

APPEAL NO. 991348

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On May 20, 1999, a contested case hearing (CCH) was held. With regard to the unresolved issues before him, the hearing officer determined that appellant (claimant) had not sustained a compensable injury on _____ (all dates are 1998 unless otherwise stated), that claimant had not timely reported the alleged injury to the employer and did not have good cause for failing to do so, and that claimant did not have disability. An issue on the average weekly wage was resolved by stipulation and will not be addressed.

Claimant appeals, contending both that "the accident" was not witnessed and that he "did sustain a repetitious trauma injury." Claimant also disagrees with other findings, including a stipulated finding on venue and attaches several medical records to his appeal. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds, asserting claimant's appeal is untimely, objecting to the attachment of medical records not in evidence and generally urging affirmance.

DECISION

Affirmed.

First, addressing the timeliness of the appeal, Texas Workers' Compensation Commission (Commission) records indicate that the hearing officer's decision was distributed by cover letter dated June 1, 1999, on that date. Although claimant states that he received the decision on June 9, 1999, the deemed date of receipt (see Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(h) (Rule 102.5(h)) would be Monday, June 7, 1999. (See Rules 102.3(a)(3) and 102.7.) To be timely, the appeal must be filed within 15 days of that date, or by June 22, 1999. An appeal shall be presumed to be timely filed pursuant to Rule 143.3(c) if it is:

- (1) mailed on or before the 15th day after the date of receipt of the hearing officer's decision . . . ; and
- (2) received by the commission . . . not later than the 20th day after the date of receipt of the hearing officer's decision.

In this case, claimant's appeal is postmarked as mailed on June 21, 1999, and was received by the Commission on June 25, 1999. The 20th day after receipt of the hearing officer's decision would be Monday, June 28, 1999. (*Again* see Rules 102.3(a)(3) and 102.7.) Claimant's appeal was timely filed.

On the merits of the case, claimant's testimony was inconsistent and contradictory, particularly as to whether claimant was alleging a repetitive trauma injury with a date of injury around (alleged date of injury) or a specific injury on _____.

Claimant was employed as an outside salesman but on _____ was taking inventory. Claimant testified in some detail how he had taken a box weighing 35 to 40 pounds off a shelf, had inventoried it and when replacing the box, a corner of the box caught on the shelf and the box fell hitting claimant on the side of his face, neck and collar bone. (There are other descriptions of this incident.) In a transcribed statement given to carrier on December 11th, claimant describes "a lot of stooping, a lot of lifting over your head" and constant pulling and lifting. That statement does not mention a box falling and hitting claimant in the neck and/or shoulder. Claimant said he began to have neck and shoulder pain on the evening of _____. Claimant testified that he continued working some weeks thinking that the injury was not serious and did not report an injury to the employer at the time. Claimant testified that the pain continued to get worse and that he knew it was work related around (alleged date of injury). Claimant saw Dr. M, a chiropractor, on December 1st. Claimant said that he told Dr. M about the _____ incident and that Dr. M told him that his condition was work related. Claimant said that he reported the work-related injury to the employer the next day, December 2nd. There was a good deal of testimony about a hospitalization claimant had in July/August of 1998, that claimant had been counseled for poor work production in June and been warned of possible termination if claimant's sales did not improve. Claimant testified that he has short-term memory loss and is not able to recall details of events or what he told the doctors. Claimant's Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated December 4th, alleges both "repetitive lifting in awkward positions & heavy box fall from high shelf."

In an Initial Medical Report (TWCC-61) dated December 14th of a December 1st visit, Dr. M recites a history of what appears to be an allegation of a repetitive trauma injury with a date of injury of "(alleged date of injury)." Dr. M had a diagnosis of "lumbar intervertebral disc degeneration with myelopathy." Claimant's medical history (and testimony) indicates that claimant has a number of other health problems unrelated to this claim and that claimant had at least two falls after his July/August hospitalization and before _____. Claimant testified that he filed for both medical and disability benefits with his group health and disability carrier (election of remedies is not an issue). Dr. M referred claimant to Dr. K. Dr. M's records include several pages of long-hand notes of treatment between December 1 and January 14, 1999.

In a report dated December 2nd, Dr. K recites a history of neck pain, claimant's July hospitalization, and a cervical MRI but makes no mention of a work-related injury. (Dr. K apparently billed under the group health coverage.) Dr. K concluded that claimant "is suffering of severe C7 radiculopathy on the left secondary to herniated disc with compromise at the C7 nerve root." Claimant had a preoperative evaluation by Dr. MO on January 27, 1999, with a history focusing on the July/August 1998 hospitalization but neither a history or mention of any kind of work-related injury.

The hearing officer, in his Statement of the Evidence, commented:

Claimant has not established by a preponderance of the credible evidence that he sustained any injury at work on _____. Claimant gave a statement suggesting a repetitious trauma injury, and testified to a specific injury where a box fell on him. The medical records from [Dr. M] suggest repetitious injury but do not state how this conditions [sic] may be job related. Records from [Dr. K] do not show a history of job injury.

Claimant is able to recall in great detail how he was injured at work on _____, but did not report any injury to his Employer until December 2, 1998. Claimant did not timely report this alleged injury to his Employer, and does not have good cause for failure to timely report.

In this case, there is substantial conflicting and contradictory evidence. 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). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. 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). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

On the issue of disability, in that we are affirming the hearing officer's decision that claimant did not have a compensable injury, claimant cannot, by definition in Section 401.011(16), have disability. Regarding claimant's allegation on appeal that venue was "questionable," we note that venue was stipulated by the parties and claimant does not enlighten us how he feels venue is questionable.

As for the additional medical records claimant attached to his appeal that were not offered and admitted at the CCH, we generally will not consider evidence not submitted into the record and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. See Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We find no basis which requires this case to be remanded for this additional evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. King, supra. We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge