

APPEAL NO. 001819

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 19, 2000. With respect to the issues before him, the hearing officer determined that the claimant did not sustain a compensable injury on _____; that he did not have disability; and that the respondent (carrier) did not waive its right to contest compensability in this case because it contested within the 60-day period provided for doing so in Section 409.021(c). In his appeal, the claimant asserts error in each of those determinations. In its response to the claimant's appeal, the carrier urges affirmance.

DECISION

Affirmed.

The claimant testified that on _____, he was working in the employer's shipping and receiving department. He stated that on that date, he and a coworker, Mr. G, were emptying trash barrels in the dumpster. The claimant stated that as he lifted a barrel, which contained both trash and rainwater, he felt a "twinge" in his low back and a "slight twitch" in his stomach. However, he stated that he did not mention the incident to Mr. G because he thought the pain would go away. The claimant testified that later in the afternoon of his injury his employment was terminated. He stated that Mr. J and Ms. T were present in the meeting where he was terminated. The claimant testified that he did not report an injury to Mr. J and Ms. T because he thought the pain would go away. He stated that after his termination, his pain became increasingly worse, so he called the plant and reported his injury to Mr. S, the plant superintendent, who referred the claimant to a hospital for treatment.

On December 14, 1999, the claimant began treating with Dr. G. Dr. G's Initial Medical Report (TWCC-61) gives a history of the claimant's having lifted a trash barrel filled with water, which spilled and caused the claimant to slip and fall, landing on his back. The claimant denies having fallen and further denies having told Dr. G that he slipped and fell at work.

Mr. G testified that he worked with the claimant on _____, prior to the claimant's layoff and that they emptied six or seven trash barrels. Mr. G stated that the claimant never said anything to him about experiencing pain or sustaining an injury. In addition, Mr. G stated that the claimant did not give the appearance of having been injured and that the claimant did not have any difficulty performing his job duties.

Mr. J testified that he was present when the claimant was laid off on _____, and that the claimant did not report an injury at the time of his layoff. In addition, Mr. J stated that he accompanied the claimant when he left the premises and that the claimant did not give any indication of having been injured. Ms. T testified that she was involved in the claimant's layoff and that he did not indicate that he had been injured at that time. Finally, Ms. T stated that after the claimant reported his alleged injury to Mr. S, Mr. S told her that the claimant was asserting that he was injured when he slipped and fell at work.

On _____, the claimant completed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41). The portion of the form which asks what parts of the body are affected by the injury lists back and knees. The claimant denies that he wrote knees on the form because his knees were not injured in the _____, incident at work. The carrier completed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on January 21, 2000, contesting compensability of the claimed injury. The TWCC-21 provides that the carrier received its first written notice of the claimed injury on December 27, 1999, from the claimant's TWCC-41.

The claimant had the burden to prove that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence and decides what weight to give to the evidence. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. 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 manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

In this instance, the hearing officer determined that the claimant did not sustain his burden of proving that he sustained a compensable injury. In so doing, the hearing officer noted the discrepancy in the history of the claimant's injury reflected in Dr. G's records and that the claimant did not report his injury to his employer at the time of his layoff. Those factors were properly considered by the hearing officer in making his credibility determinations. Our review of the record does not demonstrate that the hearing officer's determination that the claimant did not sustain a compensable injury on _____, is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool; Cain.

Given our affirmance of the determination that the claimant did not sustain a compensable injury, we likewise affirm the determination that the claimant did not have disability. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Thus, the existence of a compensable injury is a prerequisite to a finding of disability.

Lastly, we consider the hearing officer's determination that the carrier did not waive its right to contest compensability in this instance. Review of that determination is made difficult by the fact that the hearing officer did not make a finding as to the date the carrier received its first written notice of the alleged injury. In addition, the hearing officer found that the carrier contested the claimed injury on January 21, 2000, the date of the TWCC-21; however, the TWCC-21 is not date stamped to reflect the date it was received by the Texas Workers' Compensation Commission (Commission). There is also no evidence in

the form of an affidavit or testimony from the carrier's adjuster addressing the question of when the TWCC-21 was filed with the Commission. Certainly, the better practice would have been for the hearing officer to make a finding as to the date the carrier received written notice of the claimed injury and for the carrier to introduce evidence establishing the date the Commission received the TWCC-21. Nevertheless, we can affirm the hearing officer's determination that the carrier did not waive its right to contest compensability herein. The carrier's TWCC-21 states that it received notice of the alleged injury on December 27, 1999, when it received the claimant's TWCC-41 and, in any event, the carrier could not have received written notice of the alleged injury any earlier than _____, the date of injury. Commission records reflect that the TWCC-21 was received by the Commission on February 8, 2000, within 60 days of both December 27, 1999, and _____. Accordingly, the hearing officer did not err in making his determination that the carrier timely contested compensability under Section 409.021(c) and did not waive its right to do so.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge