APPEAL NO. 93201

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was convened in (city), Texas, on November 4, 1992, before hearing officer (hearing officer). As the hearing officer's statement of the case reflects, the record of the hearing was left open, by agreement of the parties, until November 18th for supplementation, and until November 30th for objection to any supplementation. On November 18th, the carrier requested additional time to supplement the record, and the record was left open for supplementation until January 30, 1993. On January 29th the carrier filed a second request for extension; that request also was granted and the record was left open for further supplementation until February 15th, when it closed.

The appellant, hereinafter claimant, appeals the hearing officer's determination that she was not injured in the course and scope of her employment, and that she did not have good cause for failing to timely report an alleged injury. The respondent, carrier herein, contends that the hearing officer's decision is supported by sufficient probative evidence.

DECISION

We affirm the hearing officer's decision and order.

The claimant worked as a home health care aide for the (employer). She testified that on (date of injury), she was assigned to assist a patient who was overweight and paralyzed on one side. She stated that she was required to transfer the patient from a wheelchair to the bed, a maneuver which required the claimant to lift the patient onto a board and slide her onto the bed. The claimant stated that while sliding her on the bed, with the claimant hanging on to her shoulders, she felt a sharp pain in her back and neck. (The claimant testified that a mechanical lifting device was available but the patient, who she said was a difficult person, did not want to use it.) The claimant said she completed her shift that evening, then returned home where she described symptoms of pain and general weakness to her husband who advised her to see a doctor and inform her employer. However, the parties stipulated that the claimant did not report an injury to her employer within 30 days, and she said she did not see a doctor until May 26th, the same date she informed her employer of the injury.

The claimant said she did not immediately notify her employer of her injury because of financial reasons and her need to keep working. She also said she was afraid she would get fired, stating that her sister, who had worked for the same employer, was instructed to turn in her beeper after she had a work-related injury. She said she had never had a workers' compensation claim, and that she was not familiar with the process. The claimant also said that she thought her back problems would get better.

The claimant continued to work for employer during April and most of May; time

sheets showed she occasionally worked overtime. She said she worked Monday, May 25th, then because of the pain she was experiencing decided to see a doctor. She saw her doctor, Dr. P on May 26th. A "Workmen's Compensation Questionnaire" she filled out at the doctor's office describes the accident as, "I was sent to put a patient to bed . . . on about the third day, I was transferring pt. from wheelchair to the bed when I felt the strain, and stress, in my neck and shoulders." A separate form lists her complaint as "neck pain, shoulders. I also have a stressful job . . . I also do a lot. I just never seem to be able to relax. Sleepless nights, waking up during the night." Dr. P apparently treated her with therapy and medication and released her to light duty work.

The same day she saw Dr. P, the claimant said she went into work and filled out an accident report. The description of the accident stated "Transferring client to bed from wheelchair. Putting client to bed. [Claimant] states that because of heavy case load she was feeling `stressed out.' [Claimant] states she began feeling pain in neck and shoulders later that evening (10:00 P.M.) (date of injury)." Under the category, "Describe Injuries," the report said "Pain in shoulders and neck. [Claimant] states pain `comes and goes.' [Claimant] states she was `stressed out' due to case load." The claimant expressed concern at the hearing that some statements in the report might have been added after she signed it.

At the employer's request, the claimant also saw employer's doctor, (Dr. C), who also released her to light duty work. The claimant said she went back to work between June 8th and June 17th doing office work such as filing and copying. She said on June 17th, after being given a large stack of papers to copy, she was in severe pain. She said she went back to Dr. P, who took her off work entirely, although she said she was not certain whether he documented it.

The claimant had been in a car accident in April 1991, in which her head hit the car's windshield. However, she denied that she had any pain or residual effects from this accident. Medical records from that accident show claimant had paraspinous muscle tenderness in her neck, and that she was given a cervical collar. X-rays of her cervical spine disclosed no bony abnormalities. Claimant's husband testified that the claimant complained off and on about pain after April 1st, that he knew of no other injury she had suffered, and that she was afraid she would lose her job if she reported an injury and she originally did not want to notify her employer until she knew the injury was serious.

Claimant said she continued to see Dr. P for approximately two and one-half months, and that he referred her to a Dr. S. Because her pain continued to worsen, she sought a second opinion and began treating with Dr. L. Dr. L ordered tests, including MRIs of the cervical and lumbar spines, CT scans, and an EMG and nerve conduction velocity study. On September 1st Dr. L wrote that the MRIs showed disc herniation at C4-5 and C6-7, as well as small herniations at L2-3 and L3-4, possible lateral disc herniation at L4 and L5 with

radiculopathy and a moderate sized disc herniation centrally at L5 and S1 which is also causing radiculopathy. The claimant was also seen by Dr. S, a neurosurgeon, who wrote on September 16th that the claimant had a disc herniation and osteophyte at C6-7, with small adjacent protrusions at C4-5 and C5-6. He also stated the claimant had degenerative changes at L2-3, L3-4, L4-5, and L5-S1, with a posterolateral disc herniation at L4-5 on the left, a central disc herniation at L5-S1, and small central herniations at L2-3 and L3-4. Both doctors reported claimant sustained pain after lifting a patient.

On October 27th the claimant was seen by (Dr. J) for an independent medical examination. Dr. J summarized the claimant's medical records and stated "CT at 4 and 5 shows marked degenerative changes at 5, 1. There may be a slight central disc herniation at 4, 5. Patient states that most of her symptoms are on the left side however." He said her lumbar spine MRI showed "significant findings especially at 6, 7 manifested by an osteophyte and herniated nucleus pulposus on the right at 6, 7. Again, patient has most of her symptoms on the left side. There are changes at C4, 5 and C5, 6 which may be construed as being subligamentous calcification. There is some calcification of the posterior longitudinal ligament behind the C7 vertebral body." Dr. J also noted significant degenerative changes in the lumbar spine and gave his diagnosis as aggravation of preexisting significant cervical spondylosis and degenerative lumbar disc disease. He said he could find no objective evidence of radiculopathy.

Dr. J, however, stated that he could not fully evaluate claimant's condition until he reviewed x-rays taken at the time of her automobile accident. He also stated that although the claimant had signed a records release, he had had difficulty securing the films from the hospital. The hearing officer issued a subpoena *duces tecum* for these records and extended the time in which the record of the hearing would be left open, in order that Dr. J have an opportunity to receive and evaluate the material.

In a letter dated February 1, 1993, Dr. J stated that he had reviewed a lateral x-ray of claimant's cervical spine dated 4/2/89 (Dr. J subsequently corrected this date to read "4/28/91"). He wrote, "I saw her for her injury of 4/1/92 and found that she had narrowing of C6, 7. From these x-rays I conclude that her x-ray findings were present before 4/28/91 and I would say had taken several years to develop. . . . The accident of 4/1/92 may have aggravated at least on a temporary basis her preexisting condition as evidence on x-rays of her cervical spine . . ."

(Ms. DP), who is employer's director of the home health program and claimant's supervisor, said she was first aware that claimant was contending she had a job-related injury when the claimant called in on May 28th to say she had been injured and taken off work. She said the claimant came in to see her the next day, saying that on Monday, the 25th, she awoke in severe pain after having worked the week before and having been off over the weekend. She said the claimant did not tell her she had been injured on the job,

but that she had been "stressed out" over working with the particular patient the claimant had seen on April 1st, who Ms. DP agreed was a difficult person. She said during that conversation the claimant also asked to continue to work, but Ms. DP told her she could not until a doctor released her to return to work.

Ms. DP said the claimant was later given light duty work such as filing and paperwork, which she said the claimant performed with no problems. She said, however, that the claimant appeared angry and complained of headaches and dizziness. Ms. DP also said that she had not been told by any of employer's case managers or anyone else that claimant was in pain or unable to do her job after April 1st.

(Ms. S), employer's associate director and chief financial officer, said she became aware of claimant's injury when she was informed by Ms. DP. She said she had heard the claimant was angry because she was required to fill out an accident report and go to employer's doctor. She said the claimant worked light duty for one week, then said she could not work any more. Ms. S said the last time she talked to claimant was in July or August when claimant reported to a clinic for a hepatitis shot; she spoke to claimant on the telephone at that time, and said that claimant was still angry and said she did not have to tell Ms. S anything. Ms. S said the claimant still has a light duty job available to her. She denied that the employer, a nonprofit association, retaliates in any way if an employee files a workers' compensation claim. She said they had had 14 claims this year, with four employees currently on light duty. One such employee, Ms R, testified at the hearing that she has had three workers' compensation claims while working for this employer and is currently on light duty work. Ms. S said she was aware that claimant's sister had had a workers' compensation claim; Ms. DP said that as far as she knew, claimant's sister was still employed by employer.

I.

DID THE HEARING OFFICER ERR IN HOLDING THAT
THE CLAIMANT DID NOT HAVE GOOD CAUSE
FOR FAILING TO TIMELY REPORT HER ALLEGED INJURY?

The 1989 Act provides that an 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. Article 8308-5.01(a). An employee's failure to so notify the employer relieves the employer and its insurance carrier of liability under the Act unless the employer or person eligible to receive notice, or the insurance carrier, has actual knowledge of the injury; the Commission determines that good cause exists for failure to give notice in a timely manner; or the employer or the insurance carrier does not contest the claim. Article 8308-5.02. In this case, the hearing officer determined that the employer did not have actual knowledge of an injury, a finding which has not been appealed. The claimant, however,

has appealed the hearing officer's determination that she lacked good cause for failure to timely notify.

"Good cause" for failing to timely comply with notice and filing requirements has been defined as that legal excuse preventing a reasonably prudent person from complying with the requirements, and it must continue to the date when the claim is actually filed. Whether the claimant has shown good cause under the ordinarily prudent person test is usually a question of fact. Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841 (Civ. App.-Corpus Christi 1991, no writ).

The claimant in this case testified that her failure to timely notify her employer of her injury was due to three concerns: her feeling that the problem would get better, her fear of losing her job, and her need to continue working for financial reasons. While trivialization of an injury has been held to constitute good cause for failure to timely notify, *see* Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992, the hearing officer is not bound to accept the claimant's testimony on this point as credible. Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992. A claimant's belief his or her injuries are not serious must be bona fide, Texas Casualty Insurance Co. v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). While no medical evidence existed during the period April 1st through May 26th that would confirm or deny the claimant's feelings about her injury, the hearing officer may have found that claimant's alleged belief that her condition would improve to be at odds with her testimony that she felt an immediate sharp pain, and a weakening that evening which she reported to her husband. The hearing officer is the sole judge of the relevance and materiality of the evidence and its weight and credibility. Article 8308-6.34(e). As such, she was entitled to reconcile any conflicts in any witness's testimony. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ).

The same is true regarding the claimant's other allegations of good cause. We note with regard to the claimant's statement that she was afraid she would lose her job, and her contention that she knew nothing about the workers' compensation system, Texas courts have held that an employee's ignorance of the provisions of the Workers' Compensation Act does not constitute good cause for such delay in reporting. Applegate v. Home Indemnity Co., 705 S.W.2d 157 (Tex. App.-Texarkana 1985, writ dism'd). That case holds that "the test . . . is not whether the insurer was harmed by the delay, but whether or not the injured worker was prudent in his beliefs that caused the delay." *Id*. at 159. Here the hearing officer, having heard testimony that claimant's sister received workers' compensation benefits and was not terminated by this employer, could have reasonably found that the claimant's fear of losing her job, and thus her income, was not prudent.

Upon review of the evidence, we find that the hearing officer's determination on the issue of good cause is not against the great weight and preponderance of the evidence.

T.E.I.A. v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). Neither is her decision an abuse of discretion, *see* Texas Workers' Compensation Commission Appeal No. 92084, decided April 15, 1992.

II.

DID THE HEARING OFFICER ERR IN DETERMINING THAT THE CLAIMANT WAS NOT INJURED IN THE COURSE AND SCOPE OF HER EMPLOYMENT?

Despite the fact that a finding of no timely notice and no good cause effectively extinguishes a claimant's rights under the Act, Petroleum Casualty Co. v. Canales, 499 S.W.2d 734 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.), we will nevertheless consider claimant's argument that the hearing officer erred in finding that any injury she suffered arose from other causes, and was not job related.

In her appeal, the claimant cites case law for the proposition that in order to be compensable, an injury must be of a kind and character having to do with and originating in the employer's work or business, and must be sustained by the employee while engaged in the furtherance of that work or business, *citing* Duncan v. Employers Casualty Co., 823 S.W.2d 722 (Civ. App.-El Paso 1992, no writ). While neck and back injury may be said to be of a kind and character having to do with the home health care business, in which the lifting of incapacitated patients could be a usual occurrence, the claimant nevertheless still had the burden of proof to show that her injury actually was sustained while engaged in the furtherance of the employer's business.

Here, the claimant consistently testified that she felt immediate, sharp pain in her neck and back upon lifting the patient. However, a claimant's testimony, even where uncontroverted, raises only a fact issue for the hearing officer. In this case, the hearing officer could have believed that the claimant's testimony regarding immediate pain from the incident was diminished in its credibility by her later statements to her employer and to her doctor that she was "stressed out" from work. Further, her supervisor testified that claimant had initially told her that she awoke with pain more than a month and a half later, and that she said nothing at that time about the lifting incident. As noted above, the hearing officer is entitled to judge the credibility of witnesses, assign weight to their testimony, and resolve any evidentiary conflicts and inconsistencies. Burelsmith, *supra*.

In addition to conflicting testimony, the medical evidence also was in conflict. Claimant's second opinion doctor found herniated discs at several levels, and recommended surgery. However, Dr. J reviewed x-rays taken shortly after claimant's car accident and concluded that her cervical problems were preexisting. He also found her lumbar condition to be degenerative. The hearing officer may also reconcile conflicts in medical evidence.

Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Civ. App.-Houston [14th Dist.] 1984, no writ). Based on the evidence in the record, there was sufficient evidence to support the hearing officer's determination that the claimant's "neck and back problems were caused by some event which cannot be identified." We will not substitute our judgment for that of the hearing officer unless we find the decision and order to be so against the great weight and preponderance of the evidence as to be manifestly unjust and unfair. In re King's Estate, 150 Tex. 662 244 S.W.2d 660 (1951). This we decline to do under the facts of this case.

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCURRING IN PART, DISSENTING IN PART:

I dissent from the part of the decision that affirms the hearing officer's finding that claimant did not have good cause for failure to report her contended injury within 30 days. In my opinion, the great weight and preponderance of evidence is contrary to this finding.

This case presents facts constituting "text book" good cause for failure to give a 30-day notice because of the belief that the injury is trivial. Claimant kept working after (date of injury). She even scheduled herself for overtime hours, at a job she personally considered, and which would hopefully be acknowledged by most people, as stressful. She eventually went to the doctor and forthwith reported to her employer that she was injured. Although the majority opinion notes that the hearing officer could have believed that claimant, solely on the basis of a complaint to her husband the night of (date of injury), should have appreciated the seriousness of her accident, this is overwhelmingly outweighed, in my opinion, by her subsequent behavior. Common experience of most of us should tell us that we complain to our spouses of many aches and pains, few of which send us to the doctor. Farmland Mutual Insurance Co. v. Alvarez, cited in the majority

opinion, instructs the finder of fact to review the totality of the claimant's conduct in determining whether reasonably prudent behavior was shown, not just isolated behavior. In effect, the hearing officer's determination, if based upon the (date of injury) conversation with the claimant's husband, to the utter exclusion of all that followed, penalizes the claimant for continuing to work, or for not attributing her condition to a date safely within the 30 day period.

The purpose of the notice requirement in Article 8308-5.01, as we've said many times before, is to allow prompt investigation of a claim. The existence of the good cause exception in Article 8308-5.02 makes clear that the notice statute is not intended to operate as a fine wire mesh screen through which all claims must pass.

Susan M. Kelley
Appeals Judge