great weight and preponderance of the evidence. Since the Appeals Panel is not the fact finder, it will not reverse a factual decision of the hearing officer unless that decision was

against the great weight and preponderance of the evidence. Since carrier is relieved of liability to pay any benefits by the late notice, any determination as to disability does not translate into any temporary income benefits being due.

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:

Stark O. Sanders, Jr.
Chief Appeals Judge

Tommy W. Lueders
Appeals Judge