APPEAL NO. 93815

This appeal is brought pursuant to 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*.). A contested case hearing (CCH) was held on August 2, 1992, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the respondent (claimant) suffered a back injury in the course and scope of his employment on (date of injury); whether the claimant had good cause for not reporting this injury to his employer within 30 days; and what is the period of disability suffered by the claimant. The hearing officer found in favor of the claimant on the first two of these issues and found disability from April 14, 1993, continuing through the date of the CCH. The appellant (carrier) challenges these determinations based, generally, on insufficiency of the evidence. The claimant urges affirmance.

DECISION

The decision of the hearing officer is reversed and the case remanded for additional findings on the good cause for claimant's not timely reporting the injury to his employer.

The claimant, who testified through a translator, said he worked as a laborer at an apartment complex, and that on (date of injury), he was standing on a table in an apartment removing wallpaper when he fell backwards off the table landing primarily on his buttocks. There were no witnesses to the fall. He felt pain, but did not consider it serious and continued working. He testified that two days later he told his supervisor, (Mr. C), that he had pain in his back, but did not, by his own admission, tell his supervisor about the fall or how the pain originated. The supervisor did not ask. It was not until January 23, 1993, that he first sought treatment for his back. On that date he went to (Dr. I), who, in an undated report addressed "to whom it may concern," stated that the claimant told him that his pain started in the thoracic region about eight months previously and that he also had pain in the lumbar region which began when the claimant fell off a "ladder" while carrying wallpaper on an undisclosed date. Dr. I took x-rays "which indicated a bilateral fracture of L-5" and diagnosed spondylolysis in the lumbosacral region, pain in the thoracic region, and "subluxation at T1, T2." Dr. I sent the x-rays of the lumbar spine to (Dr. KN), a radiologist, for evaluation. Dr. KN's February 1, 1993, report stated his impressions that the claimant had "Grade I spondylolisthesis and bilateral spondylolysis at L5-S1."

Claimant testified, variously, that on February 11, 1993, he told Mr. C that he hurt his back (described as a fracture which eventually would cripple him) and showed Dr. I's x-rays to Mr. C, but said he still did not tell Mr. C how the back injury occurred.[1] Later, however, when asked to describe his conversation with Mr. C on February 11, 1993, the following exchange took place: "And I told him the accident happened here. He [Mr. C] said if it happened here I'll be responsible." He further testified "yes" in response to the question: "Did you tell him [Mr. C] your back hurt because you broke it at work that day?" (He also

[1]According to Dr. I's report, the claimant told Dr. I that he did not tell his employer because he was afraid he might lose his job "and urged me very strongly not to mention it to his employer. . . ."

testified the reference of Dr. I to pain eight months earlier referred to pain in his shoulder, not his back.) Mr. C testified that the claimant first complained to him about back pain on February 11, 1993. According to Mr. C, he asked claimant if his injury occurred at work, and the claimant said, "no." Mr. C prepared a memo of the February 11, 1993, conversation which records the claimant as saying he did not know how or when he injured his back.

According to the claimant, Mr. C told him the x-rays were of poor quality and he should seek better medical care. The claimant continued working until March 23, 1993, when he complained to Mr. C that he could not work any more because his back hurt. Mr. C set up an appointment for the claimant with (Dr. F) on that same day. Dr. F, on March 23, 1993, took additional x-rays and diagnosed "[l]umbar radiculopathy, may have a compression fracture at L-5." Dr. F reports that the claimant told him that the pain developed about six months previous and that he, the claimant, was told "he had a fracture at L-5." (A second review of unspecified radiographs was performed by a (Dr. K) who concluded that the x-rays showed "L5 spondylolysis, with no significant spondylolisthesis evident.") Dr. F referred the claimant to (Dr. G) who examined him on April 14, 1993, read Dr. F's x-rays, and concluded that they "demonstrate a spondylolysis of L5 with no spondylolisthesis." His further opinion was:

> This man has a spondylolysis of L5. This work related injury has likely aggravated his condition in his lower back and has caused him to have a low back pain syndrome.

Dr. G took the claimant off work for four weeks on April 14, 1993, and for another four weeks on May 4, 1993, and recommended physical therapy. The claimant said he did not undergo the therapy because the carrier refused payment. He has not worked since April 14, 1993 and has not received medical care since May 1993.

The carrier introduced excerpts from a medical textbook which dealt with types, origins, and treatment of spondylolisthesis.

It is axiomatic that the claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility and the inferences to be drawn therefrom. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. Campos, *supra*; Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, 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 we will 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 Company, 715 S.W.2d 629, 630 (Tex. 1986). Injury may be proven by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal basis. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

The determinations of the hearing officer pertinent to the issue of whether the claimant suffered an injury in the course and scope of his employment are:

FINDINGS OF FACT

4.CLAIMANT fell from a ladder while hanging wall paper on (date of injury), injuring his low back.

CONCLUSIONS OF LAW

2.CLAIMANT suffered an injury in the course and scope of his employment on (date of injury) (sic), when he fell from a ladder while hanging wallpaper and broke a vertebra in his low back.

Also, in the STATEMENT OF EVIDENCE the hearing officer states that "CLAIMANT saw a chiropractor in January who referred him to a specialist who took x-rays which indicated CLAIMANT had a broken vertebra."

In its appeal, the carrier first contends that Finding of Fact No. 4, as set out above, that the claimant injured his "low back" is not specific enough to support Conclusion of Law No. 2, also set out above, that claimant "broke a vertebra in his low back" and cites Texas Workers' Compensation Commission Appeal No. 92258, decided August 7, 1992, in support of its position. The Appeals Panel, in Appeal No. 92258, which referenced Texas Workers' Compensation Commission Appeal No. 92230, decided July 17, 1992, found that a so-called finding of fact that began: "Claimant has not proven by a preponderance of the evidence that she injured her leg and back . . ." was by its very terms not a finding of fact, but a conclusion of law. Since there were no other findings in the decision of the hearing officer relevant to the determinative issue of the existence of an injury in the course and scope of employment, the Appeals Panel held that this "conclusion of law" had no finding of fact upon which it was based as required by Section 410.168(a) and remanded the case for appropriate findings. The case under consideration is clearly distinguishable. Here, the contested finding is not on its face a conclusion of law. It references no burden of proof and by its terms makes what can arguably only be a finding of fact, i.e., that claimant injured

his low back.

Carrier's further argument that this finding of low back injury is not specific enough to support a conclusion of law that claimant broke a vertebra is also not well taken. In Texas Workers' Compensation Commission Appeal No. 93174, decided April 12, 1993, the Appeals Panel addressed the requirement for basic findings of fact under both the Administrative Procedure Act (APA), TEX. GOV'T. CODE ANN. § 2001 *et seq*. (effective September 1, 1993), and the Texas Workers' Compensation Act, *supra.* Discussing relevant case law as to the APA, the Appeals Panel noted that findings of underlying fact need only be included in an agency's final order if the relevant enabling act establishes mandatory fact finding. More importantly, the Appeals Panel, observing that the Commission is not, as regards this issue, subject to the APA, went on to state the 1989 Act "sets forth no requirements as to how detailed `findings of fact' must be." We believe that Finding of Fact No. 4 is sufficient to support Conclusion of Law No. 2 and complies with Section 410.168(a). Though the latter is more specific than the former, the two are not inconsistent. The carrier cannot reasonably contend to have been misled by the finding especially in light of the discussion of the evidence as set out above and in view of the fact that the issue of injury was contested at the hearing on the basis of there being no fracture.

The carrier also questions on appeal the adequacy of the evidence to support the findings and conclusions of the hearing officer as to the existence of the claimed injury. The hearing officer concluded that the claimant broke a vertebra in his lumbar spine. A careful review of the evidence discloses that Drs. K and KN found spondylolisthesis, but made no mention of a fracture. Dr. I stated that his x-rays "indicated a bilateral fracture of L5." Dr. F diagnoses "[l]umbar radiculopathy, may have a compression fracture at L5." Dr. G diagnoses only spondylolysis, not spondylolisthesis. We do not consider the non-expert testimony of the claimant on this complex subject probative. *See* Texas Workers' Compensation Commission Appeal No. 92083, *supra*. Although a major effort of the carrier at the CCH was to disprove the existence of a fracture and establish that the claimant's condition was congenital and not job related, it relied only on a medical treatise on spondylolisthesis without directing the hearing officer's attention (or that of the Appeals Panel) to any specific portion thereof. This treatise describes four types of spondylolisthesis, only two of which involve fractures. One is congenital and the other degenerative. The grading applied in the textbook to spondylolisthesis is based on "the severity of the displacement of the vertebra above on the vertebra below." (Grade I is 25% or less). Nowhere is this textbook discussion directly related through expert evidence to the actual symptoms and condition of the claimant.

Based on our review of this record, we conclude that the evidence of Dr. I that a fracture was "indicated" and that of Dr. F that the claimant "may have" a fracture was sufficient to support the hearing officer's determination that the claimant suffered a low back injury, specifically a broken vertebra. The remaining medical evidence of spondylolysis and spondylolisthesis is not inconsistent with this conclusion of a fracture. The carrier's textbook evidence, while also not inconsistent with the hearing officer's conclusion, is particularly unenlightening on carrier's contention on appeal "that it is unlikely that the

Claimant's diagnosed condition could be caused by one traumatic event but rather is most probably congenital in nature" (Request for Review and Brief of Appellant, p.7) since such evidence was generic, covered four types of spondylolisthesis, and was not directly tied by the evidence to claimant's condition. As to the question of whether this injury arose in the course and scope of employment on (date of injury), the testimony of the claimant, considered credible by the hearing officer, formed a sufficient basis for his conclusion. For these reasons the determination of the hearing officer that the claimant suffered an injury (broken vertebra) in the course and scope of his employment on (date of injury), is affirmed.

As to the issue of whether the claimant had good cause for not notifying his employer of the injury within 30 days, the relevant determinations of the hearing officer are:

FINDINGS OF FACT

5.CLAIMANT first reported his injury to EMPLOYER as an on the job injury on February 11, 1993.

6.CLAIMANT first sought medical attention for the back condition on January 30, 1993.

7.CLAIMANT acted as a reasonably prudent person in not reporting his injury prior to February 11, 1993.

8.CLAIMANT had good cause for failing to report his injury within thirty days of (date of injury).

CONCLUSIONS OF LAW

3.CLAIMANT had good cause for failing to report his injury to EMPLOYER prior to February 11, 1993.

It is undisputed that the claimant did not report his injury within 30 days of its occurrence on (date of injury). Section 409.002 provides, in relevant part, that the failure of the employee to notify the employer of the injury by the 30th day after the injury relieves both the employer and the carrier of liability for benefits unless "good cause exists for failure to give notice in a timely manner." The standard for good cause adopted by the Appeals Panel is one of ordinary prudence, that is, "whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he had used the degree of diligence required is ordinarily a question of fact to be determined by the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion." Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370 (1948), quoted in Texas Workers' Compensation Commission Appeal No. 93494, decided July 22, 1993, and Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993.

The existence of good cause is a question of fact and the test for reversal is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 91120, decided March 20, 1992. It has also been held by the Appeals Panel that the existence of good cause must continue up to the time the otherwise untimely report of injury is made. Appeal No. 93677, *supra. See also* Texas General Indemnity Company v. McIlvain, 424 S.W.2d 56 (Tex. Civ. App.-Houston [14th Dist.] 1968, writ ref'd). This does not mean that a report of injury must be made "immediately" upon the termination of good cause. Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993. Rather, the "totality of a claimant's conduct must be primarily considered in determining ordinary prudence." Appeal No. 93544, *supra*, and cases cited therein.

The hearing officer found as a matter of fact that the claimant first sought medical care on January 30, 1993. This is clearly in error since Dr. I's report as well as the testimony of the claimant established that his first visit was on January 23, 1993. This error may be clerical in nature and remedied on remand. Claimant contends that he did not seek treatment earlier because he did not consider his injury serious, a conclusion borne out by his continuing to work. Trivialization of an injury, or the bona fide belief that it is not serious has been held by the Appeals Panel to constitute good cause for not reporting an injury. Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. The hearing officer, in conclusory findings, found that good cause existed until February 11, 1993, the time the claimant reported the injury.[2] The hearing officer does not enlighten us as to the facts he found to constitute good cause. If the hearing officer found that claimant's good cause was his trivilizing of the injury, then when was the belief the injury was trivial no longer a reasonable belief? The evidence shows that when the claimant was first diagnosed by Dr. I on January 23, 1993, Dr. I wanted the x-rays reviewed by a radiologist and that this did not occur until Dr. KN "read" the x-rays on January 30, 1993, and reported his findings in writing on February 1, 1993, at the earliest. During the period from February 1st to February 11th, the claimant said he continued working. If claimant was advised by Dr. I of the serious nature of his injury on January 23, 1993, or on a later date but before February 11, 1993, then what facts constituted good cause after that date and up to February 11, 1993, the date found to be the date claimant reported the injury to Mr. C? We remand for additional factual findings on the good cause issue.

The carrier also contends, generally, in its appeal that there was insufficient evidence to support the hearing officer's finding of disability from April 14, 1993, through the date of the hearing. The evidence showed that Dr. G took the claimant off work four week intervals pending the results of physical therapy. The claimant testified that he never went to physical therapy because the carrier would not pay. Although we find this evidence sufficient to support the hearing officer's determination of the period of the claimant's

[2]The hearing officer found that the claimant first reported his injury to Mr. C as job related on February 11, 1993. Mr. C in his testimony and in a contemporaneous memo of his conversation with the claimant on February 11, 1993, vigorously denied this. Claimant's own testimony as to what he told Mr. C on this date is also somewhat inconsistent. Nonetheless, given our standard of review, we believe there was sufficient evidence to support the hearing officer's determination that notice was given on February 11, 1993.

disability, we reserve ruling on this issue.

Finally, the carrier's reference in its appeal to the "lack of careful review and attention that has been accorded to this case" by the hearing officer deserves comment. Regrettably, the Decision and Order of the hearing officer does reflect some inattention to detail none of which render the decision fatally defective, but which, cumulatively, could tend to undermine confidence in the decision. We have already mentioned the date (January 23 vis-a-vis January 30, 1993) in Finding of Fact No. 6 which could affect the issue of timely notice. In Finding of Fact No. 3 and Conclusion of Law No. 2, the hearing officer stated the year as 1993, when it obviously should have been 1992. These discrepancies can be remedied by the hearing officer on remand. We also note that in his request for review the claimant spells his surname "V." The hearing officer also found in Finding of Fact No 4 that the injury occurred when the claimant fell from a "ladder" even though the uncontradicted testimony from the claimant, the only witness to the event, was that he fell off a "table."

We affirm the hearing officer's determinations that claimant sustained an injury on (date of injury), in the course and scope of his employment. We remand the case to the hearing officer for such additional findings of fact, conclusions of law, and evidentiary development as is appropriate on the issue of claimant's having good cause for not having reported the injury to his employer until February 11, 1993. We reserve ruling on the disability issue pending the remand.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge