

APPEAL NO. 002840

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 November 15, 2000. With regard to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable (low back) injury on _____ (all dates are 1999 unless otherwise noted); that the claimant timely gave notice to the employer of her injury; and that the claimant had 14 days of disability.

The appellant (carrier) appeals the adverse findings, pointing to evidence that supports its position on a sufficiency of the evidence basis. On the disability issue, the carrier, in the alternative, requests that we remand the issue to the hearing officer to make specific findings on the dates of disability. The claimant responds, generally urging affirmance.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant was employed as a laborer/clean-up person for the employer construction company (employer 1). The claimant testified that on _____ she was helping BL move a stove when she felt severe stabbing and burning pain in her lower right hip and that she told BL that she had hurt her back. Whether BL was a coworker or a foreman is unclear but the hearing officer comments that BL "was in charge of Employer [1's] activities at that time." The claimant further testified that later on September 15 she overheard BL call CA, employer 1's superintendent, and that BL told CA of the claimant's injury. This is generally denied by CA, who testified, and BL, whose statement is in evidence. (BL does state that the claimant said that her back hurt the following day.) The claimant also wrote, "[claimant] hurt back," in the "Weekly Log" employer 1 kept. CA testified that he was unaware of the claimant's injury until around Thanksgiving when the claimant told him about the injury at a social event and that she had made the notation in the log. CA said that he checked the log then and saw that the claimant had, in fact, made such a notation. The claimant testified that she was unable to work the next day, September 16, because of her back injury (what the claimant said when she called in is disputed). The claimant said that she came to work on Friday, _____, despite continuing back pain; was off over the weekend; and was laid off on Monday, September 20.

The claimant subsequently applied for and received unemployment benefits until she returned to work for another employer (employer 2) on October 29, earning a higher wage than she had received from employer 1. The claimant testified that she continued working for employer 2 until October 18, 2000, missing intermittent days because of her back injury. The claimant was laid off by employer 2 and told that she would not be permitted to work until she obtained a full work release from her doctor.

The claimant's treating doctor is Dr. M, who is also her regular family doctor. In evidence are some reports and progress notes for various problems prior to September 15. The claimant saw Dr. M for the first time after _____ on November 9. A progress note dictated on November 10 noted complaints of back pain "present for several weeks" and "[n]o history of trauma although she did strain her back while twisting about six weeks ago." Dr. M's assessment was "[m]echanical back pain." Subsequent progress notes refer to back pain.

Without any discussion, the hearing officer found that the claimant sustained a compensable injury. The carrier argues that the claimant failed to meet her burden of proving a compensable injury. There was conflicting evidence between the claimant's testimony, various recorded statements, and CA's testimony. The carrier also points out that the claimant initially applied for group health benefits. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer.

The biggest dispute is whether the claimant gave timely notice to employer 1 within 30 days of her injury pursuant to Section 409.001. The carrier asserted that the notation in the logbook did not meet the requirements of Section 409.001 and that the claimant's testimony was disputed by CA and BL. The hearing officer, in her discussion, comments that the injury report noted in the logbook "is hardly a model of clarity . . . it does appear that this report was made in a timely fashion and complies with the statutory requirements" of Section 409.001. The claimant, in the response, further points out that CA's testimony that CA was unaware of the log notation is "ludicrous" in that the entries for September 16, on the following line under the claimant's notation, were CA's own handwriting of the following day's activities. We are unwilling to hold that the hearing officer's decision on this issue is wrong either as a matter of law or against the great weight and preponderance of the evidence.

On the issue of disability, the hearing officer found the claimant had 14 days of disability without specifying those dates or that period of time. Having affirmed the hearing officer's decision of a compensable injury, we disregard the carrier's argument that the claimant did not have disability because there was no compensable injury. Similarly, we dismiss the carrier's argument that there is no medical evidence indicating that the claimant could not work by noting disability may be established by the claimant's testimony alone, if believed. Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.).

However, the hearing officer finds 14 days of disability without identifying those dates. The carrier contends that those dates are necessary so it can calculate benefits or any interest that might be due. Also, the date of the eighth day of disability needs to be identified to establish the income benefits accrual day and the statutory maximum medical

improvement date. Consequently, we remand the case for the hearing officer to identify the specific 14 days of disability. No further evidentiary proceeding is necessary.

We affirm the hearing officer's decision that the claimant sustained a compensable injury; that the claimant timely reported her injury to employer 1; and that the claimant had 14 days of disability. We remand only for the hearing officer to specify the 14 days of disability in order to determine the accrual date.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Kenneth A. Huchton
Appeals Judge

Gary L. Kilgore
Appeals Judge