

APPEAL NO. 990537

Following a contested case hearing held on February 10, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that although the appellant (claimant) did sustain an injury in the course and scope of his employment on _____, he failed to provide the employer with timely notice of the injury, and that since the injury was thus not compensable, he did not have disability. Claimant has appealed the adverse determinations. He asserts that his testimony concerning his having provided the employer with timely notice was more credible than the unsigned witness statements adduced by the respondent (carrier) and constitutes the great weight of the evidence on the timely notice issue. The carrier urges, in response, that the evidence is sufficient to support the challenged determinations.

DECISION

Affirmed.

Claimant testified through a Spanish language translator that at about 1:30 p.m. on _____, while working at a hotel as a janitor, he lifted a heavy bag of trash from one container and placed it into another container on a cart to take it to the rear of the hotel and as he did so felt right-sided neck pain which radiated into his chest, and also felt left-sided neck pain. He said that as he left with the cart for the rear of the hotel, he told the two female housekeepers whose trash he emptied about his neck pain and that he continued to work until his shift ended about three hours later. Claimant further testified that the immediate supervisor, Ms. M, had left so he told a higher supervisor, Mr. S, who said he could go home; that he was off for the weekend the following two days; that when he returned to work on Monday, he told Ms. M he had neck pain and was feeling dizzy and that he also told her he had hurt himself lifting the bag and while using a strong liquid to clean bathrooms which made him ill; and that she said the employer had no insurance and that it would be best for him to return to (Country). He further stated that he continued to work; that he was treated at (hospital) the following Sunday; that when he returned to work, he told Ms. M and Mr. D, "the big boss," that he was feeling pain and was dizzy; and that he "explained everything" to them, but they did not tell him anything and he continued to work. Claimant said he began missing days from work, that his last day of work was January 14, 1998, and that when he later attempted to return to work, he was told he could not do so while on medication. He also indicated that although he was given an orientation when he commenced the employment, it did not include information on work-related injuries. In the transcript of his recorded statement of April 29, 1998, claimant stated that he had a prior workers' compensation claim for a back injury two years earlier while working for another hotel.

A December 20, 1997, hospital record reflects complaints of shortness of breath, dyspnea, and chest pain with no known mechanism of injury and a diagnosis of atypical chest pain. Later December 1997 hospital records, which reflect that claimant was 54

years of age, state diagnoses of non-cardiac chest pain, dysphagia, and atypical chest pain with vertigo. Dr. A January 15, 1998, record states that claimant was seen that day for chest pain and dizziness and that he could return to work the next day. The initial report of Dr. P, dated May 26, 1998, states a history of claimant's lifting a large box of garbage, being unable to continue carrying the large bag, and injuring his neck, the area between his shoulders, and his low back; and the diagnosis includes rule out cervical herniated nucleus pulposus (HNP), cervical radiculopathy, thoracic segmental dysfunction, lumbar HNP, and myofascitis. Dr. P also stated that claimant remains off work on account of the job-related injury of "_____." The July 23, 1998, consultation report of orthopedic surgeon Dr. D, which reflects that claimant was 55 years old, states the diagnosis as HNP at C5-6 and cervical radiculitis.

The transcription of the recorded statement of Mr. B, the general manager at the hotel, which contains a statement certifying that the document is a true and correct transcription and which is signed by the person who performed the transcription, states that claimant never reported to him "a worker's comp injury" and that claimant, during the orientation, was informed on the procedure for reporting such injuries. Mr. B further stated that with the assistance of Ms. M he made numerous attempts in conversations with claimant to find out why he was missing work and that claimant mentioned not feeling well, having dizziness, chest pain and headaches but that claimant did not relate these to his work. Mr. B also stated that claimant's last day of work was February 20, 1998.

In her recorded statement, the transcription of which bears a similar certification, Ms. M states that claimant mentioned illnesses such as heart problems, stomach problems, and asthma, and always seemed to have trouble breathing but never told her he was injured on the job.

In his recorded statement, the transcription of which also bears a certification, Mr. D, the front office manager, states claimant's history of missing work beginning on January 14, 1998; of his being sent home on February 9, 1998, when he had appeared visibly dizzy; and that the only thing he knows that claimant said to indicate work relatedness was claimant's saying he was cleaning and some fumes made him dizzy and that was why he initially was not feeling well.

Section 409.001 provides, in part, that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs; while Section 409.002 provides that failure to so notify the employer relieves the employer and the carrier of liability unless the employer or carrier has actual knowledge of the injury, the Texas Workers' Compensation Commission determines that good cause exists for failure to provide notice in a timely manner, or the employer or the carrier does not contest the claim.

Concerning the notice issue, the hearing officer found that claimant told his supervisors that he was dizzy and that he had chest pain, but he did not advise that he had a neck injury from a lifting incident on _____; that he stopped working in February 1998 and had not given notice of a work-related neck injury before he stopped working; that he

knew his neck had not resolved; that he sought medical attention in December 1998; that he did not have good cause for not giving notice within 30 days; and that the employer did not witness the incident and did not have actual knowledge of a neck injury from claimant's lifting at work on _____.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, is to resolve the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). As an appellate reviewing tribunal, the Appeals Panel does not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). It was not claimant's position that he did not provide notice within 30 days but had good cause for late reporting. The hearing officer's discussion indicates that she found unpersuasive claimant's testimony to having provided the employer with timely notice of a _____, neck injury through statements made to Ms. M and Mr. D within 30 days thereof. Since the evidence supports the hearing officer's determination that claimant failed to provide the employer with timely notice of his claimed neck injury, he failed to prove that he sustained a compensable injury (Section 401.011(10)), a prerequisite for a finding that he had disability (Section 401.011(16)).

As for the hearing officer's admission into evidence and consideration of the transcriptions of the recorded statements of Ms. M and Mr. D, claimant cites our decision in Texas Workers' Compensation Commission Appeal No. 960662, decided May 15, 1996, for the proposition that the Appeals Panel has held that it would be the better practice not to admit unsigned and unauthenticated statements. That case, which reversed and remanded for the hearing officer to consider unsigned transcribed telephone statements which were admitted without objection and then not considered by the hearing officer, also states that Section 410.165(b) does not say that hearing officers are to automatically exclude unsigned telephone transcriptions of witness statements and a hearing officer has the discretion whether to admit such statements. Further, the transcribed statements objected to by claimant bear the certificate of the transcriber attesting to their correctness. Accordingly, we find no abuse of discretion in the hearing officer's having admitted and considered them.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Judy L. Stephens
Appeals Judge