

APPEAL NO. 991734

Following a contested case hearing held on June 25, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer, resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable injury to his lumbar spine on Subsequent injury; that claimant did not have disability resulting from the injury sustained on Subsequent injury; and that claimant failed to timely notify his employer of a work-related injury pursuant to Section 409.001 and thus the respondent (self-insured or employer) is relieved of liability for the claim. Claimant has requested our review of these determinations, contending that the evidence is insufficient to support them. The self-insured contends in its response that the evidence is sufficient and urges affirmance of the decision.

DECISION

Affirmed.

Not disputed are findings that claimant worked as a sewing machine operator in March 1998 and on March 17, 1998, notified his supervisor that his back was hurting; that claimant had a previous back injury in (injury 2) and was treated by Dr. Z for that injury; that claimant sought medical treatment from Dr. Z on March 19, 1998, with a complaint of back pain after lifting material on Subsequent injury; that Dr. Z diagnosed claimant with lumbosacral neuritis on March 19, 1998, and placed him on light duty; that claimant applied for and received short-term disability benefits beginning on April 17, 1998; and that claimant filed a written notice of injury with the Texas Workers' Compensation Commission on October 12, 1998, stating a date of injury of _____.

Claimant testified through a Spanish language translator that he was a sewing machine operator for the employer and injured his low back in (injury 1) while pushing a cart with fabric while at work; that this injury was a back muscle injury and was treated by Dr. Z; that he only saw Dr. Z about five times and received physical therapy; and that he only had pain for two months and did not see Dr. Z again after May injury 1 until March 1998 after he sustained a new low back injury while at work for the same employer. Claimant testified that on _____, a date he later corrected to Subsequent injury, he lifted a heavy bundle of fabric from a cart on his right onto his shoulder to transfer to a cart on his left and injured his low back in the process; that on March 19, 1998, he told a manager, Ms. L, that he had pain because of the heavy bundle; that she sent him to the office where he told Ms. P, a human resources clerk, that his back hurt and that it was probably due to picking up a bundle on _____; that he was taken to Dr. Z who told him, "[i]ts going to be like this forever"; and that when he asked Dr. Z if the pain was related to the injury 1 injury, Dr. Z responded that he did not know. Claimant acknowledged on cross-examination that when he talked to Ms. L about his back pain, he did not tell her how he was injured. He later said he told her his low back hurt and how he lifted the bundle. Claimant said that when he talked to Ms. P, he told her he hurt himself two days earlier but did not tell her how.

Claimant further stated that Dr. Z placed him on light duty on March 19, 1998; that Dr. Z took him off work on April 2, 1998, for about two weeks and then returned him to light duty; that he changed treating doctors to Dr. M, whom he first saw on November 18, 1998; that Dr. M took him off work until April 22, 1999; and that he commenced new, full-time employment as a security guard on April 28, 1999. Claimant also stated that an MRI obtained on April 20, 1998, revealed a bulging disc at L5-S1.

Claimant acknowledged that he did not sign an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) until October 12, 1998, and he characterized as "a mistake" the stated injury date of _____, on that form, which he said he later corrected (either to "_____" or "_____"). The self-insured's Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21), which states a denial of the compensability of the claim, is dated "11/22/98." Claimant also acknowledged that in his answers to the self-insured's interrogatories he stated the date of injury as _____. Claimant further stated that he began receiving short-term disability payments from Prudential Insurance (disability carrier) in April and May 1998. He signed his disability benefits application on May 7, 1998, and said it was filled out by Ms. P. The application states that the disability is work related and refers to an accident in injury 1 involving a strained lower back.

Ms. L, the sewing floor superintendent, testified that claimant told her in the office that his "back hurts," that he injured it in injury 1, and that he was having the same pain. She said he did not tell her then, or later, that he had a new injury, and that she did not learn that he was asserting a new injury until October 1998.

Ms. P testified that she had handled claimant's injury 1 injury; that when Ms. L brought him into the office in 1998, he complained of pain and reminded her that he had an accident in injury 1; and that she then looked for the file on that injury and arranged for him to see Dr. Z. She said that claimant did not say he sustained a new injury lifting a bundle and never has reported a new injury to her. Ms. P further testified that in November 1998, Ms. S, apparently an adjuster, called her and she prepared an "E-1" but would have prepared an Employer's First Report of Injury or Illness (TWCC-1) had claimant reported a new injury. She further stated that she assisted claimant with his short-term disability application and that when he stopped receiving benefits in October 1998, he called and asked her why he was not receiving benefits.

Dr. Z's Initial Medical Report (TWCC-61) dated "3/19/98" states the diagnosis as lumbosacral neuritis and the history as an injury occurring on _____ when claimant picked up some material and put down a carton and hurt his back. The report also states that claimant can work light duty for a couple of weeks and then return to his regular job. Dr. Z's Specific and Subsequent Medical Report (TWCC-64) dated "4/02/1998" states that claimant is going to come off work for about a week and then he will be reviewed again. An MRI report dated April 20, 1998, states the impression as degenerative disc disease at the L5-S1 level associated with a small annulus bulge. Dr. Z's TWCC-64 dated "4/27/1998" added the diagnoses of lumbar disc displacement and spondylosis without myelopathy and

stated that claimant is not yet able to return to work. Dr. Z's TWCC-64 dated "6/01/1998" stated that claimant is going to be able to return to work on June 2, 1998. Dr. Z's TWCC-64 dated "8/10/1998" states that claimant is currently working. A functional capacity evaluation of "8/15/1998" concludes that claimant can work at the medium work level on a full-time basis. Dr. Z reported on "10/26/1998" that claimant was given a note to go back to work to a job that would let him sit four hours a day and stand four hours a day; that the job was too hard for him and he could not do it; and that he complains of a backache.

Dr. M's letter of April 22, 1999, states that claimant has been under her care since November 18, 1998, and removed from work to the present date; that he suffers from a herniated lumbar disc with myelopathy, chronic pain syndrome, and fibromyalgia; and that he is currently able to return to light duty.

In addition to the dispositive conclusions of law, claimant challenges factual findings that he advised Ms. L, the plant superintendent, that his back was hurting as a result of his prior back injury of injury 1; that he did not sustain a low back injury on Subsequent injury, while working as a sewing machine operator; that he did not notify the employer of a work-related injury not later than the 30th day after the claimed injury of Subsequent injury; that claimant did not act as a reasonably prudent person by failing to notify the employer of an alleged work-related injury for more than six months after the injury; and that claimant did not lose time from work because of a work-related injury of Subsequent injury.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, as appellate reviewing tribunal, does not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Tommy W. Lueders
Appeals Judge