

APPEAL NO. 991639

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 8, 1999. With respect to the issues before him, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; that the respondent (carrier) would be relieved of liability for benefits pursuant to Section 409.002, if the claimant had sustained an injury in the course and scope of his employment because the claimant did not timely report his alleged injury to his employer; that the claimant had good cause for failing to timely file his claim such that the carrier would not be relieved of liability under Section 409.004; and that the claimant did not have disability within the meaning of the 1989 Act because he did not sustain a compensable injury. In his appeal, the claimant argues that the hearing officer's injury, notice, and disability determinations are against the great weight of the evidence. In its response, the carrier urges affirmance. The carrier did not appeal the hearing officer's determination that it would not be relieved of liability pursuant to Section 409.004 because good cause excused the claimant's failure to timely file his claim for compensation.

DECISION

Affirmed.

The claimant testified that on _____, he was employed as a working supervisor with a construction company. He acknowledged that he had preexisting problems with his back and that his employer was aware of those problems when he was hired. The claimant stated that the employer primarily left it to his discretion to decide what tasks he could perform and what tasks he could not with his back. The claimant testified that on _____ he was on a ladder caulking around a second-story window. He stated that as he leaned forward to caulk the window, his leg went numb, causing him to lose his footing and slide down the ladder. He stated that he landed "with a hard jolt straight down on his feet." The claimant testified that he reported the incident and the fact that he had injured his back in the fall to Mr. W, his supervisor, shortly after it had happened. The claimant insisted that he specifically recalled telling Mr. W that he had fallen from the ladder and that he had hurt his back. In addition, the claimant stated that he again reported his injury to Mr. W at least "half a dozen times" over a three-week period following _____.

The claimant testified that he sought medical treatment from Dr. W, an orthopedic surgeon with whom he had previously treated for his back, on April 15, 1996. The record does not contain a report from that appointment. Rather, the first record from Dr. W is a May 8, 1996, off-duty slip that contains a diagnosis of lumbar radicular syndrome. On April 22, 1996, the claimant had a lumbar MRI, which revealed a lateral disc bulge at L4-5 which "could encroach" the L5 nerve root; a paracentral disc protrusion at L5-S1 with mild posterior displacement of the right S1 nerve root; and degenerative disc disease at L4-5 and L5-S1. On June 3, 1996, Dr. W referred the claimant to the county hospital for reevaluation to consider spinal surgery, noting that the claimant's pain and radicular

symptoms from his L4-5 and L5-S1 herniations had worsened in spite of conservative care. The claimant testified that he began missing work immediately after his _____, injury and that he remained off work until January 2, 1997. He stated that he continued to work for the employer until October 29, 1998, when he asserts he sustained another work-related injury in a fall on stairs at work. The claimant pursued a claim for the October 1998 injury. The claimant gave a recorded statement in that case in which he was asked if he had ever had any prior workers' compensation injuries and he responded "No, ma'am, never [sic] fall before."

Mr. W testified that the claimant was a "very competent construction man." He stated that he was aware of the claimant's chronic back problems when he hired him, but that he hired him anyway because the problems did not "materially affect" the claimant's day-to-day activities. Mr. W stated that he needed the claimant at work and that he told the claimant he would rather the claimant do no physical activity and be at work, rather than do physical work and risk injuring himself. Mr. W testified that the claimant was off work from April 1996 to January 1997 because of his back; however, he denied that the claimant had told him that he had injured his back at work. Mr. W insisted that the claimant did not report an on-the-job injury to him, other than the claimed October 1998 injury. Finally, Mr. W stated that if the claimant had reported an _____, injury to him, he would have completed the necessary paperwork for a workers' compensation injury, noting that while he did not believe that the claimant's October 1998 injury was compensable, he nonetheless completed the paperwork when the claimant reported his alleged injury.

The claimant has the burden to prove by a preponderance of the evidence that he sustained a compensable injury and that he timely reported his injury to his employer under Section 409.001. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App. -Texarkana 1961, no writ). Those issues presented the hearing officer with questions of fact. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence before him. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the evidence and determines what facts have been established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer may believe all, part, or none of the testimony of any witness. The testimony of the claimant, as an interested party, raises only an issue of fact for the hearing officer to resolve. Campos; Burelsmith v. Liberty Mut. Ins. Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder and it does not normally pass upon the credibility of the witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Ins. Co. v. Soto, 819 S.W.2d 619 (Tex. App.-El Paso 1991, writ denied).

In this instance, the hearing officer determined that the claimant did not sustain a compensable injury and that he did not timely report his injury to his employer. A review of the hearing officer's decision demonstrates that he simply was not persuaded by the claimant's testimony that he injured his back in an incident at work on _____. In addition, the hearing officer was not persuaded by the claimant's testimony that he reported the alleged injury to Mr. W on the day it happened and on some six other occasions

thereafter. Rather, the hearing officer gave more weight to Mr. W's testimony that the claimant did not report the alleged _____, injury to him. The hearing officer was acting within his province as the fact finder in deciding to reject the claimant's testimony and evidence. Our review of the record does not reveal that the hearing officer's determinations that the claimant did not sustain a compensable injury and that he did not timely report his alleged injury to his employer are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse those determinations on appeal. Pool v. Ford Motor Co., 15 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the hearing officer's determination that the claimant did not have disability. 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). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge