

APPEAL NO. 001220

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 May 12, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____; _____; or on any other relevant date. He also determined that the respondent (carrier) is relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer under Section 409.001; and that the claimant has not had disability. The parties reached an agreement that the carrier did not waive the right to contest compensability of the claimed injury. The claimant appeals, urging that his injury occurred on _____; that he reported the injury on _____; that he had disability; and that documents given to his ombudsman should have been admitted into evidence. The carrier replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant testified that he injured his head and neck on _____, when he hit his head on a scissor lift and that he reported the injury to his supervisor, Mr. D. Approximately 10 days prior, the claimant had sustained a compensable injury to his shoulder. The claimant continued to work until October 29, 1999, when he was laid off. The claimant asserted disability from October 29, 1999, through the date of the CCH.

On November 18, 1999, the claimant sought medical treatment at HHW, where he was being treated for his shoulder injury. The claimant testified that he told the doctor at HHW about his head injury, although the medical records from HHW do not reflect complaints or treatment for a head or neck injury. Medical records on November 29, 1999, indicate a diagnosis of cervical strain and contusion to the head; x-rays were taken; and the claimant was released to return to work without restrictions. On December 9, 1999, the claimant sought medical treatment from Dr. W. Dr. W's records indicate that the claimant gave a history of hitting his head on _____. Dr. W recommended an MRI of the claimant's cervical spine and right shoulder and took the claimant off work.

Mr. D and Ms. A testified. Ms. A, a receptionist who was not in a supervisory position, testified that the claimant contacted her on November 19, 1999, and reported that he had sustained a head injury on _____. Mr. D testified that the claimant never told him that he had injured his head on a scissor lift, but that prior to the shoulder injury, the claimant had reported hitting his head when he jumped off a dock.

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). The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). He did not find the claimant's

testimony persuasive based on claimant's testimony that he was injured on Sunday, _____, but did not work Sundays; Mr. D's testimony that the claimant did not report an injury to him on _____; and Ms. A's testimony and Dr. W's records that indicate that the claimant reported an injury occurring on _____. The hearing officer concluded that claimant did not sustain damage or harm to the physical structure of his body. 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 a compensable injury on _____; _____; or on any other relevant date.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after the date on which the injury occurs. The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Section 409.001(b)(2). 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.

Conflicting evidence was presented as to when the claimant reported the injury to the employer. The hearing officer, after considering all of the evidence, found that the claimant did not report the injury to the employer or a person in a supervisory or management position on or before the 30th day after the date of injury and that the claimant failed to show good cause for his failing to timely report the injury. 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 carrier is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer pursuant to Section 409.001.

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 a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The claimant states in his appeal that interrogatories and statements by Mr. D which were given to his ombudsman are missing and should have been admitted into evidence. The claimant did not mention such documents on the record or request a continuance in order to obtain a motion for discovery. Under these circumstances, we find that no error was preserved on the record regarding this matter.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge