

APPEAL NO. 990882

Following a contested case hearing held on March 30, 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 the appellant (claimant) did not sustain a compensable injury on _____, that the respondent (carrier) is relieved from liability under Section 409.002 because of claimant's failure to timely notify the employer of the injury pursuant to Section 409.001, and that, because claimant did not sustain a compensable injury, she did not have disability. Claimant has appealed these determinations, asserting that they are against the great weight of the evidence. The carrier's response details the evidence it asserts is sufficient to support the challenged findings and conclusions.

DECISION

Affirmed.

Claimant testified that she commenced employment with the employer on June 8, 1998 (all dates are in 1998 unless otherwise stated). According to Mr. B, the employer's order processing supervisor, claimant was a probationary employee for 90 days. He said that she had been counseled about her low productivity and that after consultation on August 12th with JT, the employer's human resources manager, the decision was taken to terminate her employment. He said he told her on _____ that her employment was terminated for inadequate productivity.

Claimant stated that on _____, as she was traversing the warehouse on her way outside for a break, a forklift moved a pallet on the floor against the side of her foot and she "started feeling tremendous pain" as if the skin was being scraped off and her toes were being broken. She said that she told a female coemployee in the vicinity, whose name she did not know, to tell the forklift driver to move the forklift; that she could not move, fell to her left, and went down hard, flipping over onto her back; and that she lost consciousness for a few seconds. She said that when she opened her eyes, the coemployee asked if she was alright and helped her up; that she continued on outside for her break; and that, while on break, she was told that Mr. B wanted to see her after the break. Claimant said that while returning from the break, she noticed that the forklift and the pallet were gone and that the security camera in the area, which had been on, had been turned off. She said that when she arrived at Mr. B's office, the forklift driver and the employee who helped her up were both there and that, when she inquired of them and was told that they had advised Mr. B of her accident, she stated, "I lost my job." She said she tried to tell Mr. B about the accident but that he did not want to hear anything and told her that her employment was terminated and to leave the premises.

Claimant further testified that the next day, she started feeling pain and had a lot of bruises on her legs, arms, and sides from where she fell; that she saw Dr. R about one week later and told her she got hurt falling on her knees and flipping over onto her back;

and that Dr. R told her she needed physical therapy (PT) for at least one year. Claimant also said that she could not afford to continue treatment with Dr. R and began seeing physical therapist Ms. S, her attorney's wife, for PT; and that she saw Ms. S five times in October but stopped going when her car broke down. In evidence is Dr. R's note of October 14th stating that claimant's attorney requested a referral slip to a PT facility for claimant.

Claimant also stated that about one month after the accident, she obtained a job with another company but could not keep up with the work and that she has since worked for different employers from time to time. She said her toes, which only had a few scratches on them, are okay but that her back, side and knees hurt. Dr. R's January 23, 1999, report of claimant's initial exam of August 21st states the diagnosis as sprain/strain of the cervical spine, thoracic spine, and lumbar spine, and multiple contusions to both knees, legs, and left foot and left toes.

Mr. B testified that when claimant came to his office on _____, she never mentioned having been injured and gave no indication that she had been injured. He said the employer first learned of claimant's claimed injury on or about October 8th when an employee related that claimant was seeking a lawyer to sue the employer. He also stated that the forklift drivers were questioned and none were aware of the claimed incident of _____. Mr B stated that he felt claimant made up the incident.

Claimant had the burden to prove by a preponderance of the evidence that she sustained the claimed injury, that she timely reported the injury to the employer (Sections 409.001 and 409.002), and that she had disability, as defined in Section 401.011(16). Contrary to claimant's contention in her appeal, the carrier did not have a burden to prove that claimant sustained an injury in some manner other than in the manner to which she testified. These issues presented the hearing officer with questions of fact to resolve and it is the hearing officer who is the sole judge of the weight and credibility of the evidence (Section 410.169(e)) and who, as the trier of fact, resolves 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)) and who determines what facts have been proved (St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.)). As an appellate reviewing tribunal, the Appeals Panel will 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). The hearing officer was not bound by claimant's testimony which only raised questions of fact to resolve and it is clear that the hearing officer did not accept claimant's version of the events. While claimant labels the hearing officer's findings as "repugnant" and "preposterous," they are, nevertheless, not against the great weight of the evidence.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Judy L. Stephens
Appeals Judge