

APPEAL NO. 040419
FILED APRIL 7, 2004

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 January 22, 2004. With respect to the issues before him, the hearing officer determined that the appellant (claimant) sustained a work-related low back injury on _____; that the respondent (carrier) is relieved of liability under Section 409.002 because the claimant failed to timely report his injury to his employer pursuant to Section 409.001; and that the claimant did not have disability because he did not sustain a compensable injury. In his appeal, the claimant argues that the hearing officer erred in adding the timely notice issue. In the alternative, the claimant contends that the hearing officer's notice and disability determinations are against the great weight of the evidence. In its response to the claimant's appeal, the carrier urges affirmance. The carrier did not appeal the determination that the claimant sustained a work-related low back injury on _____, and that determination has become final pursuant to Section 410.169.

DECISION

Affirmed.

Initially, we consider the claimant's assertion that the hearing officer abused his discretion in adding the issue of whether the claimant timely reported his injury to his employer. The carrier timely filed a response to the benefit review conference (BRC) report requesting that the timely notice issue be added. The hearing officer noted that the adjuster that represented the carrier at the BRC credibly testified that the notice issue was discussed at the BRC. In addition, the hearing officer noted that the timely notice defense was raised in the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) that the carrier filed with the Texas Workers' Compensation Commission on July 29, 2003. Based upon this evidence, the hearing officer found good cause to add the issue because it was discussed at the BRC. In Texas Workers' Compensation Commission Appeal No. 032331, decided October 22, 2003, and the cases cited therein, we determined that a hearing officer erred in refusing to add issues that were discussed at the BRC but were not listed as issues that remained unresolved in the BRC report. Under the guidance of those cases, we cannot agree that the hearing officer abused his discretion in adding the notice issue in this instance.

The hearing officer did not err in determining that the claimant did not timely report his injury to his employer. The claimant had the burden of proof on the injury and notice issues and they presented questions of fact for the hearing officer to resolve. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). 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 the 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). In this instance, the hearing officer simply was not persuaded that the claimant reported his injury to his employer within the 30-day period provided for doing so in Section 409.001 or that he had good cause for his failure to do so. The hearing officer was acting within his province as the fact finder in so finding. Nothing in our review of the record demonstrates that the hearing officer's notice determination is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse those determinations on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The 1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). Because we have affirmed the hearing officer's determination that the carrier was relieved of liability for the claimant's work-related injury, we likewise affirm the determination that he did not have disability.

The hearing officer's decision and order are affirmed.

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

**RICHARD A. MAYER
11910 GREENVILLE AVENUE, SUITE 600
DALLAS, TEXAS 75243-9332.**

Elaine M. Chaney
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Thomas A. Knapp
Appeals Judge