APPEAL NO. 991803

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 28, 1999. He (hearing officer) determined that the appellant (claimant) did not sustain an injury in the course and scope of employment on _____, and without good cause failed to give his employer timely notice of the injury. The claimant appeals these determinations, expressing his disagreement with them. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant testified that on _____, he felt a pop in his neck while lifting pallets. According to the claimant, he sustained a compensable face and neck injury in January 1997 at a prior job as a result of an assault. He said he had “off and on pain” and stiffness thereafter, but that the _____, incident created pain of a different type. A cervical MRI on April 13, 1999, disclosed degenerative disc disease.

The claimant also sustained a work-related groin injury with the current employer in November 1998. He was counseled for not reporting this incident and advised that the next level of corrective action would include termination. He began looking for another job after the counseling. He secured a new job effective in January 1999. In an undated written statement, he said he did not report the _____, injury because he feared losing his job. At the CCH, he testified that he did not report it because he did not think it was serious and only became so later. When asked about the reason for not reporting the injury that he gave in his handwritten statement, he said at one point that he "didn't quite mean this" and at another point said the statement was "in some sense" true. He said he finally reported it when Dr. G diagnosed cervical herniation, for which surgery has been recommended, and told him it was related to the _____, popping incident. The medical report of Dr. G in evidence that discusses the _____, and January 1997 incidents is dated April 21, 1999. Mr. H, the store manager, testified that he first received notice of the claimed injury from the claimant on May 1, 1999.

The claimant had the burden of proving he sustained a compensable cervical spine injury on _____, as claimed. 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 and could be proved by his testimony if deemed credible by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer commented in his discussion of the evidence that the claimant had questionable credibility and that the MRI report made Dr. G's diagnosis of herniation "somewhat problematic." Ultimately, the hearing officer believed that the medical evidence was generated too long after the injury to be persuasive and that, for these reasons, the claimant did not meet his burden of proving a work-related injury on

_____. 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 his determination that the claimant failed to meet his burden of proof supported by sufficient evidence.

Sections 409.001 and 409.002 require that a claimant give the employer notice of the injury by the 30th day after it occurs. In the absence of good cause, failure to give timely notice relieves the employer and carrier of liability for benefits. The hearing officer found consistent with Mr. H's testimony that the claimant gave notice of his injury on May 1, 1999. In his appeal, the claimant argues that he gave notice on the weekend of April 12, 1999,[1] which arguably was April 21,1999, the date of Dr. G's report discussed above. In any case, because neither date was within 30 days of the date of the claimed injury, the claimant is relying on good cause for failure to timely report the injury. In his discussion of the evidence, the hearing officer mentioned the two versions of why the claimant did not give timely notice (fear of termination and trivialization of the injury) and commented that they were not necessarily consistent. He also questioned why the claimant would fear termination when he already had another job. All this, to the hearing officer, was considered to "detract" from the claimant's credibility. He found no good cause for the untimely reporting. In his appeal, the claimant argues, as the basis for good cause, trivialization of the injury until he began to lose feeling in his fingertips and suggests that at the time of the injury he declined to report it because he still did not know for sure he had another job. In response to this latter point, we observe that he did start the new job, according to his testimony, well within 30 days of the claimed _____, injury. We also note that he continues on appeal to rely on two theories of good cause, which the hearing officer believed discredited his credibility. What is clear from the decision and order in this case is that the hearing officer's evaluation of the claimant's credibility was the deciding factor in the decision reached. Such credibility determinations are especially the responsibility of the hearing officer and will not be disturbed on appeal.

[1]We note that April 12, 1999, was a Monday.

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

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge