

APPEAL NO. 012005
FILED OCTOBER 11, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 7, 2001. With respect to the issues before him, the hearing officer determined that the claimant did not sustain a compensable injury on _____, and thus had no resultant disability. The hearing officer further determined that the claimant timely reported his alleged injury to his employer. In his appeal, the claimant challenges the injury and disability determinations on sufficiency grounds and complains of a witness' failure to appear at the hearing. The respondent/cross-appellant (carrier) challenges the timely notice determination in its cross-appeal and, in its response, urges affirmance of the injury and disability determinations. In his response to the carrier's cross-appeal, the claimant urges affirmance of the hearing officer's notice determination.

DECISION

Affirmed.

We first note that in his appeal, the claimant asserts error in the failure to appear of Mr. S, the man the claimant alleges slapped him on his back causing his injury. The record reflects that the claimant requested and received subpoenas for Mr. S to appear at three prior settings of the hearing; however, the record does not reflect that the claimant procured a subpoena for Mr. S to appear at the August 7, 2001, hearing. In addition, the claimant did not request a continuance at the August 7th hearing after Mr. S failed to appear. Thus, the claimant did not preserve error for purposes of appeal. Nevertheless, we note that any error related to Mr. S's failure to appear at the hearing would not rise to the level of reversible error. The hearing officer accepted the claimant's testimony concerning the mechanism of injury, a slap to the back; he simply did not believe that the slap caused the injuries alleged by the claimant. Mr. S could not reasonably be anticipated to shed any light on the aspect of the evidence which the hearing officer found deficient; thus, the absence of that evidence could not reasonably be calculated to cause a different result as would be required to support a reversal here. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The hearing officer did not err in determining that the claimant did not sustain a compensable injury on _____. The issue of whether the claimant sustained a compensable injury was a question of fact for the hearing officer. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer noted that the mechanism of injury alleged by the claimant was "rather unusual," i.e., that a coworker's slap to the claimant's back caused serious back and neck

injuries, from which stemmed depression and fibromyalgia. The hearing officer further noted that the medical records at best failed to support the claimant's assertions and predominantly contradicted them. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). We do not so find here.

We likewise affirm the hearing officer's determination that the claimant had no disability as a result of the _____, incident. By definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

In addition, the hearing officer did not err in determining that the claimant informed his employer of the _____, incident within 30 days of its occurrence. The hearing officer seemed to be most persuaded by the fact that the employer conceded that its investigation of the incident began on November 13, 1997, a date which falls within the 30-day notice period. The hearing officer's determination that the claimant timely reported his alleged injury is not so against the great weight of the evidence as to compel its reversal on appeal. Cain; Pool.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is:

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201**

Elaine M. Chaney
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge