

APPEAL NO. 991132

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 5, 1999. She determined that the appellant/cross-respondent (claimant) sustained a work-related left knee injury on _____; that, as a result, he was unable to obtain and retain employment at his preinjury wages from June 7, 1998, through the date of the CCH; that the claimant failed, without good cause, to give his employer timely notice of his injury, thus relieving the respondent/cross-appellant (carrier) of liability for the injury; and that the claimant was not barred from pursuing workers' compensation benefits by virtue of an election to use private health insurance. The claimant appeals the finding of no timely notice, contending that this determination is contrary to the great weight and preponderance of the evidence. The carrier replies that this portion of the decision is correct and should be affirmed. It appeals the findings of a work-related injury and an inability to earn preinjury wages on the basis that there was no compensable injury, contending that these determinations are against the great weight and preponderance of the evidence. The appeals file contains no response to the cross-appeal. The finding that the claimant did not make an election of remedies has not been appealed and has become final. Section 410.165(a).

DECISION

Affirmed.

The claimant worked as a cook at a restaurant. He testified that he had a work-related left knee injury in (prior date of injury), but that he had essentially recovered from it or that it was not as serious as his claimed injury on _____. On that day, he said, he fell again on his left knee while carrying food and sustained the injuries that are the subject of this claim. A coworker, Mr. P, testified that he was a witness to the fall.

The claimant further testified that he reported the fall on _____, and that he was having resulting "problems" with his left knee, to Mr. S, the kitchen manager, on May 19, 1998. The claimant then left on a vacation trip, via bus, to (City 1) and then to (Country). He said he returned from (Country) on June 3, 1998, and again told Mr. S, in the presence of Ms. M, the dining room manager, that he hurt his left knee when he fell. He said he also told them that he was going to (Country) for medical treatment because he was unable to afford the cost of care in Texas. Surgery was performed in (City 2), (Country), on June 17, 1998. The claimant said he returned from (Country) on July 12, 1998. He completed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on August 26, 1998, on which was listed a March 1, 1997 (as well as April 1, 1997) and a _____, date of injury. He said he did this because he was asked about prior injuries and included the earlier knee injury on the form. He admitted that, just before he left for (City 1), he borrowed \$500.00 from his employer, through (Ms. W, the bookkeeper, but did not tell her he had injured himself on _____.

Ms. W testified that she completed an Employer's First Report of Injury or Illness (TWCC-1) on August 13, 1998, on which she listed a (prior date of injury) date of injury. She did this, she said, because that was the only date mentioned by the claimant. She also said that the first time she saw the claimant after his return from his surgery in (Country) was on August 10, 1998, when he told her that he needed money to pay for it and wanted to know if the employer would pay. Apparently, Ms. W set up a meeting with the carrier to fill out the TWCC-1 in the presence of the claimant and, about two weeks later, the carrier told Ms. W that it would not pay for the surgery. Ms. W said she told this to the claimant and only then did he come back with the TWCC-41 and claim a _____, left knee injury. She also testified that Mr. S told her the claimant wanted to go to (Country) for medical care, but only because he was "ill."

Mr. S testified that he took the claimant to the bus station for his trip to (City 1) and the claimant never mentioned any knee injury. He said he was aware that the claimant hurt his knee about a year and a half ago and that the claimant told him he had to go to (Country) for a knee operation. He further said that only after the surgery did the claimant tell them that he hurt himself on _____ in a fall. In a transcribed telephone conversation, Ms. M said the claimant told her on or about May 18, 1998, that he hurt his left knee, but said he did this in (prior date of injury). She said that she only learned sometime after his return from surgery that he claimed a left knee injury on _____.

The claimant had the burden of proving that he injured his left knee on _____, as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact and could be proved by the testimony of the claimant alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, the hearing officer found the claimant credible in his description of a _____, injury, which was supported by the testimony of Mr. P. In its appeal, the carrier argues that the claimant did not sustain a left knee injury on this date "and in fact, that all of the claimant's knee problems were the result of an incident that occurred in March of 1997." To the extent that this is a sole-cause defense, the carrier had the burden of proof. Texas Workers' Compensation Commission Appeal No. 950800, decided June 30, 1995. The carrier also maintains that the claimant fabricated a _____, injury only after he found out the employer and carrier would not pay for his June 17, 1998, surgery. The claimant, of course, denies this motivation. The hearing officer, as fact finder, was the sole judge of the weight and credibility of the evidence. Section 410.165(a). She obviously found the claimant credible in his assertion of an injury. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the testimony of the claimant sufficient evidence to support the determination that the claimant sustained a work-related left knee injury on _____, and affirm that determination. Having affirmed this determination, we also affirm the determination that the claimant, as a result of

this injury, was unable to earn his preinjury wage for the period of time found by the hearing officer.

The crux of this case is the hearing officer's finding of no timely notice. Section 409.001 requires an employee to give the employer notice of an injury by the 30th day after it occurs. Failure to do so in the absence of good cause relieves the employer and carrier of liability for the injury. Whether and, if so, when notice is given are questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. The claimant was adamant that on May 19, 1998, he notified Mr. S about his injury and again on June 3, 1998, in the presence of Ms. M, when he returned the first time from (Country) before his second trip for surgery. Mr. P testified somewhat confusingly that he heard the claimant report his injury on June 3, 1998, and actually showed his injured leg to Mr. S. Mr. S, Ms. M, and Ms. W all gave evidence that they were aware of a (prior date of injury) injury and that the claimant gave only this as the date of his injury until he was told, well beyond 30 days after _____, that the carrier would not pay for his surgery based on an injury in (prior date of injury). In his appeal, the claimant argues that both Mr. S and Ms. W "were trying extremely hard to show they had no knowledge about claimant was hurt on _____, and it is manifestly unjust to believe either." The claimant suggests that this denial is consistent with the employer's prior conduct in ignoring other workers' compensation claims. As noted above, the hearing officer was the sole judge of the credibility of the evidence. The evidence on the notice issue was in direct conflict. The claimant clearly pointed out these conflicts and offered reasons why he believed the carrier's evidence should not have been believed. The hearing officer resolved the conflict by determining that the claimant did not give timely notice of a _____, injury. Under our standard of review, we decline to reverse this determination.

Because the claimant did not rely on the good cause for being relieved of the effects of a lack of timely notice and no good cause was identified by the claimant, we also affirm the determination that the claimant did not have good cause for not giving the employer timely notice of the injury.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge