

APPEAL NO. 991141

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 19, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury on _____, and, if so, did the claimant have disability. The hearing officer determined that the claimant did not sustain a compensable injury and, thus, did not have disability. The claimant appeals, urging error in a finding of fact and two conclusions of law as not being supported by the evidence. The respondent (carrier) replies that there is sufficient evidence to support the finding and conclusions appealed by the claimant and further disagrees with other findings of fact by the hearing officer. While the response of the carrier is timely as a response, it is not timely as an appeal since the carrier signed for the Decision and Order on May 4, 1999, and the response to the claimant's appeal, together with the assertion of other errors, was not filed and received until June 10, 1999. Not timely as an appeal, the findings of fact and conclusion complained of by the carrier will not be considered.

DECISION

Affirmed.

Briefly, the claimant, a long haul truck driver, claims injuries to his neck, back, and shoulder on _____, as a result of being severely jostled around from an extremely rough road as he was trying to get from the sleeper compartment to the passenger seat of the tractor. He states he felt immediate pain, told the lead driver about his condition, and wanted to stop for some Ben-Gay ointment. He states he continued to have pain and went to his primary care doctor on November 17, 1998, Dr. B, who had been treating him for spasms in his back and for arthritis. A November 17th medical note from Dr. B states that the claimant has been advised to work only five to six days per week with one to two days off "due to medical condition." The claimant subsequently went to a chiropractor and underwent conservative treatment which he stated has helped him. He was seen on referral by Dr. S, and had an MRI which showed herniations in the cervical and lumbar area. The claimant states that he continues to have symptoms and pain in his cervical/lumbar area, that he is only "going about 20%," and that he has not been able to go back to work.

The lead driver in the truck on _____, Mr. F, testified that the claimant never complained of any injury to him and that he would have reported an injury, as required, if one had occurred. Mr. F denied that it is bumpy in the truck or that he had ever been thrown up or down or to the side while in the truck. He stated that the whole truck he and the claimant were in on _____, was on an air ride suspension system, that it had an air cushion, and that it was very smooth riding. He stated that nothing happened as claimed by the claimant, that he was unaware of any injury, and that the claimant never told him about any injury.

A carrier's doctor reviewed both pre- and post-incident films and MRI reports on the claimant and gave his opinion that they show degenerative changes, degenerative disc disease, and mild spondylosis of the lumbar spine. He concludes his report by stating:

In summary, the examinations document mild degenerative disease of the cervical and lumbar spine which undoubtedly were present prior to _____. There are no abnormalities on these examinations which can be reasonably attributed to possible injury occurring on _____.

The hearing officer quite apparently did not find the claimant's testimony persuasive when juxtaposed against the other evidence, including the testimony of Mr. F. Assessing credibility and the weight to be given testimony and other evidence is the responsibility of the hearing officer. Section 410.165(a). He is not required to accept the testimony of a claimant at face value. Bullard v. Universal Underwriters Insurance Company, 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Here, there was directly contradictory testimony as to the events of _____, and whether any incident occurred or injury resulted. Further, there was medical evidence which showed that the claimant had some preexisting back conditions and a medical report that concluded that the claimant's back condition could not reasonably be attributed to an incident of _____. The hearing officer, weighing the conflicting evidence, determined that the claimant had not shown by a preponderance of the evidence that he sustained a compensable injury on _____. The claimant clearly had the burden of proof to establish a compensable injury. Texas Workers' Compensation Commission Appeal No. 980577, decided May 7, 1998. And, resolving conflicts and inconsistencies in the testimony and evidence was a matter for the hearing officer to accomplish. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Only were we to conclude, which we do not here, from our review of the evidence that the determinations of

the hearing officer were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust would there be a sound basis to disturb the decision of the hearing officer. Employers Casualty Company v. Hutchinson, 814 S.W.2d 539 (Tex. App.-Austin 1991, no writ); Texas Workers' Compensation Commission Appeal No. 92803, decided April 16, 1992. Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge