

APPEAL NO. 991149

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 May 3, 1999. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the form of an occupational disease on or about _____; whether the respondent (carrier) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001; whether the carrier waived its right to contest compensability of the claimed injury by not contesting compensability within 60 days of being notified of the injury; and whether the claimant had disability. The hearing officer determined that the claimant did not sustain a compensable injury in the form of an occupational disease on or about _____; that the carrier is relieved from liability because the claimant did not give notice of a work injury within 30 days and he did not have good cause for not giving notice timely; that the carrier did not waive the right to contest compensability of the claimed injury as it contested compensability within 60 days of written notice; and that because the claimant did not sustain a compensable injury, he did not have disability. The claimant appeals, urging the hearing officer's decision is incorrect, and that the hearing officer erred in excluding the testimony of a witness he subpoenaed, Ms. C. The appeals file does not contain a reply from the carrier.

DECISION

Affirmed.

The claimant testified that he sustained a prior compensable injury to his right shoulder, a torn rotator cuff, in November 1997. According to the claimant, he was released to light duty in December 1997, and his supervisor, Mr. J, assigned him work involving filing, copying, and assembling accident kits. The claimant testified that as a result of assembling 250 accident kits, he sustained a repetitive trauma injury to his low back on _____. The claimant stated that assembling the accident kits required him to repeatedly use his legs and left hand, pulling and twisting the plastic pipe, which opened on one end, and inserting paperwork. According to the claimant, after two days of performing this work, his back was injured. The claimant testified that on _____, he told Ms. C, who was in charge when Mr. J was not in the office, and Ms. M, who was in charge of workers' compensation accidents for employer, that he sustained an injury assembling accident kits. The claimant stated that he called his treating doctor for the November 1997 injury, Dr. P, and visited Dr. P on January 20, 1998. According to the claimant, he told Dr. P that he was injured on _____, explained how the injury occurred, and Dr. P told him that he needed to see his personal doctor. The claimant testified that he discussed this with Ms. M on January 20, 1998. The claimant testified that on January 25, 1998, he was in such pain that he was told to go home by Mr. J. The

claimant testified that he has been unable to work from January 25, 1998, through the date of the CCH as a result of the _____, injury.

On January 28, 1998, the claimant received medical treatment at the KSC. The medical records indicate that the claimant had pain in his upper and lower back, arms, neck area, shoulder and shoulder blades. A February 2, 1998, record indicates the claimant had complaints of left shoulder and upper back pain, ringing in his ears, and states that the pain initially started at work while lifting papers. A February 25, 1998, record indicates that the claimant "thinks his symptoms are related to injury." On March 12, 1998, the claimant completed a KSC orthopedic evaluation form. On that form, the claimant stated that he was seeking care for a right foot injury and the date of injury/ onset was March 6, 1998. The claimant described the injury/onset as "on and off pain in foot since 1992; lower back pain and foot January 25, 1998; fell February 26, 1998 on steps and immediate pain in hip [and] foot started to swell [on] March 6, 1998." On May 20, 1998, the KSC released the claimant to return to work without restrictions.

The claimant submitted an Employee's Request to Change Treating Doctors (TWCC-53) on June 8, 1998, for his November 1997 right shoulder injury. The Texas Workers' Compensation Commission (Commission) approved the claimant's request to change treating doctors from Dr. P to Dr. C on June 8, 1998. In a letter dated November 16, 1998, addressed to the Commission, Dr. C states that based on his examination of the claimant on June 8, 1998, the medical history, and the claimant's work assembling accident kits, the claimant sustained an injury to his low back on _____. Dr. C took the claimant off work on June 8, 1998. The claimant completed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on June 11, 1998.

The carrier presented the testimony of Ms. M, Mr. J, and Mr. PU to support its position that the claimant did not sustain an injury on _____, and did not timely report an injury. According to Ms. M, the claimant did not report an injury on _____ or on January 20, 1998, and the first time she had knowledge that the claimant was asserting a _____, injury was from Mr. PU, after a benefit review conference in January 1999. Mr. J testified that Ms. C was a clerk who worked for him and Ms. C was not in a supervisory capacity when he was out of the office. Mr. J testified that the claimant only completed approximately 35 accident kits; that the claimant never complained of an injury or physical problems between _____ and January 25, 1998; that he did not send the claimant home on January 25, 1998; and that he did not know why the claimant did not return to work after January 25, 1998. Mr. PU testified that the first knowledge he had of the claimant's alleged _____, injury was in December 1998.

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence,

the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The claimant had the burden to prove that he sustained an occupational disease, repetitive trauma injury. Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. The hearing officer, as fact finder, may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Based on the evidence presented, the hearing officer concluded that the claimant did not meet his burden of proving he sustained a repetitive trauma injury to his back. The first medical report which indicates the claimant's back pain was related to the assembling of accident kits was generated by Dr. C on November 16, 1998. While a claimant's testimony alone can prove an injury, the hearing officer found that the claimant's symptoms and history regarding his injury were not consistent nor credible during the CCH. We find there was sufficient evidence to support the hearing officer's determination that the claimant did not sustain an injury in the form of an occupational disease on _____.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs or, if the injury is an occupational disease, the date the employee knew or should have known that the injury may be related to the employment. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. Conflicting evidence was presented as to when the claimant gave notice of the _____, injury to the employer. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. The hearing officer found the testimony of Ms. M, Mr. J and Mr. PU credible and determined that the employer's first notice of a claimed injury was in December 1998. We find sufficient evidence to support the hearing officer's determination that the claimant did not give notice of a work injury within 30 days and did not have good cause for failure to give timely notice.

The claimant asserted that the carrier received written notice of the claimant's injury as early as February 17, 1998. Additionally, the claimant asserted that the Commission sent notice to the carrier on August 26, 1998; that the claimant had filed a TWCC-41. The claimant argued that pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5 (Rule 102.5), the carrier is deemed to have received this information. The carrier argued that it first received written notice of the _____, injury on December 17, 1998, when the Commission sent a facsimile copy of the TWCC-41 to the adjuster, Mr. PE.

A carrier is required to dispute the compensability of an injury not later than 60 days after receipt of notice of injury, or it will waive its right to do so. Section 409.021(c). A notice of injury, for the purposes of starting the time period for contesting compensability, must be written and must fairly inform the carrier of the nature of the injury, the name of the injured employee, the identity of the employer, the approximate date of injury, and must state "facts showing compensability." Rule 124.1(a). The writing may be from any source. Rule 124.1(a)(3). Written reports that consider whether a condition is work related may constitute written notice of injury under Rule 124.1, whether or not a concrete diagnosis is made. Texas Workers' Compensation Commission Appeal No. 950522, decided May 11, 1995. An employee who argues that a document is written notice of the compensability of a particular injury and that receipt of the document makes the carrier's contest of compensability untimely, has the burden of proving when the notice was received. Texas Workers' Compensation Commission Appeal No. 941398, decided December 1, 1994; Texas Workers' Compensation Commission Appeal No. 990307, decided March 24, 1999.

In this case, Claimant's Exhibit No. 5 is a Texas Compass Compensation or Notice of Refused/Disputed Claim, a computer-generated Commission record comprised of data entered information on March 22, 1998. This record indicates the carrier's first written notice of injury was received on February 17, 1998. We note that the original Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) is not in evidence, nor any other documents which indicate the carrier received written notice on this date. Mr. PE testified that he did not know where this date was obtained or how the document was created. Claimant's Exhibit No. 6 is a Dispute Resolution Information System Contact Data entry which states "EE41 letter printed 08/25/98; mailed 08/26/98" and indicates "LTR AUTOMATED LETTER SENT." Mr. PE testified that he never received this letter from the Commission, nor did he locate such a letter after a search of the claimant's November 1997 claim file. The hearing officer noted that the letter was not in evidence and without such evidence, it is unknown when or to whom the letter was sent. Mr. PE testified that he received a call from the Commission on December 17, 1998, inquiring if he had another claim file for the claimant, he said he did not, and on that day the Commission sent him a facsimile copy of the claimant's TWCC-41. Mr. PE confirmed that the facsimile number which appears at the top of Carrier's Exhibit No. 1 is the facsimile number of the carrier. There was no dispute that the carrier filed a TWCC-21 with the Commission on December 22, 1998, contesting the _____, injury. The hearing officer, as the fact finder, resolved the inconsistencies in the evidence and determined that the carrier first received written notice of the _____, injury on December 17, 1998. We find sufficient evidence to support the hearing officer's determination that the carrier did not waive its right to contest compensability.

The claimant appealed the hearing officer's finding of no disability. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant

did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the documents the claimant has attached to his appeal, but not in evidence, will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992. We observe that the documents attached to the appeal which were not offered at the hearing do not meet the criteria for newly discovered evidence. Appeal No. 92400. To constitute "newly discovered evidence," the evidence would need to have come to appellant's knowledge since the hearing; that it was not due to lack of diligence that it came no sooner; that it is not cumulative; and that it is so material it would probably produce a different result upon a new hearing. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The claimant asserts that the hearing officer erred in excluding the testimony of a witness he subpoenaed, Ms. C. There is no ruling on the record regarding the subpoena and it is unclear whether the subpoena was not acted on or was denied. Under these circumstances, we find that no error was preserved on the record regarding this matter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge