APPEAL NO. 92505

On August 11, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The issues at the hearing were: (1) whether the claimant sustained an injury in the course and scope of his employment on (date of injury 1); (2) whether the claimant timely reported his alleged injury of (date of injury 1), to his employer; (3) whether the claimant had good cause for not reporting the alleged injury of (date of injury 1), to his employer within 30 days; (4) whether the claimant sustained an injury in the course and scope of his employment on or about (date of injury 2); (5) whether the claimant timely reported his alleged injury of (date of injury 2), to his employer; and (6) whether the claimant had good cause for not reporting any alleged injury of (date of injury 2), to his employer within 30 days.

The hearing officer found against the claimant on all issues and ordered that he take nothing as a result of his claims under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant, referred to as the claimant herein, disagrees with the adverse findings and asks that he be awarded workers' compensation benefits. Respondent, who is the employer's workers' compensation insurance carrier and who is referred to as the carrier herein, responds that the findings and decision are supported by the evidence, are not against the great weight and preponderance of the evidence, and requests that the decision be affirmed.

DECISION

The decision of the hearing officer is affirmed.

The claimant was hired as a truck driver by the employer, (employer), in October 1991. The claimant testified that on (date of injury 1), he injured his back when he opened the damaged hood of his employer's truck at work and that on that day he told his foreman, (K G), that he had pulled a muscle in his back opening the hood. The foreman testified that he recalled talking to the claimant about the damaged hood, but did not recall the claimant mentioning any injury to him on (date of injury 1) or at any time after (date of injury 1). The claimant continued to work the day of the alleged accident and for several weeks thereafter. He did not seek medical attention until May 2, 1992.

The claimant further testified that sometime during the period of (date of injury 2), he reinjured his back at work while riding in the bed of the crew truck. He said the truck was being driven by his foreman and that when the truck took off quickly from the gate on the way to the parking lot, he was thrown off of the tire hub he was sitting on and into (Mr. B), a coworker. He said that in addition to reinjuring his back, his mouth struck (Mr. B's) knee causing his mouth to bleed. (Mr. B) testified that he did not recall any incident as described by the claimant, did not recall the claimant being thrown into him, and did not recall the claimant being injured in the crew truck. The foreman testified that he did not recall any incident as described by the claimant, nor did he recall the claimant being injured in the crew truck. The foreman further testified that the claimant did not report the crew truck incident

to him at anytime.

The claimant's girlfriend, (J W), stated in a signed written statement that the claimant had told her about both accidents, that he was in pain, and that she took him to the hospital on May 2, 1992. Medical records showed that on May 2, 1992, the claimant went to the hospital and reported that two months prior to the visit he had hurt his back at work. The claimant was diagnosed as having back pain, was prescribed pain medication, and was given crutches. A May 7th CAT scan of the claimant's lumbar spine revealed a herniated intervertebral disc at L5-S1, and a disc protrusion at L4-5.

The employer requires each employee to indicate on the foreman's time card whether they were injured at work. The claimant indicated on the time card that he had not been injured at work on (date of injury 1), and for each day that he worked during the period (date of injury 2), the claimant indicated on the time card that he had not been injured at work. The claimant said that on the day he was injured in (month), he had signed the time card and noted no injury before the accident occurred. The claimant did not indicate that he had been injured on any of the (month) and (month year) time cards that were in evidence.

The claimant's testimony and the testimony of (Ms. C), who described her job position while working for the employer as "secretary and head of employment," revealed that either on Monday, May 4 or Tuesday, May 5, 1992, the claimant called (Ms. C) at work and told her he had been in the hospital on May 2nd, and that he thought he had been hurt when he lifted the truck hood and when he fell in the crew truck. (Ms. C) said that before he reported his accidents, the claimant told her that he had been water skiing with his girlfriend over the weekend. The claimant and his girlfriend denied that they had water skied over the weekend. The claimant's foreman said that he was in the office when the claimant called (Ms. C) and that (Ms. C) told him at that time that the claimant had told her he had strained his back lifting the hood of the truck in (month), but that (Ms. C) did not mention that the claimant had reported an injury in (month). A report dated May 8, 1992 showed that the employer's safety superintendent was aware by that date that the claimant had reported to (Ms. C) that he had received a back injury while lifting the hood of the employer's truck at work and that he had reinjured his back while being transported in the crew truck.

The hearing officer made the following findings of fact in regard to the issues of whether the claimant was injured in the course and scope of his employment:

Finding No. 3. On (date of injury 1), and at all other times pertinent to these claims, claimant did not sustain any injury to his back nor to any other part of his body while opening a hood on a vehicle of employer.

Finding No. 5. On or about (date of injury 2), and at all other times pertinent to these claims, claimant did not sustain any injury to his back, mouth, or any other part of his body while being transported in the back of a company truck.

A "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act." Article 8308-1.03(10). It is the claimant's burden to establish that an injury was received in the course and scope of employment. Spillers v. City of Houston, 777 S.W.2d 181, 186 (Tex. App.-Houston [1st Dist.] 1989, writ denied). The hearing officer is the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). Because the claimant was an interested party in this case, his testimony only raised issues of fact for the hearing officer's determination. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758, 760 (Tex. Civ. App.-Amarillo 1973, no writ). When presented with conflicting evidence the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986). That the trier of fact might have arrived at findings different than she did does not justify the abrogation of the determinations the trier of fact concluded from the evidence to be the most reasonable. Escamilla, *supra*. In this case, the claimant testified that he was injured lifting the hood of the truck and while being transported in the crew truck. However, the claimant indicated on the employer's time cards that he had not been injured. In addition, the coworker the claimant said he fell on testified that he could recall no such incident. Having reviewed the record, we conclude that the evidence is sufficient to support the findings that the claimant was not injured at work as claimed, and further conclude that the findings are not against the great weight and preponderance of the evidence.

The hearing officer made the following findings of fact in regard to the issues of whether the claimant timely reported his alleged injuries to his employer:

Finding No. 4. Claimant did not mention any alleged injury occurring on (date of injury 1), to employer within 30 days.

Finding No. 6. Claimant did not notify employer of any alleged injury occurring on or about (date of injury 2), within 30 days of the alleged injury.

For an injury other than an occupational disease, Article 8308-5.01(a) provides that "[a]n employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs." The notice may be given to the employer or any employee of the employer who holds a supervisory or management position. Article 8308-5.01(c). Under Article 8308-5.02, failure to give timely notice relieves the employer and the employer's insurance carrier of liability under the 1989 Act unless: (1) the employer, the carrier or a person eligible to receive notice has actual knowledge of the injury; (2) the Commission determines that good cause exists for failure to give notice in a timely manner; or (3) the employer or carrier does not contest the claim. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284, 286 (Tex. Civ. App.-El Paso 1965, no writ).

The hearing officer had the responsibility to resolve the conflicting testimony on

whether the claimant told his foreman on (date of injury 1) that he was injured on that day. The hearing officer was entitled to believe the foreman's testimony that notice of injury was not given on that day and to disbelieve the claimant's testimony that he mentioned his injury to his foreman on (date of injury 1). *See* R.J. McGalliard, *supra*. The evidence was not very well developed on whether (Ms. C) held a supervisory or management position with the employer on May 4 or 5, 1992, when the claimant told her of his alleged injuries at work. However, even if she had held such a position it would not matter in regard to the issue of timely notice of the alleged (date of injury 1) injury since notice to her was well after the 30-day period. Also, (Ms. C's) report to the foreman and safety superintendent concerning the claimant's report of the (date of injury 1) injury was after the 30-day period. We conclude that the finding of no timely notice of the alleged (date of injury 1) injury is supported by sufficient evidence and is not against the great weight and preponderance of the evidence.

We conclude that the hearing officer erred in finding that the claimant did not notify the employer of any alleged injury occurring on or about (date of injury 2), within 30 days of the alleged injury. The evidence clearly showed that the claimant told (Ms. C) about his alleged injury occurring at work during that time period on either May 4 or May 5, 1992, and that (Ms. C) told the employer's safety superintendent, a person obviously in a supervisory or management position, of the claimant's alleged (date of injury 2) injury by May 8, 1992. The safety superintendent's written accident report of May 8th confirmed that he knew of the alleged (date of injury 2) injury by May 8th, which was within 30 days of the date of the alleged injury. Article 8308-5.01(a) allows the notice of injury to be given by a person acting on behalf of the employee. Even if (Ms. C) was not in a supervisory or management position and thus not a person eligible to receive notification under Article 8308-5.01(c), the evidence showed that she relayed the claimant's notice of injury to a person in a supervisory or management position within 30 days of the date of the alleged (month) injury, which we think in the circumstances of this case should be considered sufficient compliance with the notice of injury provision. *See* Texas Workers' Compensation Commission Appeal No. 92141, decided May 21, 1992, where we held that notice of injury by the employee's mother to a coworker of the employee who then notified the employee's supervisor within 30 days of the date of injury that the employee's mother had reported that the employee had injured her back at work was notice of injury under Article 8308-5.01(a). Although we hold that the hearing officer erred in finding that timely notice of the alleged (month) injury was not given to the employer, our determination on that issue does not affect our decision in this case since we have previously determined that the finding that the claimant was not injured at work on or about (date of injury 2), is supported by the evidence and is not against the great weight and preponderance of the evidence.

The hearing officer made the following finding and conclusion in regard to the issues of whether the claimant had good cause for not reporting his alleged injuries to his employer within 30 days:

Finding No. 7. Claimant did not offer any reasons for his failure to notify his employer of any alleged injuries occurring either on (date of injury 1), and/or

(date of injury 2) (dates inclusive).

Conclusion No. 5. The greater weight of the credible evidence does not establish that the claimant had good cause for failing to report the alleged injuries of (date of injury 1), and/or (date of injury 2) (dates inclusive).

A claimant who fails to give the employer notice of the alleged injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473, 475 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). As we previously observed, the evidence clearly showed that the claimant did notify his employer of his alleged (month) injury within 30 days. Thus, there was no reason for the claimant to present evidence bearing on the issue of good cause for failure to timely notify the employer of that alleged injury.

In regard to the issue of good cause for failure to timely notify the employer of the alleged injury of (date of injury 1), the claimant testified that he did not think the injury was serious until he saw a doctor on May 2, 1992. However, the claimant also testified that after the alleged injury of (date of injury 1) he hurt every night. A good faith belief on the part of the claimant that his injury was not serious may constitute good cause for failure to give the employer timely notice of the injury providing his belief meets the test of ordinary prudence. Brown, *supra*. Good cause for delay from the viewpoint of ordinary prudence is ordinarily a question of fact. Texas Indemnity Insurance Company v. Cook, 87 S.W.2d 830 (Tex. Civ. App.-Austin 1935, writ ref'd). We conclude that the hearing officer erred in finding that the claimant did not offer any reasons for his failure to notify his employer of his alleged injury of (date of injury 1). However, having reviewed the record we cannot conclude that Conclusion No. 5 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. If the hearing officer erred in determining adversely to the claimant on the issue of good cause for failure to timely notify the employer of the alleged injury of (date of injury 1), such error would not affect our decision in this case since we have upheld the finding of no injury in the course and scope of employment on (date of injury 1).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge