APPEAL NO. 931006

On October 1, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). The issues to be resolved at the hearing were: 1) whether the appellant (claimant) was injured in the course and scope of his employment with his employer, (employer)., on (date of injury); 2) whether the claimant reported his injury to his employer not later than 30 days after (date of injury); 3) whether the claimant's medical condition is the result of a (date of injury), work-related injury; and 4) whether the claimant has disability. The hearing officer found that the claimant tripped and fell while at work on (date of injury), but that he did not suffer the claimed injuries when he fell. The hearing officer further found that the claimant failed to give timely notice of his injury to his employer and failed to show good cause for failing to give timely notice. In addition, the hearing officer found that the claimant did not have disability. The hearing officer decided that the claimant is not entitled to workers' compensation benefits under the 1989 Act. The claimant disagrees with the hearing officer's decision and requests that it be reversed. The respondent (carrier) responds that the decision is supported by sufficient evidence and requests affirmance.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified that he injured his back, elbows, and face at work on (date of injury), when he tripped over a pallet and fell face down on the floor and on a case of cans he was carrying. He said the accident was witnessed by (RC), who was a coworker, and by two supervisors, (SS) and (BW). He said he got up and continued to work. He said that although he was in pain, he did not complain to anyone other than RC about being injured. The claimant speaks a limited amount of English so he said he asked RC to call (MJ), who is a work counselor for the employer, the next day and report that he was injured. The claimant said RC called MJ the day after the accident and told her that he "had fallen." The claimant did not know whether RC told MJ that he was in pain. The claimant said he continued to work for the employer until the end of January 1993, when he quit and went home to his family in South Texas. The claimant said he stopped working for the employer because he did not have transportation to get to work (RC had been driving him to work until the end of January 1993 when RC had a car accident) and because RC was returning to South Texas. He said that had he had transportation to get to work he would have continued to work for the employer. The claimant further testified that he did not seek medical attention for his claimed injury until February 22, 1993, because he was "hoping it would go away." On February 22, 1993, he said he saw (Dr. L), a chiropractor. The claimant said that since returning to South Texas he has sought work at two places but was not employed because of "my back." The claimant did not testify to the effect that he thought his injury was not serious.

RC testified that she saw the claimant fall at work on (date of injury), and that at his

request she called MJ the next day and reported that the claimant had fallen at work and was "sore." She said that when MJ asked her how the claimant looked, she said "he looks okay." RC also said that the day after the claimant saw Dr. L, she again called MJ about the accident.

In a sworn written statement, MJ denied receiving notice of the claimant's claimed work-related injury until sometime in February 1993 when Dr. L's clinic called to verify workers' compensation coverage. MJ said that it was not until the day after Dr. L's clinic called her that RC called her and talked to her about the claimant's injury.

(BC), the employer's branch manager, stated in a sworn written statement that the employer was not notified of the claimant's claimed work-related injury until February 22, 1993, when Dr. L's clinic called the employer. She said that after she received the call from Dr. L's clinic she talked to the claimant's supervisors, SS and BW, and that she was told that when the claimant fell he used his arms to brace himself, stood up, dusted himself off, said he was fine, and went right back to work. BC also stated that the claimant did not lose any time from work. Personnel notes of BC indicate that SS and BW also told her that the claimant had no cuts, bruises, or marks of any kind on his body after he fell, except for maybe a tiny scratch on his face.

In a sworn written statement, SS said that in (month year) he saw the claimant trip over a pallet and fall to the floor on his side. He said that when he asked the claimant how he was, the claimant said he was "okay." He said the claimant continued to work and did not complain to anyone. SS further stated that no report was made of the accident because the claimant did not complain of being injured.

Dr. L's records reflect that he saw the claimant on February 22, 1993, and that the claimant reported that he was injured at work on (date of injury), when he fell face down hitting both elbows. Dr. L diagnosed right rotator cuff and biceps sprain/strain associated with supraspinatis tendonitis, left elbow sprain, cervical sprain/strain associated with cervical intervertebral disc syndrome, and lumbar sprain/strain associated with lumbar facet syndrome. Dr. L gave the claimant work restrictions, including no lifting greater than 20 pounds above the waist.

The hearing officer found that the claimant tripped and fell while at work on (date of injury); that the claimant did not suffer the claimed injuries when he fell at work; that the employer was not notified of the alleged injury until February 22, 1993; that the employer did not have actual knowledge of the claimed injury; and that it was not reasonable for the claimant to delay reporting his claimed injury until February 22, 1993. Based on his findings of fact the hearing officer concluded that claimant failed to establish by a preponderance of the evidence that he was injured in the course and scope of his employment on (date of injury); that neither the claimant nor anyone on the claimant's behalf notified the employer of the claimed injury within 30 days after (date of injury); that the claimant failed to show good cause for his failure to timely notify the employer of the claimed injury; and that the claimant has not suffered disability. The hearing officer decided that the claimant was not

injured in the course and scope of his employment and that he was not entitled to workers' compensation benefits.

Having reviewed the record, we conclude that the hearing officer's findings of fact are supported by sufficient evidence and that the findings are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See* Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ).

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 subtitle." Section 401.011 (10). The claimant has the burden to prove that he was injured in the course and scope of his employment. Johnson, *supra*. The hearing officer is the judge of the weight and credibility to be given to the evidence. Section 410.165(a). A claimant's testimony is that of an interested party and it only raises an issue of fact for the fact finder to determine. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). The hearing officer may believe all, part, or none of the testimony of any witness, and may believe one witness and disbelieve others. Cobb v. Dunlap, 565 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). In the instant case, it is undisputed that the claimant had an accident at work on (date of injury). The burden was on the claimant to establish a causal connection between the injuries claimed and the work-related accident. We have previously observed that "[e]ntitlement for workers' compensation does not arise from accidents, but from compensable injuries." *See* Texas Workers' Compensation Commission Appeal No. 92276, decided August 5, 1992. Whether the claimed injuries were linked to the accident was a factual question to be determined by the hearing officer. The claimant failed to persuade the hearing officer that the claimed injuries were causally related to the accident. The hearing officer found that the claimant was not injured when he fell at work and, although different inferences might be drawn from the evidence, we cannot conclude from the evidence presented that that finding is against the great weight and preponderance of the evidence.

Section 409.001(a) provides that for injuries other than occupational diseases, an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs. The claimant has the burden to show timely notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). In the instant case, the claimant relied on the testimony of RC to establish timely notice of injury. However, MJ denied receiving notice of injury until Dr. L's office called on February 22, 1993, well after the 30-day notice period expired. This conflict in the testimony of the witnesses was for the hearing officer to resolve. He could believe MJ's testimony over that of RC concerning whether notice was timely given to the employer. The hearing officer's finding of no timely notice is not against the great weight and preponderance of the evidence.

A claimant who fails to give the employer timely notice of injury has the burden to

show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). In the instant case, the claimant did not assert good cause nor did he present any evidence on good cause. Thus, we have no basis to disturb the hearing officer's finding that good cause did not exist for failure to give timely notice.

It has been held that the need for notice of injury to the employer can be dispensed with when the employer or insurer has actual knowledge of the injury. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Section 409.001(a)(1) codifies the actual knowledge exception to timely notice of injury. Generally, actual knowledge of an injury is a fact question and the claimant has the burden of proof to show that the employer had facts that would lead a reasonable person to conclude that a compensable injury had been sustained by the claimant in the accident which the claimant's supervisors witnessed. *See* Miller v. Texas Employers Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). In Miller, the court held that evidence that the employer had notice of the employee's five-foot fall from a truck bed and that the employee landed on his back or side on asphalt pavement, together with evidence that the employee began to slow down in his work within the 30-day notice period, presented a question for the finder of fact with respect to whether the employer had actual knowledge of the injury. The court said that the facts did not establish, as a matter of law, either that the employer had notice or that the employer did not have notice of a compensable injury. The court concluded that the trial court erred in granting the carrier's motion for instructed verdict since there was evidence which would support a jury finding that the employer had actual knowledge that the claimant sustained a compensable injury. Thus the case was remanded in order to allow the fact finder to determine the actual knowledge issue.

In Fairchild v. Insurance Company of North America, 610 S.W.2d 217 (Tex. Civ. App.-Houston [1st Dist.] 1980, no writ), a stack of paper fell over on the employee knocking him to the floor. Both the president of the company and the employee's supervisor heard the paper hit the floor and went over to the employee and asked the employee if he was hurt, to which he answered that he thought he was fine. During the remaining period of his employment with the employer, the employee never notified or mentioned to anybody that he was hurt as a result of the accident. The jury found that the employee sustained an injury in the course and scope of his employment, but that the employer did not have notice of the injury within 30 days. On appeal, the employee urged that since his supervisor and the president of the company were aware of the accident it relieved him of the obligation to notify his employer that he had sustained an injury. The court said:

> This is true in cases where the injury is apparent or there was evidence which would show that the employer had actual knowledge of the injury. Miller v. Texas Employers Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). But in our case, the record is void of any evidence which would show that the employer had actual knowledge of appellant's injury. Appellant exhibited no signs of injury, he sought no medical treatment for any ailment, he missed no time from work, nor did he even mention that

he suffered in any way from the accident.

According to the evidence in the present case, the supervisors saw the claimant fall, get up, dust himself off, and then go back to work. When asked, the claimant told the supervisors he was "okay." The claimant continued to work without complaint to the supervisors and there is no evidence that he slowed up in his work. The claimant did not lose any time from work and did not seek medical treatment for two months. Given this evidence, we cannot conclude that the finding that the employer did not have actual knowledge of the claimed injury is against the great weight and preponderance of the evidence. In any event, if the hearing officer erred in the determination of notice of injury to the employer or actual knowledge of the injury by the employer, the outcome of the case would not change since the finding of no injury in the course and scope of employment is not against the great weight and preponderance of the evidence.

"Disability" means "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since the claimant failed to establish that he sustained a compensable injury, he could not have disability as defined by the 1989 Act.

Lastly, the claimant complains on appeal that he was "poorly represented" by the ombudsman at the hearing and that the ombudsman failed to bring out important "parts" that would have been favorable to the claimant. First, we do not consider the claimant's complaint to afford any basis for disturbing the decision of the hearing officer. Second, the ombudsman assists, but does not represent, an unrepresented claimant. Section 409.041(b). Third, the claimant fails to indicate what evidence was not brought out at the hearing. Fourth, having reviewed the record it is our opinion that the ombudsman assisted the claimant in a competent and professional manner at the request of the claimant. Given the evidence of the claimant's behavior immediately following the accident, his continuing to work without complaint, and his delay in seeking medical treatment for two months after the accident and after he quit his job, it was certainly not an easy task to try to persuade the fact finder that a logical, traceable connection existed between the accident and the claimed injuries.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

ONCUR IN RESULT:

Gary L. Kilgore
Appeals Judge