

APPEAL NO. 991687

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 July 8, 1999, with the record closing on July 16, 1999. The issues at the CCH were whether the appellant (claimant) sustained an injury in the course and scope of employment on _____; whether the respondent (carrier) is relieved of liability pursuant to Section 409.002 because of the claimant's failure to notify his employer within 30 days as required by Section 409.001; whether the claimant had disability; and the claimant's average weekly wage (AWW). The hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment on _____; that the claimant did not report the alleged injury to his employer within 30 days or establish good cause excusing his failure to give timely notice of injury; that the carrier is relieved of liability pursuant to Section 409.002; that the claimant did not have disability; and that the claimant's AWW is \$849.40. The claimant appeals, urging that he did sustain an injury on _____; that he reported the injury on August 5, 1998; that he has disability; and that his AWW is \$1,045.00. The appeals file does not contain a reply from the carrier.

DECISION

Affirmed.

The claimant testified that on _____, while working as a truck driver, he was rear-ended by a gravel truck; that he reported the accident to his employer and stated that he had a headache; that he drove away from the accident scene and continued working; that on August 5, 1998, he called his employer, reported the injury, and said that he had headaches and neck pain; that he was unable to work intermittently for approximately two weeks between _____, and February 21, 1999; that he was unable to work due to his injury beginning February 21, 1999; and that he did not seek any medical treatment for his injury until February 21, 1999.

The medical records indicate that on February 21, 1999, the claimant sought treatment at an emergency room (ER) and was diagnosed with acute sinusitis and acute sinus headache. ER records on February 25, 1999, indicate a history of "sharp pain shooting up back of neck-started this p.m.-denied injury to neck-was seen here Sun. p.m." On March 9, 1999, the claimant sought medical treatment with Dr. D. Dr. D's history states:

This patient is a 54 year old male who was injured in a MVA [motor vehicle accident] when he was sleeping in a truck cab and the truck was involved in an accident. Apparently he was thrown around quite a bit and hit his head. He has complained of severe headaches and neck pain since that time. Then in February of this year he was in a MVA when he was hit from behind. This has increased the severity of his headaches.

The claimant asserted that Dr. D's reference to "February of this year" should have reflected _____. Dr. D prescribed pain medication, performed diagnostic testing, and performed cervical facet injections of C2-3 through C5-6. On April 16, 1999, Dr. D opined that based on the history given by the claimant, it is his professional medical opinion that the claimant's current symptoms are causally related to injury that occurred on _____.

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). He resolved contradictions in the evidence against the claimant and concluded that the claimant did not meet his burden of proving he sustained a compensable injury. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight 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). We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not sustain an injury in the course and scope of employment on _____.

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 the employer on August 5, 1998, is in direct conflict with the carrier's assertion that the employer did not get notice until March 2, 1999. The hearing officer, after considering all of the evidence, found that the claimant did not 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 not timely report the injury or establish good cause for failure to give timely notice.

The claimant appealed the hearing officer's finding of no disability. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain an injury in the course and scope of employment, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The claimant asserted at the CCH that his AWW was \$872.64 based on an incomplete wage statement reflecting total wages of \$10,499.17. The CCH was recessed to obtain accurate and complete information regarding the claimant's wages. After the hearing, the carrier submitted additional evidence reflecting the wages paid in the 13 weeks preceding the date of injury, and that the employer paid \$167.00 per month in health/life insurance. The hearing officer determined that the total wages and benefits paid to the claimant in the 13 weeks prior to the date of injury totaled \$11,042.17, resulting in an AWW of \$849.40. The claimant appealed this determination, stating that based on the wage statement, the total amount earned including insurance was a total of \$12,246.06, resulting in an AWW of \$1,045.00. The claimant did not indicate any basis for how he arrived at his figures, and the record sufficiently supports the hearing officer's determination that the claimant's AWW is \$849.40.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge