

APPEAL NO. 002768

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 6, 2000, a hearing was held. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (carrier) is relieved of liability under Section 409.002 because the respondent/cross-appellant (claimant) failed, without good cause, to timely notify his employer of his work-related injury of _____, and that the claimant has not had disability due to the claimed injury of _____. Both parties appealed and responded.

DECISION

The hearing officer's decision is affirmed.

The claimant testified that on _____, he injured his lower back while performing his job duties for the employer when one end of a 150-pound metal scrapper blade he was holding on a scaffold fell and jerked him down into a bent position. The claimant said that he told his foreman, NV, on _____, about the incident with the scrapper blade but gave conflicting testimony as to whether he told NV on _____, that he had hurt his back in that incident. The claimant said that the next day he told NV that his back was hurting but did not tell NV that it hurt because of the incident at work the day before. The claimant said that he continued to complain to NV about his back hurting and that NV sent him to the employer's first aid station on July 23, 1999. The first aid log of July 23, 1999, noted that the claimant related that his lower back was hurting at home on Sunday morning, and it was noted that the cause of the pain was unknown and that it was not a workers' compensation matter.

The claimant went to his family doctor, Dr. M on July 28, 1999. The claimant said that he did not tell Dr. M that he was injured at work on _____. Dr. M's reports do not mention an injury at work. Dr. M diagnosed the claimant as having sciatica. The claimant returned to Dr. M on August 4, 1999, complaining of back pain. He saw Dr. M several times thereafter.

The claimant said that on _____, he felt back pain and right leg pain when he stepped off of a concrete slab at work and fell to his knee, that he reported that injury to NV the same day, and that he was sent to the employer's first aid station. An employer report dated August 5, 1999, noted that the claimant reported that he had pain when he stepped off the concrete slab that day and that he had been treating with his doctor for an inflamed sciatic nerve. The employer's report noted that the claimant was sent to Dr. MO. There is no mention of a _____, work injury in the August 5, 1999, report.

Dr. MO saw the claimant on _____. Dr. MO noted the _____ work incident in his report and diagnosed the claimant as having sciatica. Dr. MO took the claimant off work. The claimant said that he did not tell Dr. MO about the July 15 injury, but that he did tell Dr. MO that he had been seeing Dr. M for his back, which is noted by Dr. MO.

On August 17, 1999, the carrier interviewed the claimant about his claimed work injury of _____, and in his recorded statement of that date, the claimant mentioned the incident at work on _____, when he stepped off the concrete slab, and that he had seen Dr. M for back pain two or three weeks before the interview for an injury he had at work, but he did not state that he had been injured at work on _____, and there is no mention of any incident at work involving a metal scrapper pulling him down and injuring his back. The recorded statement is somewhat confusing with regard to whether the claimant was stating that he had or had not hurt his back at work prior to _____.

An MRI of September 23, 1999, revealed that the claimant has a herniated disc in his lumbar spine at L2-3.

The claimant began treating with Dr. N, a chiropractor, on September 23, 1999, and Dr. N noted that the claimant told him that he was injured at work on _____, while picking up a metal blade and Dr. N recommended that the claimant not work. An EMG done in December 1999 showed L3 radiculopathy. Dr. N released the claimant to return to regular work duties on April 24, 2000, and the claimant obtained a job with another employer.

The Texas Workers' Compensation Commission sent the claimant to Dr. W, who opined that the claimant's low back problem is a result of the _____, injury.

In An Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) dated September 23, 1999, the claimant claimed a work-related injury to his back and right knee of _____, and in a TWCC-41 dated January 13, 2000, the claimant claimed a work-related injury to his back and right knee of August 5, 1999. The November 6, 2000, hearing involved issues related to the claimed injury of _____.

The carrier appeals the hearing officer's finding that on _____, the claimant injured his low back in the course and scope of his employment when moving the metal blade, and the hearing officer's conclusion that the claimant's injury of _____, would have been compensable if it had been timely reported. The claimant appeals the hearing officer's findings that the claimant did not timely report his _____, injury to his employer, that the claimant did not have good cause for failing to timely report the July 15, 1999, injury to his employer, and that the employer did not have notice of the claimed injury of _____, until on or about September 23, 1999. The claimant also appeals the hearing officer's conclusions that, with regard to the claimed injury of _____, the carrier is relieved of liability under Section 409.002 because of the claimant's failure to timely notify his employer under Section 409.001 (which requires notice of injury to the employer within 30 days after the date of injury) and that, because the injury is not compensable, the claimant has not had disability.

Conflicting evidence was presented to the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). We conclude

that the hearing officer's determinations are supported by sufficient evidence and that they are not against the great weight and preponderance of the evidence.

The claimant asserts that the Employer's First Report of Injury or Illness (TWCC-1) dated August 6, 1999, which noted a date of Injury of _____, when the claimant stepped off a concrete slab, shows that the claimant timely reported his injury of _____, because the employer noted on the TWCC-1 that the claimant had a "previous injury." We disagree with that assertion. We note that the TWCC-1 does not state that the previous injury was a work-related injury and could simply be a reference to the first aid report of July 23, 1999, which noted back pain at home from an unknown cause, and that Section 409.005(f) provides that a report required under Section 409.005 (employer report of injury) may not be considered to be an admission by or evidence against an employer or an insurance carrier in a proceeding before the Commission or a court in which the facts set out in the report are contradicted by the employer or insurance carrier.

The hearing officer's decision and order are affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge