APPEAL NO. 002164

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 remand for reconstruction of the record on August 10, 2000. The issues at the CCH were whether the appellant (claimant) sustained an injury in the course and scope of employment on _____; whether she had disability from this injury; whether the respondent (carrier) was relieved from liability for the injury because of the claimant's failure to notify her employer within 30 days; whether the claimant filed a claim for compensation within one year after the date of injury and, if not, did good cause exist for the failure to file; whether the compensable injury extended to the lumbar spine; and whether the carrier waived the right to dispute compensability.

The hearing officer 's threshold finding was that there was no injury to the claimant in the course and scope of her employment. He also found that the claimant had not timely notified her employer of the injury; that the contended injury did not extend to the lumbar spine; that she did not file a claim for compensation within one year; that no legal excuses applied to timely notice or timely filing to prevent the carrier from being discharged for liability from the claim; that the carrier timely disputed the compensability of the claim; and that the claimant had not suffered disability.

The claimant has appealed. First, the claimant argues that there is no evidence that the reason that the claimant fainted was due to pregnancy and, in any case, it would not make an injury from a fall at work less compensable. She also argues that she proved an injury in the course and scope of employment that included her lumbar spine and related disability; that the one-year statute for filing a claim was tolled because the employer did not file an Employer's First Report of Injury or Illness (TWCC-1); that she gave timely notice of her injury; and, finally, that the employer had actual knowledge of the claimant's fall. The waiver issue was not appealed. The carrier responds by reciting evidence in favor of the decision, arguing that the hearing officer properly applied the law to the facts he found consistent with his responsibility as the sole judge of weight and credibility.

DECISION

Although some of the evidence could lend itself to different inferences, we affirm the hearing officer's decision.

The claimant was employed to work as a sanitation aid for (employer). She said that on the morning on _____, it was very hot in the kitchen area and the air conditioning had failed that day. At around 8:00 a.m., almost two hours after beginning work, the claimant fainted while cleaning some pots and pans. She awoke while laying on her back. Her supervisor, Mr. C, had her transported to the emergency room (ER) of the facility in a wheelchair. She said that during this evaluation, she found out that she was about 11 weeks pregnant.

Statements from coworkers that are in evidence state that the claimant dropped to her knees but did not fall on her back. One statement also noted that when the claimant returned to work, she explained that she had fainted and that it was probably due to being pregnant.

The legible portions of the medical record for the claimant's treatment that day show that she was dehydrated from heat exhaustion and that she had fainted previously (a statement she denied). The claimant was released and went back to work around 10:00 a.m.; she said her employer would not let her go home. The claimant called in sick the next day because she was hurting, but came to work the following day and worked up until January 5, 1998, when she took off for maternity leave.

The claimant said she tried to file an accident report when she returned to work on July 2, 1997, but Mr. C refused, saying that it was not compensable because she fainted due to pregnancy. Mr. C filed a statement denying that he was ever told that the claimant hurt her back when she fell. The claimant continued to perform her normal duties while working, but contended she was in pain the whole time. She did not return to work after Family Medical Leave Act (FMLA) time off, because, she said, Mr. C urged her to find another job while on leave. However, the claimant did not hunt for other employment but did apply for and received five and one-half months of unemployment compensation from around May through November 1998. She said that she was terminated by the employer and lost her regular health insurance at this time.

The claimant applied for workers' compensation benefits on August 24, 1999. She said that she did not apply previously because Mr. C told her that her injury was not compensable. The hearing officer was asked to take official notice of whether the employer filed a TWCC-1 and his decision indicated that the employer had not. The carrier first filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) on October 25, 1999; this form claimed that first written notice of injury had been received on _____. Subsequent forms were filed on October 27 (amending the date of first written notice to September 29, 1999) and November 15, 1999, which added the additional ground of untimely filing of the claim. (No issue was requested as to whether the grounds made in a later amendment could be considered when benefits were not initiated.)

The claimant actually began treatment for her back on March 6, 1998, with Dr. H. The Texas Workers' Compensation Commission referred the claimant for an independent medical examination by Dr. V. Dr. V recited a history of the incident which one can infer was supplied through the interview and review of records that Dr. V conducted. Dr. V said she did not have copies of the ER records. Dr. V found the claimant to have marked tenderness over the sacroiliac joint but not the lumbosacral area. Although some medical records of the claimant indicate a separation of the symphysis pubis, Dr. V found no tenderness in this area.

Dr. V concluded that the claimant's fainting was likely not due solely to her pregnancy and there was evidence that she passed out due to the heat. Dr. V concluded that the claimant's back problem was due to the fall, although the separation of the symphysis pubis was likely due to pregnancy and childbirth. Dr. V noted that if the claimant could work, it would be sedentary work with limitations. Dr. V was of the opinion that the injury was to the right sacroiliac joint. The claimant was referred for injections for pain relief.

We would first note that whether the claimant fell, in part, due to pregnancy, or not, does not control compensability of any injury. The claimant correctly notes that idiopathic falls that result in injury from some instrumentality of the employer are compensable.

In this case, the hearing officer has evidently concluded that effects from the fall did not rise to the level of injury and that the claimant's later sacroiliac problems, postdelivery, were not caused by this fall. As we have stated many times before, the Appeals Panel is not a second-tier fact finder and, absent a great weight and preponderance of evidence to the contrary, will not reverse the fact finding of the hearing officer when there is sufficient support for the conclusion drawn, even though other inferences may be drawn. *See* Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). In this case, we cannot agree that the finding of no injury from the fall is reversible under this standard. The hearing officer could certainly consider that after returning to work on July 2, 1997, the claimant continued to work until she left on FMLA leave. Likewise, he could choose to believe Mr. C's statement over the claimant's testimony concerning whether the injury was reported to the employer. While we agree that actual knowledge of an injury obviates the need for notice, in this case the hearing officer could infer that the employer was unaware that there had been "injury" as such from the incident at work or that this incident, as opposed to feeling unwell, was the reason that the claimant called in sick the next day.

Finally, we affirm the hearing officer's determination that the claimant had not timely filed a claim and tolling did not apply. Plainly, there could be no good cause for trivializing the injury throughout 1998 and early 1999, when the claimant sought treatment for her back and contended also that she was in pain. Tolling does not apply unless the requirement for filing a TWCC-1 is established; where the employer is not informed of a compensable injury as the basis for time off, there is no duty to file the TWCC-1.

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 cannot agree that this was the case here, and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert E. Lang
Appeals Panel
Section Manager