APPEAL NO. 93698

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001, *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 1, 1993, in (city), Texas, (hearing officer) presiding. The issues at the CCH were: 1. whether the appellant (claimant herein) injured her right hand on (date of injury), in the course and scope of employment; 2. whether the claimant had good cause for not timely reporting this injury to the employer; 3. whether the claimant sustained an abdominal hernia on (date of injury), in the course and scope of employment; and 4. whether the claimant had good cause for not timely reporting this injury to the employer. The hearing officer found that the claimant suffered both the alleged hand and hernia injuries in the course and scope of her employment. The hearing officer also found that the claimant had good cause for failing to timely report her hernia injury to the employer but not for failing to report the hand injury. Based on these finding the hearing officer denies benefits for the claimant's hand injury and orders benefits for the claimant's hernia injury.

The claimant appeals asking that we review the evidence concerning her hand injury. The cross-appellant/respondent (carrier herein) files a response to claimant's request for review contending that the hearing officer's decision as to the hand injury was supported by sufficient evidence. The carrier also files a request for review arguing that the findings of the hearing officer that the claimant suffered a hernia injury in the course and scope of employment and that she had good cause for failing to timely report this injury to the employer are against the great weight and preponderance of the evidence. The claimant files no response to the carrier's request for review.

DECISION

Finding no reversible error in the record and the decision of the officer supported by sufficient evidence, we affirm.

The claimant testified that she started working as a medical secretary for (Dr. M) in October 1992. The claimant testified that beginning on (date of injury), she began to have pain in her right middle finger, due, she believed to excessive writing required by her job. The claimant testified that in early (date) she told Dr. M that her finger hurt and that she needed pencil protectors. Dr. M testified that the claimant never told him in (date), and he would have remembered if she had.

Dr. M also testified the claimant was not required to write anything except phone messages since all other information processing, including billing and insurance forms, were computerized in his office. Dr. M further testified that two other people took phone messages in his office other than claimant and in any given day the combined number of phone messages taken by the three people in his office handling the phone ranged between 20 and 50. (Ms. M), the claimant's office manager, testified that the claimant had calluses on the middle finger of her right hand and that the claimant had told her that these calluses were from excessive writing at the claimant's prior employment.

The claimant testified that on (date of injury), she moved a heavy potted plant in the doctor's office. According to the claimant, the plant had been moved from its original location to make room for the office Christmas tree, and she was moving it back. The claimant testified that while moving the plant she felt stomach pain, but thought it was due to a stomach virus, which she had for several weeks.

Ms. M testified that the claimant did not move the plant, but that another employee moved it. She also testified that the claimant had told her nothing about a virus in January and that the claimant did not lose any time in January. Dr. M stated that in his termination interview with the claimant she did not mention any injury.

Dr. M terminated the claimant on January 29, 1993, due to "problems with appointments." The claimant testified that she filed for and received unemployment benefits. The claimant testified that she saw (Dr. G), her family doctor for 20 years, for a gynecological examination. Dr. G diagnosed the claimant has having a small incisional hernia at the site of previous laparoscopic surgery and acute tenosynovitis. The claimant stated that after discussing the history of her hernia and hand problems with Dr. G, she concluded that they were due to injuries on the job while working for Dr. M. The claimant testified that she reported both her hand and hernia injuries to the Texas Workers' Compensation Commission (Commission) after her visit with Dr. G and was advised by the Commission to notify her employer. The claimant then sent a letter by certified mail to Dr. M's office reporting both the hand and hernia injuries.

Carrier challenges the hearing officer's findings that the claimant suffered a hernia injury in the course and scope of her employment and that she did have good cause for failing to timely report this injury. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Under this standard of review we cannot set aside the challenged findings of the hearing officer. A finding of injury may be based upon the testimony of the claimant alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989); Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. Clearly, in the present case, the hearing officer chose to believe the testimony of the claimant that she suffered the hernia while moving the potted plant at her employer's office. While there was some contrary evidence, it certainly did not constitute the great weight and preponderance of the evidence.

The hearing officer chose to believe the claimant's testimony that she originally believed her abdominal pain to be the result of first a virus, and then later a gynecological problem, rather than her injury. The virus and gynecological problem, apparently by masking or mimicking the symptoms of her hernia injury, caused the claimant to not realize the extent of her injury from moving the plant. In other words, the difficulty of the claimant in understanding the cause of her symptoms caused her to trivialize the injury. Testimony that a claimant believed an injury to be trivial and not disabling is sufficient to show good cause for failure to give the employer timely notice of injury. Aetna Casualty & Surety v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Ft. Worth 1971, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991. In the present case the testimony of Ms. M and Dr. M tended to support, rather than contradict, the claimant's testimony as to triviality.

The claimant asks that we review the determination by the hearing officer that she not receive benefits for the injury to her hand. Section 409.001(a) provides that an employee shall notify an employer of injury not later than the 30th day after which the injury occurs. Section 409.002 provides:

Failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability under this subtitle unless:

(1)the employer, a person eligible to received notice under Section 409.001(b), or the employer's insurance carrier has actual knowledge of the employee's injury;

(2)the Commission determines that good cause exists for failure to provide notice in a timely manner; or

(3)the employer or the employer's insurance carrier does not contest the claim.

In the present case, the claimant's date of hand injury is (date of injury). She testified that she did not discuss her hand problems with her employer until (date), and the employer claims it received no notice until March 1993. Also, unlike with the hernia injury, there is no evidence that the claimant considered her hand injury trivial. There is evidence from the claimant's own testimony, as well as that of other witnesses, to support the determination of

the hearing officer that the claimant is not entitled to benefits for her hand injury because of her failure without good cause to report it to her employer within 30 days.

For the foregoing reasons, the decision of the hearing officer is affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge