APPEAL NO. 93498

On May 11, 1993, a contested case hearing was held with the hearing record being closed on May 28, 1993. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the claimant did not sustain an injury in the course and scope of his employment on ___, did not give timely notice of injury to his (employer), and did not have good cause for failing to give timely notice of injury. The hearing officer decided that the claimant is not entitled to workers' compensation benefits under the 1989 Act. The appellant (claimant herein) disputes certain findings of fact and asserts that the hearing officer should not have considered the issue of timely notice of injury because it was not a disputed issue at the benefit review conference (BRC). The respondent (carrier herein) responds that the hearing officer's findings and decision are supported by the evidence and that the notice of injury issue was properly considered by the hearing officer. The carrier requests that we affirm the hearing officer's decision.

DECISION

The decision of the hearing officer is affirmed.

The claimant was hired by the employer as a laborer on or about September 1, 1992. The claimant testified that on ___, he injured his back lifting and moving a 150 to 200 pound bale of clothes in the employer's thrift store. The claimant said that there were no witnesses to the injury. The claimant said he was terminated on (day after date of injury), due to a verbal dispute he had with a volunteer worker. The claimant did not see a doctor until he saw, (Dr. A), on January 27, 1993. Dr. A's progress note of January 27th indicates that the claimant complained of "knots" in his back and a possible hernia, but does not indicate any work related cause for the complaints. X-rays of the claimant's lumbar spine taken on January 28, 1993, revealed mild degenerative changes with no fractures seen. Dr. A prescribed pain medication, and on February 1, 1993, wrote that he would only see the claimant on an emergency basis for the next 30 days. On February 4, 1993, the claimant was examined by (Dr. R), at a hospital emergency room. Dr. R diagnosed a lumbar strain and a left inguinal hernia. The emergency room note indicates that the claimant told Dr. R that he was injured at work on (alleged date of injury), while lifting a heavy box. The claimant returned to the hospital emergency room on May 5, 1993, and was examined by (Dr. RY), who diagnosed "low back pain." A patient note indicates that the claimant told Dr. RY that he was injured in August 1992, while lifting at work. The claimant testified that he has been unable to work since ___, because of the injury he claims he sustained at work on that day. The claimant admitted that he did not inform his employer that he was injured at work until February 1, 1993, but asserted that he had good cause for the delay in giving notice.

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). The burden is on the claimant to establish that the injury occurred while he was engaged in or about the furtherance of his employer's business and that the injury was of a kind and character that had to do with and originated in the employer's business. Director, State Employees Workers' Compensation Division v. Bush, 667 S.W.2d 559 (Tex. App.-Dallas 1983, no writ). The question of whether an injury was sustained in the course and scope of employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ). A doctor's recitation of the history of the injury as reported to the doctor by the claimant does not necessarily compel a determination that the injury in fact occurred as alleged by the claimant. *See* Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). Under the 1989 Act, the hearing officer is the trier of fact in a contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e) and (g). An injury at work need not be witnessed in order to be compensable; however, as an interested witness, the claimant's testimony does no more than raise a fact issue to be decided by the trier of fact. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-1980 Eastland, no writ). The hearing officer is privileged to believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Having reviewed the record, we conclude that there is sufficient evidence to support the hearing officer's findings and conclusion that the claimant was not injured in the course and scope of his employment, and further conclude that the findings and conclusion are not against the great weight and preponderance of the evidence. *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).

Because the claimant failed to establish that he sustained an injury in the course and scope of his employment, he has not sustained a compensable injury and, therefore, he is not entitled to benefits under the 1989 Act. A claimant's entitlement to income benefits and medical benefits under the 1989 Act is dependent on the claimant having sustained a compensable injury. Articles 8308-4.21(a); 8308-4.61(a). Consequently, the question of whether the claimant gave timely notice of injury or had good cause for not giving timely notice is, in essence, rendered moot by the determination of no compensable injury. Thus, error, if any, by the hearing officer in finding against the claimant on the questions of timely notice and good cause for delay in giving notice would not amount to reversible error. We will, however, briefly review the evidence and arguments on the notice issue.

First, we do not disagree with the hearing officer's determination that notice of injury was an unresolved disputed issue from the BRC, notwithstanding the fact that the issue as

stated on the BRC disputed issue form relates only to injury in the course and scope of employment. In determining that notice of injury was an issue at the BRC, as urged by the carrier, the hearing officer looked to the positions of the parties as reflected on the BRC report. Part of the carrier's position at the BRC, which it carried forward to the contested case hearing, was that the claimant was not due benefits because he had not reported any accident or injury occurring during his employment in ___, until February 1, 1993. While the claimant asserted at the hearing that notice of injury was not an issue, he also asserted that he had good cause for failing to give timely notice. We have previously looked to the positions of the parties as stated in the BRC report and their positions at the hearing in determining whether the hearing officer failed to address an issue raised at the BRC. *See* Texas Workers' Compensation Commission Appeal No. 92071, decided April 9, 1992; Texas Workers Compensation Commission Appeal No. 93335, decided June 17, 1993. In the particular fact situation presented in this case, we believe that the hearing officer could properly conclude that notice of injury was an issue to be determined at the hearing.

Second, we conclude that the claimant's admission that he did not give notice to the employer of his alleged injury of ___, until February 1, 1993, sufficiently supports the hearing officer's finding and conclusion that the claimant failed to give notice of injury to his employer within 30 days as required by Article 8308-5.01(a).

Third, we conclude that the evidence supports the hearing officer's findings and conclusion that the claimant did not establish good cause for failing to give timely notice of injury to his employer and that the findings and conclusion are not against the great weight and preponderance of the evidence. Article 8308-5.02 provides to the effect that the employer and carrier are relieved of liability if the claimant fails to give timely notice of injury unless the employer or carrier has actual knowledge of the injury or unless the Commission determines that good cause exists for failure to give timely notice. There was no evidence that the carrier or employer had actual knowledge of the alleged injury within 30 days of the injury. It has been held that a claimant who fails to give his employer notice of his alleged injury within the 30-day statutory time period for giving notice 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.).

The claimant gave several explanations for his five month delay in giving notice of injury to his employer. He testified that he believed his injury was trivial; however, he also testified that he had been unable to work since ___, because of the pain from his injury, and that he was "sore the whole time" and "never got well." Whether or not the claimant had a good faith belief that his injury was not serious and whether he acted with ordinary prudence in the circumstances were questions of fact to be decided by the hearing officer. Brown, *supra*. Given the claimant's testimony to the effect that his injury was of a serious enough nature to prevent him from working during the five months before giving notice of injury, we conclude that the hearing officer's finding that the claimant did not have a good

faith belief that his injury was trivial is not against the great weight and preponderance of the evidence.

The claimant also testified that, although he knew he was "hurt" at work, he did not know he had been "injured" and thought he had kidney problems or cancer as opposed to a back injury until he saw Dr. A on January 27, 1993. Whether the claimant had a good faith belief that his injuries were caused by something other than an accident at work and whether he exercised ordinary prudence were fact questions for the hearing officer to decide. Texas Employers Insurance Association v. Leathers, 395 S.W.2d 601 (Tex. 1965). We cannot conclude that the hearing officer erred in failing to find that the claimant had a good faith mistaken belief as to the cause of his injury given the claimant's testimony that he knew he was hurt at work at the time of the accident and given the absence of any medical opinion during the five month delay in giving notice which would support an explanation of mistaken belief as to the cause of injury.

The claimant also said that he did not report his injury for five months because he was afraid of being fired. This explanation for good cause for delay is baseless inasmuch as the claimant was terminated the day after his injury for getting into a dispute with a volunteer worker and, therefore, he had no reason to be afraid of losing his job as he had already lost it for reasons unconnected with his alleged work-related injury.

The claimant further asserted as good cause for delay in giving notice of injury that he was unaware that a worker's compensation system existed in Texas until he was advised of such by an attorney in late January or early February 1993, and he further asserted that he was not aware that his employer had workers' compensation insurance coverage until late January or early February 1993. The court in Applegate v. Home Indemnity Company, 705 S.W.2d 157, 160 (Tex. App.-Texarkana 1985, writ dism'd), observed that Texas courts have consistently held that an employee's ignorance of provisions of the Workers' Compensation Act does not constitute "good cause" in regard to giving notice of injury or filing a claim. We further observe that Major Wheeler, who is the employer's manager, testified that it is the policy of the employer to notify all employees that the employer has workers' compensation insurance, that the employer's employee handbook informs employees of the existence of such insurance, and that there is a large, illuminated sign next to the time clock where employees punch in and out of work which notifies employees that the employer has workers' compensation insurance. The claimant has a general equivalency diploma and can read and write, and his time card showed that he used the time clock which was said to be next to the sign regarding workers' compensation coverage, on more than one occasion. Having reviewed the record, we cannot conclude that the hearing officer erred in determining that the claimant failed to show good cause for failing to give timely notice of injury to his employer. We conclude that the hearing officer's determination that the claimant did not establish good cause is sufficiently supported by the evidence and is not against the great weight and

preponderance of the evidence.

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge