APPEAL NO. 991159

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 5, 1999. He (hearing officer) determined that the appellant (claimant) reported the claimed injury of _____, to his supervisors on August 21, 1997; that the respondent (carrier) is relieved of liability because of the claimant's failure to notify the employer of the claimed injury not later than 30 days after the date of the claimed injury; that the claimant has not filed a claim with the Texas Workers' Compensation Commission (Commission); that the carrier did not in a reasonable time after the one-year period for the claimant to file a claim with the Commission contest the compensability of the claim because of the claimant's failure to file a claim with the Commission in the required time; that the carrier is not relieved of liability for the claimant's failure timely to file a claim with the Commission; that the claimant's average weekly wage (AWW) is $573.50; that the claimant's inability to obtain and retain employment equivalent to the preinjury wage was not caused by the compensable injury; and that the claimant did not have disability. The claimant appealed, essentially contending that the determinations that the carrier is relieved of liability for the claimed injury because he did not timely report the claimed injury to the employer and that he did not have disability are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust and requesting that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The carrier replied, urged that the evidence is sufficient to support the decision of the hearing officer, and requested that it be affirmed. The determination that the claimant's AWW is $573.50 has not been appealed and has become final.

DECISION

We reform Findings of Fact Nos. 5 and 8; affirm Finding of Fact No. 5 as reformed; because of the circumstances of the case, do not reverse and remand Finding of Fact No. 8 as reformed; and affirm the decision and order of the hearing officer.

In his appeal, the claimant pointed out that Finding of Fact No. 5 states that the carrier received written notice of the claimed injury on (alleged date of injury). The written notice of the claimed injury was received on September 8, 1997, and we reform Finding of Fact No. 5 to so state. In Conclusion of Law No. 3, the hearing officer concluded that the carrier was relieved of liability because of the claimant's failure timely to notify the employer of the claimed injury. The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated September 12, 1997, states that the carrier contested compensability because the claimant did not timely report the claimed injury to the employer and did not have good cause for not timely reporting the claimed injury. In the TWCC-21, the carrier does not contest compensability on the ground that the claimant was not injured in the course and scope of his employment. Because of that failure, we infer a finding of fact that the claimant sustained an injury in the course and scope of his employment.

The evidence is conflicting on when the claimant reported the claimed injury to the employer. He testified that he told a supervisor the day that it happened, that he continued to tell his supervisors, that the supervisors knew that he was injured at work, and that he was told not to report the injury because all of the crew members would lose their safety bonuses if an injury was reported. Mr. C, a tool pusher, testified that on about August 21, 1997, the claimant told him that he had strained something in his leg, but did not know whether he had hurt it at home or at work; that on September 4, 1997, he first learned that the claimant was claiming that he was hurt at work; and that before that date, the claimant had not said anything about hurting his leg at work. In a statement dated September 4, 1997, Mr. B, a driller, stated that on about August 21, 1997, the claimant told him that he may have injured himself at another drill site sometime between July 8 and 14, 1997. Mr. H made a similar statement dated the same day.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). The hearing officer's determinations that the claimant did not timely notify the employer of the claimed injury and that the carrier is relieved of liability because of the failure timely to notify the employer of the claimed injury are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

"Compensable injury" is defined as an injury that arises out of and in the course and scope of employment for which compensation is payable. Section 401.011 (10). The claimant appealed Finding of Fact No. 8 that states that the claimant's inability to obtain and retain employment equivalent to the preinjury wage was not caused by the compensable injury. He argues that his inability to work is because of the injury he sustained on _____. We implied a finding of fact that the claimant was injured in the course and scope of his employment on _____, because of the carrier's limited contest of compensability. We reform Finding of Fact No. 8 by changing "compensable injury" to "injury sustained in the course and scope of employment." "Disability" means the inability because of a compensable injury to obtain and retain employment at wages equivalent to

the preinjury wage. Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id.* Since we have found the evidence to be sufficient to support the determinations that the carrier is relieved of liability and the claimant did not sustain a compensable injury, the claimant cannot have disability. It is not clear what, if not the _____, injury, caused the claimant not to be able to obtain and retain employment at wages equivalent to the preinjury wage. However, under the circumstances of this case, we do not find it necessary to reverse and remand Finding of Fact No. 8.

We affirm Finding of Fact No. 5 as reformed and the decision and order of the hearing officer.

_____
Tommy W. Lueders
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Judy L. Stephens
Appeals Judge