

APPEAL NO. 990429

On February 1, 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 appellant (claimant) sustained a compensable injury on _____; (2) whether respondent (carrier) waived its right to dispute the compensability of the alleged injury; and (3) whether claimant has had disability. The claimant requests review and reversal of the hearing officer's decision that: (1) claimant did not sustain a compensable injury on _____; (2) carrier did not waive its right to contest compensability of claimant's alleged injury of _____; and (3) claimant has not had disability. The carrier requests affirmance.

DECISION

Affirmed.

Claimant worked as an auto glass installer for the employer. He testified that on, _____ (all dates are in 1998 unless otherwise indicated), he, RA, another coworker, and GD, who is the owner of the employer's business, were moving a crate of glass at work when he felt a pull in his back when he pushed down and stood on a four-foot lever to lift up the crate. He said that he told RA that he felt a pull in his back. RA stated in an affidavit that claimant did not tell him that he had injured his back moving the crate of glass. Claimant worked for the employer on (day after the date of injury) and May 1st. Claimant said that his back got worse over the next few days and that he thought he might have a kidney problem. MV, who works for the employer, testified that the evening of May 2nd, she saw claimant and claimant's fiancée (claimant and his fiancée were married in July) fast dancing at a nightclub and that claimant did not appear to be hurt. Claimant did not go to work or call in to work on May 4th. MV said that on May 5th claimant called in to work and said his kidneys were hurting, that on May 6th he came to work and left about noon, and that on May 7th he called in to work and said he went to a doctor and his back was hurt. MV said that the first week of May claimant told her that he was trying to make extra money working on vehicles and that he thought he had hurt his back working on one of those vehicles.

Claimant said that the automobile mechanic work he had done on his own for extra money was done months before his work injury, that he did not hurt his back working on those vehicles, that he did not do any work during the weekend of May 2nd, that he did not tell MV that he had worked on a vehicle over the weekend, and that he changed out a vehicle radiator which weighed no more than 30 pounds three or four weeks after his injury at work. Claimant said that the only time he had been to the nightclub mentioned by MV was in late June and that he did not dance on that occasion. Claimant said that on May 5th he called in to work and said that his back was hurting and that on May 6th he told GD that he hurt his back moving the crate of glass and that he then went to Dr. O the same day.

Claimant said that he has never had a kidney problem and that he found out for sure that he had a work-related back injury when he saw Dr. O on May 6th. He said that he was unable to work from May 6th until January 9, 1999, because of back pain from his work injury. He said that on January 9, 1999, he went to work for a construction company doing welding and cleaning equipment for a lesser hourly wage than he made at the employer and that that job does not require him to do heavy lifting.

Claimant's wife testified that claimant told her on _____ that he had pulled something in his back at work, that the only time she and claimant went to the nightclub mentioned by MV was at the end of June, and that when they were at the nightclub all claimant did was sit at a table and walk around.

GD testified that he was present when the crate of glass was moved on _____; that claimant and RA were at the rear of the crate with a lever; that levers were used to lift the crate; that on _____ no one said anything about claimant's being hurt; that after being out from work on May 4th and 5th, claimant came to work on May 6th and told him that his kidneys were hurting (he also said that claimant said his back was hurting); that a few days later claimant's wife told him that claimant had gone to a doctor for his back; that on May 7th or 8th he went to claimant's house and saw claimant in greasy overalls; and that after the weekend of May 9th he let claimant go because claimant was not showing up at work (a document reflects claimant was terminated on May 13th).

JH stated in an affidavit that he is employed by employer and that on May 6th he saw claimant holding his side at work and claimant told him that he had hurt his back while lifting a motor he was installing during the past weekend. Claimant said that he told JH that he hurt his back moving the crate of glass.

A medical record from Dr. O's office dated May 6th notes that claimant complained of having severe lower back pain for two days but does not appear to state anything about claimant's having been hurt at work or elsewhere. Claimant said he told Dr. O how he was hurt at work and that he had had back pain for more than two days. A radiologist reported that lumbar spine x-rays taken on May 6th were negative for acute fractures or subluxation and that they showed mild scoliosis, degenerative facet arthroplasty at L5-S1, and old minimal compression deformities at L3-4. Dr. O diagnosed claimant as having a low back strain and wrote that he recommended that claimant see a specialist and that he was not released to return to work on the day of the visit, which was the only time he saw the claimant.

Claimant started treating with Dr. S and in a report dated September 5th Dr. S diagnosed claimant as having a lumbar strain, lumbar radiculitis, and myofascial pain. The history section of Dr. S's report notes that claimant was injured on _____ when he was lifting a crate of glass by himself. Claimant said he did not tell Dr. S that he was moving the crate of glass by himself but that he was working with several people. Dr. S wrote that it was unknown when claimant could return to work. On September 16th Dr. S

wrote that claimant was not then able to return to his normal job duties but that it may be possible for him to return to sedentary duty. Dr. S wrote in November that claimant needs a lumbar MRI because a herniated disc is suspected. Claimant said that authorization for the MRI was denied.

The 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). The hearing officer found that claimant did not sustain an injury while he was engaged in his job duties with the employer on _____, and he concluded that claimant did not sustain a compensable injury on _____. There was much conflicting evidence with regard to whether claimant was injured at work on _____. The 1989 Act makes the hearing officer the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Section 410.165(a). As the trier of fact, the hearing officer resolves conflicts in the evidence and may believe all, part, or none of the testimony of any witness. Texas Workers' Compensation Commission Appeal No. 950084, decided February 28, 1995. An appellate level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgement for that of the trier of fact. Appeal No. 950084. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not contrary to the great weight and preponderance of the evidence. The hearing officer did not err in deciding that claimant has not had disability because, without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.6 provides for written notice of injury to the carrier. Claimant contends that the Employer's First Report of Injury or Illness (TWCC-1) gave written notice of injury to carrier. The TWCC-1 is dated June 17th and was completed by GD's daughter, BL. GD testified that a TWCC-1 is normally filed immediately after an employee gives the employer notice of an injury; that BL takes care of that; and that he does not know if BL sent a TWCC-1 to carrier. Claimant and claimant's wife testified that they received a copy of the TWCC-1 a few days after June 17th. There appears to be a Texas Workers' Compensation Commission (Commission) date stamp on the TWCC-1 but it is illegible. The benefit review conference report notes that the TWCC-1 was filed with the Commission on June 19th, but it does not state who filed that report with the Commission.

AM stated in an affidavit that she is the adjustor for claimant's claim; that she did not receive notice that claimant was claiming a workers' compensation injury until August 28th; that on August 28th, she received a copy of the TWCC-1 and a copy of claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated August 28th from the claimant's attorney; that on August 28th BL informed her that the employer had not sent her the TWCC-1; and that August 28th was the first day that

she received written notice that claimant was making a claim for a workers' compensation injury for the date of _____. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 8th the carrier stated that its first written notice of injury was received on August 28th and disputed that claimant sustained an injury in the course and scope of his employment. It is undisputed that carrier filed the TWCC-21 on September 11th.

The hearing officer found that carrier received its first written notice of claimant's alleged compensable injury of _____ on or after July 13th and that it filed its TWCC-21 disputing compensability on September 11th. September 11th was the 60th day after July 13th. The hearing officer concluded that carrier did not waive its right to contest the compensability of claimant's alleged compensable injury of _____. We conclude that the hearing officer's decision on the waiver issue 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

Gary L. Kilgore
Appeals Judge