APPEAL NO. 991301

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 19, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury on _____; whether the claimant timely reported such alleged injury, or had good cause for any failure to do so; and whether the claimant has sustained disability. The hearing officer determined that the claimant sustained a compensable injury on _____, that the claimant timely reported the injury, and that the claimant has sustained disability since February 2, 1999. The appellant (carrier) appeals, urging that the hearing officer's decision is against the great weight and preponderance of the evidence and should be reversed. The claimant replies that the hearing officer did not err, that he met his burden of proof, and that the decision of the hearing officer should be affirmed.

DECISION

Affirmed.

The claimant testified that on _____, while driving a logging truck over a rough dirt road, he hit a pothole, which caused his seat to "bottom out," hitting the floor of the vehicle. According to the claimant, this was caused by a defective air shock on the seat, which would not hold his weight. The claimant testified that he felt immediate pain in his back and left leg and later that day he told Mr. RS and Mr. CRR, the owner of the company at that time, that he was injured due to the seat, and requested that the seat be fixed. The claimant testified that he repeatedly complained about the seat and his back pain to Mr. RS, but the seat was never fixed. The claimant testified that he continued to work until February 2, 1999, when his pain increased to the point that he could no longer perform his job.

The claimant presented the testimony of Mr. RR and Mr. LB to support his position. Mr. RR, the son of Mr. CR, who purchased the company from Mr. CRR in January 1999, testified that after the claimant did not return to work in February 1999, he picked up the truck from the claimant's residence and drove it. According to Mr. RR, he could not tell if anything was wrong with the seat because he did not air up the seat when he drove it. Mr. RR testified that he heard that the shock absorber on the seat of claimant's truck was repaired sometime after he drove it. Mr. LB, a coworker of claimant and Mr. RR's uncle, testified that he overheard the claimant on several occasions complain to Mr. RS that the seat was broken and hurting his back. Mr. LB testified that he inspected the truck seat after February 2, 1999, and a new shock absorber had been installed.

The carrier asserts that the claimant did not sustain an injury on _____, and did not timely report a work-related injury within 30 days, and presented the testimony of Ms. S and Mr. RH to support its position. Mr. RS, son-in-law of Mr. CRR, testified that the claimant did not report an injury to him on _____, or at any time thereafter. According to Mr. RS, the claimant complained about the seat on several occasions, and also complained

that his back was hurting, but never said what was causing the pain. Mr. RS testified that after February 2, 1999, he took the truck to Mr. RH who inspected the seat and did not find anything wrong with it, but despite this, he replaced the shock on the seat because it did not "ride right."

Ms. S, Mr. CRR's daughter, who is in charge of workers' compensation for employer, testified that she first received notice that the claimant was reporting a work-related injury on February 2, 1999, when she received a telephone call from Hospital asking for workers' compensation verification on the claimant. Ms. S testified that on that day she spoke to the claimant on the telephone, asked him if he had been hurt and he said "no," only that his back was hurting. According to Ms. S, the claimant never alleged an injury due to his seat at any time prior to February 2, 1999. Ms. S testified that the truck seat was examined by four certified mechanics who could not find anything wrong with the seat or the shocks. Mr. RH testified that he examined the truck seat on February 9, 1999, aired the seat up, checked it several days later, and it still held the air. Mr. RH testified that he did not detect any defects in the truck seat or shocks on either February 9, 1999, or April 22, 1999.

The medical records from Hospital on February 2, 1999, indicate the claimant gave a history of "2 months driving and drove over bump." The claimant was examined, referred to Dr. C, a neurosurgeon, and taken off work through February 7, 1999. The claimant testified that he followed up with Dr. S, his family doctor, on February 4, 1999. Dr. S's records indicate the claimant "reported that about 2 months prior to this he had been driving a truck for his employer, hit a pot hole in the road and had sudden onset of pain in his back and tingling in his legs (the left worse than the right.)" Dr. S took the claimant off work and scheduled an MRI. The claimant testified that the carrier denied his claim and as a result, he has not received an MRI or any further medical treatment.

The claimant had the burden to prove that he injured himself as claimed on _____. 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 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). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). 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.

In this case, there was considerable dispute and contradiction regarding the maintenance and repair of the truck, the mechanism of injury, and whether the injury was reported. The hearing officer resolved contradictions in the evidence for the claimant and

concluded that the claimant did meet his burden of proving he sustained a compensable injury. The hearing officer noted that the claimant and Mr. LB offered generally credible testimony which tended to indicate that the claimant's vehicle was not well-maintained and that the claimant gave a consistent history of injury, as related in his medical records. The hearing officer did not find the testimony of Ms. S persuasive. We find there was sufficient evidence to support the determination of the hearing officer that the claimant did sustain an injury on _____, while engaged in the exercise of his job duties with employer.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs. 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. The testimony of the claimant that he reported the injury to Mr. RS and Mr. CRR on _____, is in direct conflict with the testimony of Mr. RS. The hearing officer, after considering all of the evidence, including the statements and retractions by various witnesses, found that the claimant did report the alleged injury within 30 days of _____. Whether, and if so, when, notice is given is a question of fact for the hearing officer to decide. We find there was sufficient evidence to support the determination of the hearing officer that the claimant did timely report the compensable injury he sustained on _____.

Disability is also a question of fact to be determined by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The carrier argues that the claimant did not have disability because he continued to work in his regular capacity as a truck driver for two months after the alleged date of injury, he failed to seek any additional medical treatment, and continued to be involved in his hobby of raising animals. The claimant testified that he was not able to work performing his job as a truck driver from February 2, 1999, through the date of the CCH because of his back pain. The hearing officer could base her determination of disability on claimant's testimony alone, without need for additional medical evidence. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 961357, decided August 16, 1996. As such, it was within the province of the hearing officer to determine that the claimant had disability since February 2, 1999. The hearing officer's determination regarding disability is sufficiently supported by claimant's testimony.

The decision and order of the hearing officer are affirmed.

_____
Dorian E. Ramirez
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge