

APPEAL NO. 000206

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On January 6, 2000, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer decided that the appellant (claimant) was not injured in the course and scope of his employment on _____, and, because the claimant did not sustain a compensable injury, he does not have disability. The claimant appealed, stated his disagreement with some of the hearing officer's comments in the statement of the evidence in his Decision and Order, said that the evidence established that he was injured in the course and scope of his employment and had disability, asked the Appeals Panel to obtain additional information, and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision in his favor. The respondent (carrier) replied, stated that the Appeals Panel should consider only the record established at the CCH and not obtain additional information, urged that the determinations of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, and requested that the decision of the hearing officer be affirmed.

DECISION

Reversed and remanded.

The claimant testified that he began working for the employer on May 10, 1999; that he worked about 12 hours a day, five or six days a week, stacking pizza boxes; that on _____, toward the end of his shift, he felt pain in his back; that he told a coworker he had a little pain and it was not an injury; that he thought it would go away; that he woke up the next morning with severe back pain; that he called Ms. B, the employer's personnel director, and told her he had hurt his back and needed to see a doctor; that she told him he was still in the probationary period and did not have insurance; and that he made arrangements to see a doctor on his own. He said that he called several persons in supervisory positions; that he left voice messages for some and talked directly with others; that he told one of them he had hurt his back and needed to see a doctor; that he told another person he was in a little pain and it was not an injury; and that some asked him if he was not at work for personal reasons or because he was sick and he said it was because he was sick. The claimant stated that he had never been injured on the job; that at work he was asked to fill out some papers and did so; that he was not familiar with the procedures; and that at Dr. W office he marked "no" by the questions whether the symptoms were due to an accident because he thought an accident was like something falling on him.

Ms. B testified that the claimant first called her on _____, and did not call her on _____. She said she told the claimant he did not have health insurance coverage because he had not completed his probationary period, that the claimant did not tell her he hurt his back at work, and that he completed forms requesting leave without pay. The

employer's safety manager said that he was on vacation at the time of the claimed injury; that the claimant left a message on his voice mail stating that he had injured his back; that he called an office employee and was advised that the injury did not occur at work; that after he returned to work, he tried to get information from the claimant; and that the claimant was unable to pinpoint a particular time when the injury occurred. Several others in supervisory positions stated that they had spoken with the claimant, that under company policy they asked the claimant if he was not at work for personal reasons or because he was sick, and that he said because he was sick.

In the statement of the evidence in his Decision and Order, the hearing officer wrote:

Although notice was not an issue in this hearing, the absence of notice when it would otherwise be expected is relevant to credibility. It was established that [claimant] has had a prior workers [sic] compensation claim in which he gave notice immediately as required. As someone who should have known better, [claimant] asked for FMLA benefits, at a time when one would have been expected to be asking for workers [sic] compensation, if his injury were in fact work-related [sic]. Furthermore, if a work-related accident had in fact occurred, such a fact would have been expected to be noted in the medical records, but in this case an accident was specifically denied.

In his appeal, the claimant again provided his explanation for indicating that the symptoms were not the result of an accident and stated that he never had an on-the-job injury before. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The hearing officer was not bound to accept the claimant's explanation for answering the question about an accident in the medical questionnaire with "no." However, the record does not indicate the claimant had a prior workers' compensation injury and immediately reported it. The claimant testified that he did not have any prior injuries. The medical history in Dr. W's records indicates that the claimant had surgery for a "naval hernia 1978," but there is no indication that it was because of a workers' compensation injury or that the claimant gave notice immediately as required. With the state of the evidence in this case, including explanations by the claimant, credibility of the claimant was extremely important. In determining the credibility of the claimant, the hearing officer improperly considered information that is not in the record. We reverse the decision of the hearing officer and remand for him to make findings of fact and conclusions of law and to render a decision and an order to resolve the disputed issues before him based on the record developed at the CCH held on January 6, 2000.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Tommy W. Lueders
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge