APPEAL NO. 000010

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 December 2, 1999. The issues concerned the date that appellant, who is the claimant, was injured (which she nevertheless contended was _____), whether she had sustained a compensable injury, whether she had disability from her alleged injury, whether she timely reported her injury to her employer within 30 days after it happened, and whether she made an election of remedies by receiving benefits through her regular health insurance.

The hearing officer found that the claimant was not persuasive in proving that she sustained a compensable injury on _____; that she had not given timely notice to her employer within 30 days, and did not have good cause for not doing so; and that she did not have disability due to the lack of a compensable injury, although she did have the inability to obtain and retain employment equivalent to her preinjury average weekly wage beginning on June 2, 1999, and continuing to the date of the CCH. The hearing officer found that she had not made a knowing election of remedies that would preclude her from seeking workers' compensation benefits.

The claimant has appealed the determinations against her claim made by the hearing officer. The claimant contends she timely reported her injury and that events led to her back injury as she testified. The respondent (self-insured) responds that the decision should be affirmed. There is no appeal of the determination that the claimant did not make an election of remedies precluding the receipt of workers' compensation benefits.

DECISION

Affirmed in part, and reversed and rendered on timely notice issue.

The claimant worked as a medication aide/LVN for a hospital run by the self-insured. She said that one morning, as she was dispensing medication, a drawer on the cart popped open and knocked her against the legs, causing her to fall back against a metal bar on the wall. She immediately felt pain in her back. Although she continued working, the pain increased and she called in to work on April 21st (all dates are in 1999, except as otherwise stated) to report that she could not come to work. The claimant could not precisely recall if she told her supervisor, Ms. A, how she hurt her back. She went to her doctor, Dr. T, on April 23rd and was taken off work, then resumed work on light duty around the 30th of the month. She was off for a week beginning April 23rd. The claimant said that she worked light duty until she was unable to stand the pain. She contended her disability began on June 2nd, when her full paycheck ceased.

The claimant agreed that she had been treated for a lower back strain by Dr. T in 1996; asked if this was her only back pain treatment "until 1999," she stated "I believe so." It was later brought out, and agreed to by the claimant, that she was also treated for back

pain in 1998, although she asserted that these previous conditions were different as they involved only strains or muscle spasms, not bulging discs. Although the claimant initially indicated that she took DayPro for her compensable injury, she agreed on cross-examination that she was already taking it when the accident occurred.

The claimant stated that she had reported her injury within 30 days, both to Ms. A and to Ms. A's supervisor, Ms. AM. Ms. AM testified and agreed that she was aware from Ms. A on April 21st or 22nd that the claimant was out of work with back pain. Ms. AM stated that she first knew that the claimant was alleging a work-related injury for this back condition sometime after May 4th, but during the first week of May. She was not asked what she believed the date of injury to be, but understood that it had happened from the claimant's manipulation of the medication cart and a twisting involved with that. Ms. AM agreed that there were complaints in May about a drawer on a medicine cart popping open and it was repaired.

Ms. A said that the claimant called in on April 22nd to report that she would be off work because she had hurt her back but that she (Ms. A) was never told directly by the claimant that the claimant was contending she hurt her back due to an occurrence at work. The claimant called again on April 24th to say she would be out the next week. Ms. A said that the claimant had missed time from work for back pain before. Ms. A said that the proper way to push the medicine cart was with the drawers facing away from the attendant's body.

The claimant completed a written report of her injury on May 11th which asserted an (alleged date of injury) date for a back strain from pushing the pill cart. She could not fully explain why this report did not state that she fell and struck her back as the mechanism of injury. The claimant was asked why she put (alleged date of injury) as the date of injury; she explained this by stating that she did not have access to a calendar, although she knew the accident was on a Monday, and the medication made her think somewhat less clearly so she inadvertently recorded the date she was first taken off work. Because this turned out to be a day that the claimant was not at work, the mistaken date came to light fairly soon and was thereafter corrected. The adjuster testified that when she disputed the claim due to the date of injury not being a date the claimant was at work, the claimant initially said she was hurt April 5th and then settled on _____ (sometime in June). The adjuster received notice of the injury from the employer on May 11th (albeit with an (alleged date of injury) date of injury).

The claimant contended that she told Dr. T at her first visit how she hurt her back, but agreed this was not recorded in his notes of that day. He subsequently wrote a letter in June stating that he was treating her for a work-related injury. She assumed that Dr. T would seek payment in the appropriate manner and said she did not specifically direct his office to her regular health insurance. After referral to a spine specialist and an MRI, the claimant was found to have spondylosis. As the hearing officer notes, a New Patient Information form filled out by the claimant for one of her referrals appears to have had the dates altered to backdate the form and the date of injury.

Section 409.001(a)(1) and (b) require that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should, at a minimum, apprize the employer of the fact of an injury and the nature of the injury as work related. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.- El Paso 1989, writ denied). The purpose of notice is to allow timely investigation of the claimed injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). In light of Ms. AM's testimony that she was informed by the claimant in writing or verbally that the claimant was contending a work-related back injury as of the first week in May, and as the hearing officer herself found, we cannot agree with the hearing officer's finding of fact that the claimant first reported her injury to her employer on or about July 8th. Because the first week of May is within 30 days of _____, we reverse the findings and fact and conclusions of law that the claimant failed to give timely notice of her injury and render a decision that she did. (We would further note that Section 409.002(1) provides that there will be no discharge of liability where the employer has actual knowledge of the employee's injury.)

However, we affirm the hearing officer's determination that the claimant did not prove that she had a compensable injury that occurred on _____ as she described. The hearing officer has detailed the inconsistencies that she found undercut the claimant's credibility. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this is the case here and affirm the hearing officer's decision that the claimant did not have a compensable injury and, therefore, did not have disability. We affirm the order that the self-insured is not liable for compensation, notwithstanding the reversal of the timely notice issue, because the outcome of the case remains the same due to the affirmed findings.

Susan M. Kelley
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge