

APPEAL NO. 991649

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 1, 1999. With respect to the issues before her, the hearing officer determined that the date of injury of the appellant's (claimant) claimed repetitive trauma injury is _____; that the claimant did not sustain a compensable repetitive trauma injury; that the claimant did not timely report his injury to his employer; and that he did not have disability within the meaning of the 1989 Act. Both the claimant and his attorney filed timely requests for review. Each appeal essentially asserts that the hearing officer's injury, notice and disability determinations are against the great weight of the evidence. In its response, the respondent (carrier) urges affirmance. Neither party appealed the determination that the date of injury of the alleged repetitive trauma injury is _____.

DECISION

Affirmed.

The claimant testified that in May 1998 he was employed as a supervisor of community outreach and education for an HMO that provides medicaid coverage. He stated that on three different occasions in May 1998, he was required to do repetitive heavy lifting, which resulted in injury to his neck and back. Specifically, the claimant testified that on _____, he packed and moved several boxes because the employer was moving its offices. He estimated that the boxes he lifted on _____ ranged in weight from 25 to 50 pounds. He stated that on _____, he attended a health fair at a church; that he was required to transport boxes of materials to be distributed to the people who attended the health fair; and that those boxes weighed up to 50 pounds each. Finally, the claimant testified that on May 26, 1998, he was required to lift boxes of manuals he had been assigned to deliver to doctor's offices that were participants in the HMO plan. The claimant asserted that those boxes weighed between 50 and 100 pounds.

The claimant went to the emergency room on June 8, 1998, with complaints of low back pain. He gave a history of low back pain, which he attributed to kidney stones because he had similar pain when he had kidney stones previously. The emergency room did not find evidence of kidney stones and advised the claimant to see Dr. B, his treating doctor, for follow-up. Dr. B ordered a lumbar CT scan, which was performed on June 22, 1998. The CT scan revealed a mild generalized disc bulge at L4-5 and small posterior vertebral body osteophytes at L5-S1. The claimant stated that he discussed the results of the CT scan with Dr. B on or about _____, and that he first realized in that conversation that his injury may be related to lifting at work because Dr. B so advised him. The claimant testified that he had a conversation with Ms. D, his immediate supervisor, in the week of June 23rd and advised her that his back injury may be work related. The claimant also testified that on June 29, 1998, he filed a claim for short-term disability benefits with the employer's group carrier.

Ms. G testified that in May 1998 she was a Medicaid procurement coordinator for the employer. Ms. G explained that her position encompassed two jobs, serving as an administrative assistant to Ms. D and serving as a fulfillment coordinator. Ms. G stated that on June 8, 1998, she had a conversation with the claimant when he called in to report that he would not be at work that day because he had hurt his back lifting groceries. Ms. G further testified that the claimant did not give the impression of having hurt his back and neck in, or after, May 1998; that she had several telephone conversations with the claimant after June 8th; that he did not advise her in those conversations that he was claiming that he had injured his back at work; and that she did not learn the claimant was alleging a work-related injury until October 1998.

Mr. N, one of the employees who was supervised by the claimant, testified that he saw the claimant packing boxes prior to the time the employer moved its offices; however, he stated that he did not see the claimant lifting any of the boxes. In addition, Mr. N stated that the claimant did lift some of the four to five boxes of materials he brought to the health fair. Mr. N noted that the claimant did not give any appearance of having been injured on the day of the health fair. Mr. N maintained that he did not learn that the claimant was asserting a workers' compensation injury until his recorded statement was taken in September 1998.

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 her. 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 within 30 days of _____, the date of injury pursuant to Section 408.007. A review of the hearing officer's decision demonstrates that she simply was not persuaded that the claimant's evidence established that he injured his neck and low back performing repetitively traumatic lifting at work. In addition, the hearing officer was not persuaded by the claimant's testimony that he reported his injury to Ms. D in the week of _____. The hearing officer was acting within her province as the fact finder in deciding to reject the claimant's testimony and evidence, even the evidence that was not specifically contradicted by other

evidence. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. Civ. App.-Amarillo 1980, no writ). Our review of the record does not reveal that the hearing officer's determinations that the claimant did not sustain a compensable, repetitive trauma 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:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge