APPEAL NO. 002220-S

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 29, 2000, in _____, Texas, with (hearing officer) presiding as the hearing officer. With respect to the issues before him, the hearing officer determined that the claimant sustained a compensable injury on _____; that he had disability as a result of his compensable injury from February 28 to July 10, 2000; that the appellant (carrier) did not waive its right to contest compensability by failing to do so within 60 days of the date it received written notice of the injury; and that in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.3 (Rule 124.3), the carrier is liable for payment of accrued benefits for the period ending June 22, 2000, as a result of its failure to either dispute or initiate the payment of benefits within seven days of the date it received written notice of the injury. In its appeal, the carrier argues that the hearing officer's injury and disability determinations are against the great weight of the evidence. In addition, the carrier argues that the hearing officer erred in applying Rule 124.3. The appeals file does not contain a response to the carrier's appeal from the claimant.

DECISION

Affirmed.

The hearing officer's decision contains a factual recitation that will not be repeated here. We will only briefly summarize those facts most germane to our decision. The claimant testified that on _____, he was working as a pipe fitter. He stated that as he stepped into a scissor lift, his right foot slipped off the step and bent backwards toward his shin. The claimant reported his injury to his supervisor and after the pain failed to subside, was taken to the plant nurse who gave him ibuprofen and advised the claimant to go home, to put ice on his ankle, and to stay off of his ankle for two to three days. The claimant stated that by February 28, 2000, his right ankle had not improved and so he went to his union hall to contact the employer and report that he would not be in to work, and to ask if they wanted him to seek medical treatment from a company doctor. The claimant stated that the employer did not advise him as to whether it wanted him to see a company doctor; thus, he scheduled an appointment with his family doctor Dr. H on March 15, 2000. Dr. H diagnosed a severe sprain of the right ankle and took the claimant off work. On July 10, 2000, Dr. H released the claimant to full duty.

On its Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) and in its appeal, the carrier acknowledges that it received its first written notice of the claimed injury on June 1, 2000. The carrier filed its contest of compensability on June 23, 2000.

The claimant had the burden to prove that he sustained a compensable injury. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). That issue presented a question of fact for the hearing officer to resolve.

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, decides what weight to give to the evidence, and determines 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). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. 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 and manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

On appeal, the carrier contends that the hearing officer's injury determination is against the great weight of the evidence, stating that the injury did not occur because certain contractual requirements between the employer and owner of the plant where the employer was working were not followed. Initially, we note that there was no evidence establishing the existence of the contractual provisions in that the contracts were not in evidence, the claimant denied having knowledge of the provisions, and the carrier did not offer other evidence to establish the existence of the provisions. However, even if such evidence had been presented, the significance, or lack thereof, of such evidence would be a matter left to the discretion of the hearing officer. The hearing officer's determination that the claimant sustained a compensable injury is sufficiently supported by the claimant's testimony and the medical evidence from Dr. H. Our review of the record does not demonstrate that the hearing officer's injury 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 that determination on appeal. Pool; Cain.

The success of the carrier's argument that the claimant did not have disability is premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the hearing officer's injury determination, we likewise affirm his determination that the claimant had disability from February 28 to July 10, 2000.

Finally, we briefly consider the carrier's assertion that the hearing officer erred in determining that pursuant to Rule 124.3, the carrier would be liable for benefits that accrued through June 22, 2000, even if the injury had not been found compensable. Rule 124.3(a) provides, in relevant part:

> Except as provided in subsection (b) of this section, upon receipt of written notice of injury as provided in §124.1 of this title (relating to Notice of Injury) the carrier shall conduct an investigation relating to the compensability of the injury, the carrier's liability for the injury, and the accrual of benefits. If the carrier believes that it is not liable for the injury or that the injury was not compensable, the carrier shall file the notice of denial of a claim (notice of denial) in the form and manner required by §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(1) If the carrier does not file a notice of denial by the seventh day after receipt of the written notice of injury, the carrier is liable for any benefits that accrue and shall initiate benefits in accordance with this title.

(2) If the carrier files a notice of denial after the seventh day but before the 60th day after receipt of written notice of the injury, the carrier is liable for and shall pay all benefits that had accrued and were payable prior to the date the carrier filed the notice of denial and only then is it permitted to suspend payment of benefits.

The carrier acknowledged at the hearing and on appeal that it received written notice of the injury on June 1, 2000, and as the hearing officer found, the carrier filed its dispute on June 23, 2000, more than seven and less than 60 days after receiving written notice of the injury. Thus, in accordance with Rule 124.3(a)(2), the carrier is liable for the benefits that accrued prior to June 23, 2000, without regard to the ultimate determination of the compensability of the injury. Although the exact nature of the carrier's argument is unclear, it appears that the carrier is arguing that June 1, 2000, the date it received written notice of the injury, is the accrual date for benefits. That is, the carrier seems to contend that its liability for benefits is limited to the period from June 1 to June 22, 2000. We find no merit in this assertion. Section 408.082 establishes that income benefits accrue on the eighth day of disability. Rule 124.3 did not change how that date is determined. Accordingly, the hearing officer properly determined that even if the injury had not been determined to be a compensable injury, the carrier would have been liable for all benefits that accrued and were payable prior to June 23, 2000, the date it filed its dispute.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Judy L. Stephens
Appeals Judge