

APPEAL NO. 001835

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 July 10, 2000. The hearing officer determined that the appellant/cross-respondent (claimant) did not sustain a compensable injury and did not have disability; that the respondent/cross-appellant (carrier) was not relieved from liability under Section 409.002 because the claimant did timely notify the employer of his injury and was not relieved of liability for benefits because the claimant did not file a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year after the date of injury; and that the claimant was not barred from pursuing workers' compensation benefits because of an election to receive benefits under a group health insurance policy.

The claimant appealed the adverse determinations of no compensable injury and no disability on the grounds of sufficiency of the evidence. The carrier appealed the adverse determinations of the claimant's timely notice of the injury to the employer, failure to file a claim for compensation within one year of the date of injury, and election of remedies, contending that the hearing officer's determinations were against the great weight and preponderance of the evidence. The carrier responded to the claimant's appeal on the issues of compensability and disability, urging that the determinations were sufficiently supported by the evidence that the claimant did not sustain a compensable injury or have disability and should be affirmed. The appeals file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant testified that he worked in the receiving and shipping area for the employer on _____, and was walking to another building when he fell down on his right side. The claimant stated that he probably was not feeling well when he fell and could not remember anything else except an ambulance being called to assist him because he lost consciousness. He did recall that there were pieces of wood around but could not recall whether he tripped or slipped on them or anything else. The claimant admitted during cross-examination that he was suffering from infections in both ears and chronic mastoiditis. The claimant denied being dizzy before he fell. He stated that J, Mr. V, and Mr. H, his supervisor, came over to help him after he fell but did not recall what they talked about. The claimant contended that his entire right side of his body, from his foot to his head, was injured as a result of his fall. The claimant also stated that his problems might be caused by working at his job for so many years; that he might have lifted something heavy, but then stated that he thought the cervical herniations diagnosed in November 1998 were caused by the fall on _____.

The claimant admitted that he did not know when he reported his injury to his supervisor, Mr. H. The claimant testified that he returned to work about eight days after _____, at lighter duties and worked until November 1998, when he was diagnosed with a herniated disc in his cervical spine for which he had surgery on November 16, 1998. In February 1999, the claimant underwent surgery for a deviated septum and mastoiditis

and apparently was off work about one week because of the surgery. The claimant stated that he received medical treatment from January 1998 through November 1998 for his injury, but it was not under workers' compensation or private health insurance. He did not know who paid the doctors and did not get any bills from medical providers. He received payments from the employer while he was recovering from the November 1998 surgery until March 1999. He claimed that he was disabled for two years and was not working at the time of the CCH because he was not feeling well but had not sought medical treatment as he did not have any money. The claimant testified that the last doctor he saw was Dr. A around February 1999. Medical records reflect that the claimant's medical treatment was resumed under Dr. G in April 1999.

The claimant stated that he first filed paperwork for his injury on April 5, 1999; that he waited until this date because he did not know to do it and did not know about workers' compensation insurance. He did not ask his employer whether it had workers' compensation insurance.

Mr. H testified that he was the claimant's supervisor and on _____, one of the employees told him that the claimant was down on the ground. He responded and saw the claimant on the ground but no debris around except for a large trash can. Mr. H testified that he saw the claimant with his shirt open on top and he noticed that the claimant's chest was "red and didn't look right." Mr. H asked the claimant what had happened and the claimant told him that he did not know but could not feel Mr. H pinching skin on one of his legs. Mr. H testified that he thought the claimant was having a heart attack and at no time did the claimant assert that he had any injury that was work related. Mr. H stated that when the claimant returned to work he worked at light duty and he noticed that the claimant walked with a limp but the claimant did not have any further complaints of pain. Mr. H testified that he did not know the claimant was asserting a job-related injury until he was told he had to testify at the CCH.

Mr. V testified that he was a supervisor and on _____, saw the claimant appear to faint and collapse to the ground. Mr. V stated that he asked the claimant if he was alright; that the claimant told him he was okay and wanted to get up, but he told the claimant to stay down. Mr. V noticed that the claimant's chest was red but he did not see any cuts or scrapes. Mr. V stated that the claimant was pale and sweating and he thought that the claimant had sustained a stroke. He also testified that when the claimant returned to work he arranged light duty for him because it was policy to do so for anyone returning to work, denying that the claimant ever told him that he needed light duty work because he had an injury on the job. Mr. V admitted that he noticed the claimant walked with a limp, but the claimant continued working until November 1998.

Mr. L testified that he was a warehouse foreman for the employer and on _____, saw the claimant walking between the buildings when the claimant reached for one of the trash bins and "saw him going down, kinda laying down on the ground." He stated that he did not notice any debris in the area or any grease. Mr. L called for help and asked the claimant if he was alright and the claimant told him that he could not feel his left arm and leg. The claimant did not assert that he had hurt his neck and did not have any cuts, scrapes, or bruises on him. After the conclusion of the carrier's evidence, the

claimant retook the stand and testified that while he was walking he tripped over two-foot by four-foot pieces of wood that were in his way.

Hospital records from _____, reflect that the claimant gave a history of tripping and falling from a standing position; that he had pain in his left thigh, knee, lower back, and right arm and his body and arms were numb from the neck down. The history reflects that the claimant lost consciousness with a possible syncopal episode. On intake the claimant denied any head trauma or chest pain prior to the fall and related a four-month history of right ear discharge. After a CT scan of the brain, the claimant was diagnosed with chronic mastoiditis. A cervical spine x-ray report dated _____, indicated no evidence of an acute injury in the cervical spine and contained a statement that the claimant did not have any complaints of pain in his neck. The claimant was discharged on _____, and released to full-duty work as of January 26, 1998.

The claimant returned for a follow-up visit on January 26, 1998. These records reflect that the claimant related a history of walking at work when he felt dizzy and fell forward. The claimant denied having any pain or problems other than that the right side of his body felt weak and numb. The claimant told the doctor that he did not hit his head or injure himself when he fell. The physician's impression was bilateral otitis media, chronic mastoiditis, right upper and lower extremity weakness and paresthesia, and dizziness. An MRI of the brain was ordered. The claimant returned for follow-up treatment on February 4, 1998. The progress note from this date reflects that the MRI indicated mastoiditis but was otherwise normal and the claimant wanted to work. A progress note dated March 30, 1998, reflects that the claimant returned with complaints of "weakness"; that he had surgery the previous Thursday; and that he had lost 12 pounds and wanted some vitamins.

The claimant did not return again for medical treatment until August 25, 1998, complaining of weakness in his right upper and lower extremity for two to three weeks. The claimant denied any trauma, chest pain, or shortness of breath. The claimant was eventually referred to Dr. A, who, after examination of the claimant and review of an MRI of the cervical spine, opined by letter dated November 4, 1998, that the claimant had severe spastic myelopathy due to C3-4 and C4-5 central disc herniations which he believed were traumatic by history. A diskectomy and fusion were performed on November 16, 1998. The claimant asserted that he was unable to work after surgery on November 16, 1998, to the date of the CCH.

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he or she sustained an injury in the course and scope of employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The 1989 Act defines "injury" as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26).

The hearing officer found that the claimant had mastoiditis, an infection that is an ordinary disease of life, and that he did not acquire the infection from the incident at work on _____. The record was conflicting and confusing as to whether the claimant

sustained harm to the physical structure of his body on _____, as a result of falling to the ground, given the claimant's denials that he had been hurt and varying medical records documenting the incident. The hearing officer concluded that the claimant collapsed at work from a chronic infection and did not suffer damage to the structure of his body, injure his neck, or suffer cervical disc herniations as a result of the fall.

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). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's 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. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied).

Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer that the claimant did not sustain an injury in the course and scope of employment on _____, we will not substitute our judgment for his.

"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). Disability, by definition, depends upon there being a compensable injury. *Id.* 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.

In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the court stated that to fulfill the purpose of the notice provision, that is, to allow the insurer an opportunity to investigate the facts, the employer need only know the general nature of the injury and the fact that it is job related. In the instant case, the claimant's supervisor, Mr. H, testified that he was aware that the claimant had fallen on _____, and that the claimant could not feel him pinch his leg. However, the claimant admitted at the hearing that he did not know when he told Mr. H he had a work-related injury. The hearing officer resolved the conflict in the evidence and determined that the claimant indicated a possible injury to the supervisors of the employer when he reported on _____, that he had right-sided numbness. We conclude that the hearing officer's findings and conclusion with regard to the notice issue are supported by sufficient evidence and that they are not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

The carrier complains that the hearing officer determined that the claimant timely filed a claim for compensation. Section 409.003 provides that a claim for compensation must be filed with the Commission within one year of the date of the injury. Failure to do so, in the absence of good cause, relieves the employer and carrier of liability for the injury. Section 409.004. The test of good cause is that of ordinary prudence; that is, did the claimant exercise the degree of diligence that a person of ordinary prudence would have exercised under the same or similar circumstances.

One of the claimant's Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) forms contains a file-stamp date of April 14, 2000, from the Houston West field office of the Commission which is over one year later than the date testified to by the claimant (April 5, 1999). The Commission Compass Notes reflect receipt of a TWCC-41 on March 17, 1999. A second TWCC-41 dated March 17, 1999, does not contain a Commission file stamp, but does contain a date-received stamp from somewhere dated March 30, 1999. The hearing officer found that the carrier received the TWCC-41 on March 30, 1999. He also found that the claimant did not file a TWCC-41 with the Commission until April 14, 1999. We reverse this finding as contrary to the great weight and preponderance of the evidence because the Commission's file-stamped copy clearly contains a date of April 14, 2000, rather than April 14, 1999, and hold that the Commission received the claimant's TWCC-41 on March 17, 1999, per the Commission Compass Notes. We note that although we have reversed this finding, the reversal does not change the fact that the claimant did not file a claim within one year.

Given that the claimant did not file a TWCC-41 with the Commission within one year of the _____, incident, the claimant had the burden of establishing that he had good cause for his failure to file a claim in a timely manner. The claimant testified that he did not know about workers' compensation and did not know that he was required to file a claim within one year. We have previously held that ignorance of the law generally does not constitute good cause for failure to file a claim for compensation. Texas Workers' Compensation Commission Appeal No. 971670, decided October 9, 1997. The hearing officer did not make a finding whether the claimant established good cause for his late filing. He did, however, find that the employer did not file an Employer's First Report of Injury or Illness (TWCC-1) for the _____, incident until April 5, 1999. We reverse this finding as contrary to the great weight and preponderance of the evidence and hold that

the TWCC-1 was received by the Commission on April 7, 1999, because the TWCC-1 provided by the parties does not contain a Commission file stamp and the Commission's Compass Notes reflect receipt on April 7, 1999. Again, although we have reversed this finding, the reversal does not affect the outcome of this issue or this case.

Section 409.008 provides that if an employer or the employer's carrier has been given notice or has knowledge of an injury and fails to file a report of injury, the period for filing a claim for compensation does not begin to run against the claim of an injured employee until the day on which the report has been furnished. The employer in this case did not file the required report until April 7, 1999, and the carrier did not file its TWCC-21 until April 15, 1999, more than one year after _____. However, by March 17, 1999, the claimant had filed his claim for compensation. Under these facts, we conclude that the evidence was sufficient to support the determination by the hearing officer that the carrier was not relieved of liability for the claim because of the claimant's failure to file a claim within one year of _____.

With regard to the issue of election of remedies, in Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the court held that the election doctrine may constitute a bar to relief when one successfully exercises an informed choice between two or more remedies, rights, or states of fact which are so inconsistent as to constitute manifest injustice. In the instant case, it was reasonable for the hearing officer to find that the claimant's medical bills were paid outside workers' compensation as the claimant testified that he did not know who paid for his medical treatment. The hearing officer found that the claimant did not make an informed choice to forego workers' compensation benefits. We find there was sufficient evidence to support the determination of the hearing officer that the claimant did not make an election of remedies.

We affirm in part and reverse and render in part.

Kathleen C. Decker
Appeals Judge

CONCUR:

Robert E. Lang
Appeals Panel
Judge/Manager

Judy L. Stephens
Appeals Judge