

APPEAL NO. 010133

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 December 15, 2000. With regard to the three issues before her, the hearing officer determined that the appellant (claimant) did not sustain a compensable injury on _____ (all dates are 1999 unless otherwise noted), that the respondent (carrier) is relieved of liability because of the claimant's failure to give timely notice to the employer pursuant to Section 409.001, and that the claimant did not have disability.

The claimant appealed the adverse determinations and the carrier responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant was a machine operator and testified that on _____ he was connecting some hoses when he felt pain in his stomach. It is relatively undisputed that the claimant told his supervisor about his stomach complaints, asked to be released to see a doctor, but did not relate the stomach pain to a work incident. The claimant saw Dr. K on _____ and in a progress note of that date noted that the claimant had been having complaints for two weeks and diagnosed "enterocolitis [and] allergies." The claimant returned to work but a week later, on October 11, returned to Dr. K, who noted that the claimant's pain had moved to his upper stomach. Dr. K noted a "small 0.5 cm umbilical hernia." Neither this report nor subsequent notes from Dr. K related a work incident or the hose incident. The claimant reported a work-related injury to the employer on _____ and the employer sent the claimant to (clinic), where, in a report dated November 8, the claimant was diagnosed with a "small, early umbilical hernia" due to a work incident. The claimant continued to work until December 1 when he was laid off. The claimant changed treating doctors to Dr. C, a chiropractor, who recommended surgery.

On the issue of injury in the course and scope of employment, there is conflicting evidence. The claimant initially reported an _____ injury but changed his testimony, after the benefit review conference, to claim an _____ injury. The initial medical records of Dr. K make no mention of a work incident and some of the other records refer to an _____ incident. With the evidence in conflict, the hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this

case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We find the hearing officer's decision on this issue supported by the evidence and we affirm the decision on this issue.

The evidence regarding the notice to the employer and whether good cause existed if there was no timely notice is conflicting. The hearing officer found the date of injury to be _____, in accordance with the claimant's testimony, and specifically found that the "Claimant gave notice of a work related injury on _____, less than 30 days after the alleged injury." The parties at the CCH seemed to argue that if the injury was on _____, reporting on _____ would not be timely. (The claimant argues that he did not know he had a work-related injury until his hernia was diagnosed on October 11.) Inexplicably, the hearing officer found, as a conclusion of law, that:

Carrier is relieved from liability under Texas Labor Code Ann. Section 409.002 because of the Claimant's failure to timely notify his employer pursuant to Section 409.001. Claimant did not have good cause for not giving notice timely.

Our calculations indicate that _____ is the 30th day after _____ and, therefore, if the alleged injury occurred on _____, as found by the hearing officer, the report on _____ was timely. Accordingly, we reverse the hearing officer's decision on lack of timely notice to the employer and render a new decision that the carrier is not relieved of liability because the claimant timely notified his employer pursuant to Section 409.001.

On the issue of disability, in that we are affirming the hearing officer's decision that the claimant had not sustained a compensable injury, the claimant cannot, by definition in Section 401.011(16), have disability.

We affirm the hearing officer's decision on no compensable injury and no disability, and we reverse and render a new decision that the claimant gave timely notice of his alleged injury to the employer based on the hearing officer's factual determinations. That reversal does not change the ultimate outcome that the claimant's injury is not compensable.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge