APPEAL NO. 991593

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 June 23, 1999. He (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury on _____; failed without good cause to give the employer timely notice of the claimed injury; and did not have disability. The claimant appeals these determinations, contending that they are contrary to the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant worked as a merchandise stocker for the employer, a large retail sales store. She testified that on _____, between 5:00 and 6:00 a.m. she was helping stock toys when she felt a pop in her mid to upper back and experienced immediate pain. Her shift ended at 7:00 a.m. She went home and did not report the incident to anyone. That same day, _____, the claimant saw Dr. S, who, she said, told her that she dislocated a rib. Upon her return home from this visit with Dr. S, the claimant said she asked her sister to call Mr. F, the assistant store manager, to report the injury. She was not present when her sister called and was "not sure" her sister told Mr. F that the claimant injured herself at work. The claimant saw Dr. S one more time, but only two brief, largely nonprobative, notes of Dr. S are in evidence.

The claimant then went to a clinic on October 21, 1998, where she saw Dr. I. The notes of this visit reflect a history of an injury at work. Later notes diagnose neck, thoracic, and shoulder/neck sprain. The claimant said she was present, presumably on October 21, 1998, when a "Cindy" from the clinic called the employer about the visit. The claimant then changed treating doctors to Dr. G, D.C., who at a visit on November 20, 1998, diagnosed lumbar derangement, cervical syndrome, and unspecified back disorders. A large portion of his clinical findings were blacked out from his report and not otherwise explained by the claimant.

One of the coworkers who allegedly witnessed the injury was not available to testify. The other denied in a written statement even knowing who the claimant was.

Although the claimant said she started work with the employer on September 1, 1998, Mr. F said she had worked about 10 days before the claimed injury. He said that a person identifying herself as the claimant's mother called on the afternoon of _____, to say that the claimant was too sick to come to work. When Mr. F asked to speak with the claimant, he said, he was told she was too sick to come to the phone. According to Mr. F, the caller never told him the claimant was contending that she hurt herself on the job. Ms. W, the personnel manager, testified that she was first informed of the claimed injury when

she was called by the carrier on November 30, 1998. She said she had three telephone discussions with the claimant in October and November 1998. One conversation was about the claimant being sick, but Mr. W said she was never told why the claimant was sick. Another discussion was about her paycheck and the third about food stamps. The claimant was eventually terminated from employment for not reporting to work. Ms. W also said that she recalled no telephone call from a clinic about the claimant, and that if a call was made, she would have been the person to whom the call would be referred.

The claimant had the burden of proving she sustained a compensable injury as claimed on _____. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether she did so was a question of fact for the hearing officer to determine and could be proved by her testimony alone if deemed credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In his discussion of the evidence, the hearing officer commented that he gave "minimal credibility" to the claimant's testimony and did not find her medical evidence persuasive. Consistent with this evaluation of the claimant's credibility, he also found that she did not give her employer timely notice of the injury. In her appeal, the claimant asserts that the determination of no timely notice was the basis for the finding of no compensable injury. We do not necessarily agree that the notice determination essentially drove the compensability determination. Because there was no corroborating evidence, the success of the claimant's case essentially depended on the hearing officer's evaluation of her credibility. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the claimant for that of the hearing officer, but find that his determination that the claimant did not sustain a compensable injury on _____, has sufficient evidentiary support in the record. For this reason, we affirm that determination.

With regard to timely notice, Section 409.001 provides that the employee or a person acting on behalf of the employee must notify the employer of an injury by the 30th day after the injury occurs. Notice is to be given the employer or an employee of the employer who holds a supervisory or management position. Section 409.002 further provides that the failure to give such notice relieves the employer and carrier of liability for benefits unless the employer or the carrier "has actual knowledge of the employee's injury" or the Texas Workers' Compensation Commission determines that good cause exists for the failure to give timely notice. To satisfy the purpose of the notice requirement, the employer need only to know the general nature of the injury and the fact that it is job related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Whether, and, if so, when notice is given are generally questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994.

In this case, the claimant relies primarily on her sister's telephone call to Mr. F on _____, to effect notice. By her own testimony, the claimant did not hear her sister's part of the conversation. Mr. F denied being told in the conversation that the claimant's condition was related to an injury at work. The hearing officer considered this evidence and found that the claimant did not establish notice on _____. Under our standard of review of factual determinations, we decline to reverse this finding. Because the claimant did not rely on or assert a good cause excuse for not giving timely notice, we also find no error in the refusal of the hearing officer to find good cause.

The claimant also argued both at the CCH and on appeal that timely notice was effected by the carrier's receipt of five "Health Insurance Claim Forms" (HCFA 1500) on October 29, 1998. The forms were completed on October 21, 1998. They contain the claimant's and employer's names, and the block indicating that the condition is related to employment is checked. They were prepared at the clinic and reflect the various sprain diagnoses. The carrier conceded that these documents were received by the carrier on October 29, 1998, as the date stamp reflects, but argues that they were received without any accompanying paperwork and do not constitute notice to the employer. The hearing officer did explicitly decide that the carrier had "actual knowledge" of the injury based on receipt of these documents. Nonetheless, the receipt of these documents do not establish "actual knowledge" of the claimed injury on the part of the recipient.

In Finding of Fact No. 3, the hearing officer determined that the claimant did not notify the employer by the 30th day after the injury. In her appeal, the claimant broadens this to a finding that the claimant did not give notice to the employer "or carrier." Thus, we construe the appeal to be, that as a matter of law, the notice requirement of Sections 409.001 and 409.002 can be satisfied by timely notice to the employer or the carrier. A reading of Section 409.001, which deals with the provision of notice within 30 days, discloses that it only addresses notice to the employer. Nowhere does it create an alternate procedure of notice to the carrier. Indeed, nowhere does the word "carrier" appear in this section. Section 409.002 does reference the carrier, but only in terms of the carrier's actual knowledge of the injury, not in terms of the carrier as an alternate receptor of notice of the injury. The claimant relies on our decision in Texas Workers' Compensation Commission Appeal No. 93438, decided July 16, 1993, for the proposition that notice to the carrier within 30 days satisfies Section 409.001 requirements for notice to the employer. That case was determined on the basis that the carrier had "actual knowledge" of the claimed injury on the date of the injury (hearing loss). *See also* Texas Workers' Compensation Commission Appeal No. 951043, decided August 7, 1995, where we rendered a decision that the employer had actual knowledge of the claimed injury when the employer received a copy of a claims form from a group medical provider within 30 days of the injury, a critical fact not present in the case we now consider. These cases are clearly distinguishable from the case we now consider, which is not an actual-knowledge case. Thus, there was no error in the refusal of the hearing officer to find notice to the employer simply by virtue of the carrier's receipt of these HCFA 1500s within 30 days, and with no evidence of the employer's receipt of these forms within 30 days of the injury.

We also find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR IN RESULT:

_____
Susan M. Kelley
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's decision and order because his determination that the claimant did not sustain a compensable injury is not so against the great weight of the evidence as to be clearly wrong or manifestly unjust. I write separately because I believe that a question exists as to whether the carrier's receipt of the Health Insurance Claim Form 28 days after the alleged injury was sufficient to serve as "actual knowledge" of the claimed injury to the carrier such that it would not be relieved from liability under Section 409.002(1). A remand is not required in this instance, however, because the resolution of the issue would not change the outcome of the case, given our affirmance of the determination that the claimant did not sustain a compensable injury.

_____
Elaine M. Chaney
Appeals Judge