APPEAL NO. 92487

On August 6, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer found that the appellant (hereinafter called claimant) did not establish that he sustained an injury in the course and scope of his employment on (date of injury), and that claimant failed to give timely notice of injury as required by the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-5.01(a) (1989 Act) or to establish "good cause" for failure to give timely notice as allowed in Article 8308-5.02(2). The claimant appealed by letter and brief dated September 8, 1992, disputing several findings of fact and conclusions of law. Respondent asks that the decision of the hearing officer be affirmed.

DECISION

Finding no reversible error and sufficient evidence to support the decision below, the hearing officer's decision is affirmed.

(J G), the claimant, was a journeyman electrician hired by (employer) on a large construction project. On (date of injury), one or two days after being hired, the claimant alleges he tripped over two pipes that had been stubbed through the floor and fell, injuring his neck, left shoulder, left arm and thumb. There is a dispute whether the injury was reported to the foreman, (M S). The claimant was able to finish his shift on (date of injury) and continued to work each regularly scheduled day until February 6, 1991. On February 6, 1991 claimant was fired for failing to meet minimum standards and for nonproductivity. Claimant went to see (G R), D.C., on February 22, 1991, which was approximately one month after the alleged accident and more than two weeks after he was terminated. Claimant next sought medical attention when he saw (B G), D.C., on November 26, 1991. Claimant contends he did not realize the seriousness of his injury until after the November 26, 1991 doctor visit and this constitutes good cause. Claimant's formal notice of injury was filed December 23, 1991.

Claimant argues he gave timely notice of the accident and injury on the day of the accident when he told the foreman "(M), I hate to be the one to report this to you, but I took a fall today. I don't think I'm hurt too bad." Claimant submitted an affidavit of (Mr. G) to the hearing officer on August 11, 1992 where (Mr. G) stated "I was working with J.D. when he tripped and fell and hurt his shoulder, (sic) and hand. Later I had to finish drilling the hole in the top [of] the control panel because he told (M) that his hand was hurting." (M S) testified he did not recall being told of the accident or the injury to appellant's hand on (date of injury). Don Garner, the employer, testified he was not given notice of the alleged accident or injury.

(Mr. G's) written affidavit would tend to support claimant's version. The hearing officer is the sole judge of the weight and credibility of the evidence, Article 8308-6.34(e). As such, the decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the

evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). Whether there was an accident and the injury was reported hinges on the credibility and weight placed on the evidence and the resolution of any inconsistencies. The hearing officer, as the fact finder, may believe all, part, or none of the testimony of the witnesses, judge credibility and assign weight to the evidence. Texas Workers' Compensation Commission Appeal No. 92422, decided September 30, 1992. The case below hinged entirely on the credibility of the evidence of whether an accident occurred and whether it was reported as appellant alleges. The hearing officer, as evidenced by his Findings of Fact Nos. 3 and 4, obviously did not give great weight to the appellant's version of the alleged accident and alleged report to the foreman. The findings should be upheld unless it is determined that the evidence was so weak or the findings so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951). We do not so find. There was evidence presented on both sides of the issue and the hearing officer had the opportunity to assess the credibility of the witnesses appearing before him. We affirm the decision of the hearing officer on this issue.

Claimant further alleges, in the alternative, that even if the claimant failed to give timely notice of injury as required by Article 8308-5.01(a) there was good cause for such failure to give timely notice as provided in Article 8308-5.02(2). The alleged accident occurred on (date of injury). The claimant first saw a chiropractor on February 22, 1991. Although claimant testified he was in pain throughout, he did not seek additional medical attention until November 26, 1991. Shortly after seeing the doctor on November 26, 1991, and on learning the expense of the treatment, claimant filed his claim on December 23, 1991. The reason claimant gives for not filing sooner is that he did not realize the seriousness of his injury until he saw the doctor in November 1991. While the 1989 Act changed certain requirements for notice from prior law, it kept the provision that failure to notify within a certain time could be excused for good cause. The 1989 Act, insofar as good cause can excuse a failure to timely notify, will be viewed as conveying the same meaning as the prior Act, Walker v. Money, 132 Tex. 132, 120 S.W.2d 428 (1938). Under the prior Act, Farmland Mutual Ins. Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1981, no writ), said a belief that an injury was trivial, or not serious, may constitute good cause for failure to timely notify. The question of good cause is a question to be ruled on by the hearing officer. As indicated in the hearing officer's Finding of Fact No. 6 and Conclusion of Law No. 3, the hearing officer clearly found that the claimant did not have good cause for the late reporting of the injury. The hearing officer did not abuse his discretion in finding that there was no good cause for the delay in notification by the claimant and that decision should not be set aside except when arbitrary or an abuse of discretion, Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1966). As the sole judge of weight to be assigned to evidence, the hearing officer judges credibility, assigns weight to the evidence and resolves conflicts and inconsistencies, TEIA v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). We do not substitute our judgment for the hearing officer, as trier of fact, when the challenged findings are not against the great weight and preponderance of the evidence. We find that the hearing officer did not abuse his discretion.

The decision of the hearing officer is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge