APPEAL NO. 950200

This appeal is considered under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on September 30, 1994, to decide the issues of whether the claimant sustained a compensable injury on (date of injury), and whether he has had disability since April 13, 1994, through the present resulting from an (date of injury) injury. The hearing officer, (hearing officer), determined these issues in the claimant's favor and the carrier appeals. The carrier contends that there is insufficient evidence to support the hearing officer's determinations or, in the alternative, that they are against the great weight and preponderance of the evidence. The carrier also alleges error in the hearing officer's failure to file his decision with the Texas Workers' Compensation Commission's (Commission) Division of Hearings within ten days following the close of the hearing, thus prejudicing carrier's rights. The appeals file does not contain a response from the claimant.

DECISION

We affirm.

The claimant was employed by (employer). He testified through an interpreter that on (date of injury) (all dates herein are 1994 unless otherwise indicated) he lifted a 75 pound chute from a concrete truck, which caused pain in his right arm and also caused him to fall with the chute on top of him. He said his shoulder, low back, and hip hurt but that he continued to work the rest of the day (although he denied that he made another load after the injury). Later that day claimant saw his supervisor, (Mr. P), and said he had intended to tell him about the injury, but Mr. P instructed him to prepare a report concerning an incident with claimant's truck which had occurred on (date). Claimant said he tried to page Mr. P the following day but was unable to talk with him; he said he came to employer's plant and spoke by telephone with Mr. P on April 14th, asking if he was to report to work, but said Mr. P hung up before claimant could mention the injury. On April 15th he spoke to Mr. P at the plant and was told he had been terminated; claimant said he did not mention the injury at that time because he was taken by surprise, did not expect to be terminated, and "forgot everything." Some ten to fifteen minutes later, however, he informed Mr. P about his injury on (date of injury). An Employer's First Report of Injury or Illness was completed on April 18th and the claimant was given authorization to go to a clinic; however, the authorization was later revoked before claimant went to the clinic because he had been terminated.

On April 29th claimant saw (Dr. P), who had been recommended by his lawyer. Dr. P's Initial Medical Report (Form TWCC-61) records claimant's statement that he was injured while carrying the chute and gives the diagnoses of cervical and lumbar sprain/strain and cervicobrachial syndrome. Claimant continued to see Dr. P until July, when his visits were discontinued because Dr. P was not getting paid. According to a Specific and Subsequent Medical Report (Form TWCC-64) of a July 22nd visit Dr. P found

claimant's cervical and lumbar ranges of motion diminished and a loss of strength in his right arm, and he recommended claimant undergo an MRI, EEG, and possibly a nerve conduction study; he also sought to refer claimant to a neurosurgeon. In that report Dr. P also recommended that the claimant remain off work until further tests could be performed, and stated, "[Claimant] has been unable to work since (date of injury)." Claimant stated at the hearing that he had not worked since (date of injury), that he had sought and been denied unemployment benefits (the Texas Employment Commission Notice of Claim Determination states claimant's benefits were denied because he had been discharged from his job for violation of company rules and policies, which was considered a discharge for misconduct connected with the work), and that he believed he could not work because he continued to have pain in his arm and hip. He said he had not been able to afford further medical treatment, although he had been seen at (Hospital) on August 18th because of a heart attack.

Mr. P testified that on April 13th and 14th the claimant had been put on suspension pending investigation involving an (date) motor vehicle accident. He said that claimant worked all day on (date of injury) and that when he spoke to claimant on that day claimant did not mention an injury; he noted that claimant had had two prior workers' compensation injuries which he had reported to Mr. P. (Mr. P stated that claimant spoke English and that the two of them had had no problems communicating.) He said he had a car phone, voice mail, a pager, and three dispatchers who took messages for him and that he had never heard of anyone who could not get in touch with him. He said claimant paged him on April 14th, seeking instructions as to whether he was to work that day, and Mr. P advised him he was on suspension; it was Mr. P's understanding that claimant was prepared to go to work if so directed. He denied hanging up on claimant during that conversation. He said that on April 15th he informed claimant he was terminated for failure to report the motor vehicle accident, and that shortly thereafter the claimant reported an injury. According to Mr. P, when asked why he had not reported the injury earlier the claimant stated he had not been able to find Mr. P. In his testimony, Mr. P disputed claimant's statement that he had not taken another load of cement following the injury.

The carrier disputes the following findings and conclusions made by the hearing officer:

FINDINGS OF FACT

4.On (date of injury), Claimant was lifting a chute, which is an attachment to his concrete truck, when he fell, with the chute landing on top of him, injuring his shoulder, lower back, hip, and right arm.

5.Claimant first obtained treatment on April 29, 1994 with [Dr. P]. The findings of the doctor were consistent with a trauma induced injury. [Dr. P], on

July 22, 1994 reported that Claimant had been unable to work since (date of injury) and continues to be unable to work.

6.As a result of Claimant's (date of injury) injury, Claimant has been unable to obtain or retain employment at wages equivalent to his pre-injury wages from April 13, 1994 through the date of this hearing.

CONCLUSIONS OF LAW

3.Claimant sustained a compensable injury on (date of injury).

4.As a result of Claimant's (date of injury) injury, Claimant has had disability from April 13, 1994 through the date of this hearing.

In its appeal the carrier points to the undisputed evidence that the claimant did not report an injury until after he was terminated, despite opportunity to do so and a history of properly reporting injuries. It also points to discrepancies in the evidence relating to the manner in which the claimant was injured, whether he continued to perform heavy work following the injury, and the extent of the injury (the Employer's First Report states that claimant's injury was to "right forearm"). Further, it notes that the claimant did not work on April 13th and 14th because of his suspension and that he sought unsuccessfully to work on April 14th; and that following his termination he sought unemployment benefits and was not actually taken off work by a doctor until July 22nd. The carrier also maintained that claimant's heart attack was the sole reason he was not working.

Whether claimant suffered an injury on (date of injury) was clearly a matter involving credibility, which is within the hearing officer's purview to determine. Section 410.165(a). While timely notice of injury was not an issue the carrier sought to impeach the claimant's credibility based upon the circumstances by which the injury was reported. Nevertheless, the hearing officer as sole fact finder could credit claimant's version of events. To the extent the evidence was conflicting, the hearing officer was entitled to resolve such conflicts in claimant's favor. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). An appeals level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). We will reverse the decision of the hearing officer only where it is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We decline to do so in this case.

Likewise, we believe that the evidence as to disability, while conflicting and somewhat sketchy, was nevertheless sufficient to support the hearing officer's finding in

claimant's favor. Although retroactive in nature, Dr. P wrote that claimant had been unable to work since the injury and that he should not work until further diagnostic tests were undertaken. We also note that the evidence about claimant's heart attack was not fleshed out except to the extent the claimant said he had been seen at a hospital on August 18. We also decline to reverse the hearing officer's determination on this issue. Cain, *supra*.

The carrier also alleges error in the hearing officer's failure to file his decision within ten days of the close of the hearing as required by Section 410.168 and Rule 142.16(c) (Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(c)). The Appeals Panel has declined to find this time limit mandatory. Texas Workers' Compensation Commission Appeal No. 950142, decided March 14, 1995. The carrier argues, however, that the lateness of the decision (which, the record indicates, was filed 99 days after the close of the hearing and was signed by the hearing officer on January 17, 1995) calls into question the accuracy of the decision in a case where credibility of witnesses plays a key role. We cannot agree that a hearing officer's memory, any more so than that of a witness who is called upon to remember past events, becomes inherently faulty and unreliable after the passage of this period of time; the hearing officer also has before him a record of proceedings by which to refresh his memory. By the same token, we believe hearing officers should strive to avoid lengthy lapses of time, which can work a hardship on either party.

Finding no error in the hearing officer's decision and order, it is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Tommy W. Lueders
Appeals Judge