APPEAL NO. 92466

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1992). On July 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that claimant, appellant herein, was not injured in the course and scope of employment and that he did not give timely notice of the incident or have good cause for not doing so. Appellant asserts that the great weight of the evidence shows an injury on the job, that appellant had good cause for notifying a supervisor when he did, and that it was error to allow an employer representative to remain in the hearing room when that representative later testified.

DECISION

Finding that the evidence sufficiently supports the decision, we affirm.

Appellant had worked for an apartment complex for approximately three years in yard maintenance. He has had muscular dystrophy (Charcot Marie Tooth disease). He claimed that on (date), while he and another worker were loading and unloading concrete steps weighing approximately 85 pounds, he hurt his back. He felt pain in his lower back. He said he made a passing comment to his supervisor, D. C., at the time, but kept working. He said his pain increased over the next weeks.

It is not disputed that he did not report an injury, other than as stated above, until at least February 11, 1992. In answer to the question, "[t]he injury happened on (date). Why was it that you waited until February 11th?" appellant said, "[f]ear of losing my job." Appellant testified that he sees his physician, Dr. F, approximately once a year to follow his muscular dystrophy. He testified that he saw him on March 4, 1992 (he later said he had seen him in February too). A letter from Dr. F dated February 13, 1992, says that he treats appellant for the muscular dystrophy; it adds that because of this condition and "changes in force in the low back," he has chronic low back pain. He added that appellant complained of wearing a protective belt at work, that this is exacerbating his low back pain. He told appellant to stop wearing the belt. Thereafter, on March 25, 1992, Dr. F wrote a letter to respondent which said that appellant never had an appointment for a job related problem but that he had been complaining of "increasing back pain." He notes a compression fracture in the lower thoracic area and says that is not characteristically associated with CMT disease; he concludes because of this that the compression fracture is "in all medical probability" associated with lifting activities. The evidence does not show that Dr. F provided a statement that appellant should not work, and on March 19, 1992, appellant started to see Dr. P, who provided a statement that appellant cannot work. Dr. P also shows that the date of injury was (date of injury), not (date).

D. C. testified that appellant did not say anything about hurting his back, and he first heard of the assertion in February or March of 1992. He agreed that they did lift old concrete steps to replace them. He says that he did not say that a person would be

terminated if he filed for workers' compensation.

The apartment manager, F. R., testified that she was told by appellant in February that he needed to have back surgery because of his disease, but that he could not afford it. She stated he mentioned this several times and in early March, as she recalls, he said he would file a workers' compensation claim. She agreed that he had helped move some heavy steps, but said that in answer to her question, he could not tell her a date of injury, and said, "I don't really know." She testified that appellant had filed two small workers' compensation claims before and each time had given notice immediately. She said she never told appellant he was terminated, but pointed out to him that if he filed a workers' compensation claim for his back, he would not be able to work--meaning that she could not allow him back to work until she received a doctor's clearance. She said that he was to begin his two week vacation the next workday and they both agreed that he should continue those plans. She said she asked him for his keys (that will enter any apartment) because all employees, except a few senior ones, turn in their keys and uniforms when leaving for vacation. When he did not return at the end of his time off, she wrote him a letter saying that she needed to get a doctor's report and gave the letter it to him, never saying that he was fired or terminated. (Appellant lived in an apartment in the complex.) When he did not come in or reply, she wrote a second letter saying that he should come to the office and see her about the doctor's report within 24 hours or she would consider the job abandoned. She said appellant worked regularly in November, December, January and February without a problem.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(e), 1989 Act. He could weigh Dr. F's first letter as reflecting more accurately the history and incidence of appellant's problem with his back than his second letter. He could question appellant's credibility when D.C. denied both that he told appellant that filing a workers' compensation claim would get a person fired and that appellant mentioned anything about injuring his back to him. He could believe that appellant told F.R. he needed back surgery because of his disease and that he did not know when he was injured but that he wanted to assert a workers' compensation claim. The evidence was sufficient to support the hearing officer's conclusion that appellant was not injured in the course and scope of employment.

The hearing officer also had sufficient evidence before him to support his conclusion that appellant did not show cause why he did not timely file. Appellant had filed two previous workers' compensation claims and had not been fired. He had filed them timely. While appellant said he delayed for fear of losing his job, the testimony of D. C. contradicted that he told appellant that filing a claim could result in the loss of a job. The delay could also be considered to result from appellant's knowledge that no injury caused the back problem, but as it appeared that more aggressive steps would be needed to treat it, he decided that workers' compensation may be a solution. Appellant cites Lee v. Houston Fire and Cas. Ins. Co., 530 S.W.2d 294, (Tex. 1975) to say that the totality of the claimant's conduct should be considered in regard to the failure to file a claim. We agree, and note that Farmland Mut. Ins. Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi

1991, no writ) also referred to considering the totality of conduct in looking to see if ordinary prudence was used in a question of reasonable time to notify. This case also said, though, that this is a question of fact for the trier of fact. The findings of fact indicate that the hearing officer considered all the evidence in reaching his conclusions. The facts do not indicate that he acted arbitrarily or abused his discretion in determining that good cause was not shown for the delay in notice.

Finally, appellant objected at the hearing and asserts now that F. R. was allowed to remain in the hearing room as the employer representative when it was known that she would testify. Article 8308-5.10, 1989 Act provides that an employer has the right to be present at administrative proceedings and does not condition that right upon whether testimony will be given. The hearing officer did not err in allowing F. R., as employer representative to remain in the hearing room.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge