APPEAL NO. 001282

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 9, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury on __________, because he was an independent contractor at the time of his injury; that the respondent (carrier) is relieved from liability under Section 409.002 because of the claimant's failure to timely notify his employer under Section 409.001; that the claimant did not fall as he stated; and that the claimant did not have disability.

The claimant appealed, arguing that he was required to sign "a paper" for his IRS Form 1099 without his reading glasses. He argues that because he was wrongfully induced to sign documents indicating he was an independent contractor, he should be considered an employee of the plumbing company for whom he worked at the time of his injury; that he reported his injury the day after it happened; and that he should be found to have disability. The carrier responded that there is no evidence that the claimant was even injured, that he did not notify the employer timely of an alleged injury, that he had no disability, and that his status was not that of employee with respect to the carrier's insured.

DECISION

We affirm the hearing officer's decision.

The claimant said that he was employed by. (plumbing company), about five months before his date of injury on __________. The claimant said he was hired by Mr. O in response to a newspaper advertisement calling for excavators. He said he had 30 years experience driving excavators at construction sites. The claimant said he worked on an apartment complex construction site and used heavy equipment supplied by the plumbing company.

The claimant denied that he was an independent contractor, although he conceded on cross-examination that he understood he was a subcontractor and would receive a "1099" form for income tax purposes. The claimant said he was paid by the hour, and that the hours would vary. He agreed that no income taxes were taken out of his checks.

The claimant contended that he had signed an Agreement for Certain Building and Construction Workers (TWCC-83) without understanding what it was. He said he did not have his reading glasses and could not read it, and that he filled in blanks for his name and social security number as indicated by Mr. O. The claimant said he was told he had to sign this to get his check. Likewise, he said he would sign subcontract agreements given to him weekly in order to pick up his check, but unless Mr. O personally asked him to sign these, he would throw them in the trash.

The claimant said that the accident leading to his injury happened on __________, in front of Mr. K, a coworker. He was handing a tool to Mr. K and slipped off a brace, dropping about five feet. He said that Mr. K remarked on this incident when it happened. The claimant reported it the next day to Mr. O and was told he had no insurance because he had signed it away. The claimant said he went to a local university medical branch emergency room on March 15, and thereafter had to defer receiving medical treatment until he could obtain Medicaid coverage.

The claimant said that he was not free to hire helpers and that he was told when and where to work by Mr. O. He said he had not received either a W2 or 1099 form from the plumbing company.

Mr. O also testified and denied that the claimant was an employee or that he had been coerced into signing the TWCC-83 or any subcontract agreements. He explained that his signature was not on the weekly subcontract agreements because he was often not present on the job site. Although he had furnished the TWCC-83 to the claimant, Mr. O could not recall why his signature was dated a few days after that of the claimant. He said that his secretary, Ms. H, was responsible for mailing TWCC-83s to the Texas Workers' Compensation Commission (Commission).

Mr. O said that his company had only a few employees and most of his work was conducted through independent contractors. Mr. O said that the work performed by the claimant was merely to fill in holes where plumbing had been laid. Mr. O said that the claimant was paid by the foot, based upon Mr. O's generalized knowledge of how many feet were typically covered over on a job as opposed to detailed records. He said that right near the end of the claimant's employment, he asked the claimant to try laying plumbing on an hourly basis but that this did not work out and the claimant was "let go." Mr. O had loaned the claimant a company truck to assist in moving the claimant from another town.

Mr. O said that he did not know of any claimed injury until sometime in August 1999, when it was reported to him by Ms. H. Ms. H said that she found out about the claim when the carrier contacted her and asked the plumbing company to file an Employer's First Report of Injury or Illness (TWCC-1). Ms. H said that a 1099 form mailed to the claimant's last reported address had been returned by the post office with no forwarding address. Mr. K also testified that he neither witnessed the claimant falling nor did the claimant mention any accident to him. Mr. K was a 10-year employee of the plumbing company, not an independent contractor.

Mr. O testified that work began at 7:00 a.m. and subcontractors were instructed to show up there, but that they were free to leave when the work was done, whenever that would be. He said that the claimant or other independent contractors would be free to hire any required assistance or to perform similar work for other contractors.

The claimant said that the TWCC-83 was signed within a week of his employment. It is dated November 27, 1998; Mr. O's signature is dated November 30. The copy in

evidence as a carrier exhibit is date-stamped by the Commission on what appears to be December 8, 1998. Check stubs in evidence for the most part are labeled "subcontract work" for an amount certain; there is one showing what appears to be a figure times $12.00, also labeled "subcontract work."

The alleged weekly subcontract agreement is evidenced in this record by documents dated from November 1998 through March 1999, none of which are signed by Mr. O in the space provided. The agreements state that the claimant will furnish all tools and equipment necessary to perform the work which is described only in terms of that which is "directed or instructed" by the plumbing company.

WHETHER THE CLAIMANT FELL AND SUSTAINED DISABILITY

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165. Where there are conflicts in testimony, it falls to the hearing officer to resolve those conflicts. We will not reverse the factual determinations of the hearing officer unless the record indicates that they are so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). 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.).

In this case, the hearing officer chose to disbelieve that the claimant was injured as he stated, and credit Mr. K's testimony. Because there must first be a finding of a compensable injury as an element of the definition of "disability," Section 401.011(16), the hearing officer's further finding that the claimant did not have disability is also supported.

NOTICE TO THE EMPLOYER

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 apprise the employer of the fact of an injury and the general nature of the injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). Whether timely notice was given, or whether there was good cause for the failure to give timely notice, are matters of fact for the hearing officer to determine. In this case, this issue would be dispositive of compensability even if the claimant had been found to be an employee, rather than an independent contractor.

In this case, it was the claimant's position that he timely reported his injury on March 10, 1999. Mr. O, Mr. K, and Ms. H all disavowed any knowledge of an alleged accident until August. The hearing officer evidently believed this testimony over that of the claimant. We cannot agree that her finding on this issue is against the great weight and preponderance of the evidence.

The claimant said he had been unable to work, except for a part-time job for two weeks in July 1999, since the date of his injury. The emergency room record merely diagnosed contusions, put the claimant on crutches, and advised that he be off work for five days. Other medical records in evidence show that a cervical MRI was negative, that the claimant had a chronic strain of his trapezius muscle, and that one Dr. Z took the claimant off work on May 19, 1999, for "medical problems," with no other records in evidence from Dr. Z. Reference is also made to a CT scan diagnosis of stenosis and bone spurs.

THE CLAIMANT'S STATUS AS EMPLOYEE OR INDEPENDENT CONTRACTOR

In this case, it was undisputed that the claimant worked as a subcontractor and that he knew and understood this. He testified that the paperwork he signed (understood or not) was directed at obtaining a "1099" form, for the reason that he was acting as a subcontractor. The hearing officer was thus faced not with determining whether the claimant had been hired as a regular employee, but whether he was an independent contractor under Section 406.141 and 406.146 such that he would be covered under the hiring contractor's workers' compensation coverage.

The unilaterally signed subcontract agreements were not in and of themselves contracts, because they were not also signed by anyone on behalf of the plumbing company. Nevertheless, they could be considered by the hearing officer as some evidence of what the arrangement was between the plumbing company and the claimant. The TWCC-83 was itself signed by both parties and filed with the Commission as required by Section 406.145. Statements made by the hearing officer during the CCH indicate that she was mindful of Section 406.146 which would preclude a company from attempting to denominate legitimate employees as independent contractors for purposes of avoiding employer responsibilities. In consideration of the record here, it is apparent that the hearing officer disbelieved that the claimant did not know, or could not read, what he signed, and that he was working for the plumbing company as an independent contractor on the date of his alleged injury. These determinations do not go against the great weight and preponderance of the evidence.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660

(1951). We do not agree that this was the case on the points appealed, and affirm the decision and order.

____
Susan M. Kelley
Appeals Judge

CONCUR:

____
Kathleen C. Decker
Appeals Judge

____
Gary L. Kilgore
Appeals Judge