APPEAL NO. 94120

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 30, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were injury, timely notice and disability. The hearing officer ruled that the respondent (claimant herein) suffered an injury in the course and scope of his employment, that he had good cause for not timely reporting this injury to his employer and that the injury resulted in disability from (date), through the date of the hearing. The appellant (carrier herein) files a request for review asking us to reverse the decision of the hearing officer because her ruling was not supported by the evidence. The claimant does not file a response to the carrier's request for review.

DECISION

Finding no reversible error and sufficient evidence in the record to support the decision of the hearing officer, we affirm.

The claimant testified that he sustained a hernia injury on or about (date of injury), while working for (employer). It is uncontested that on the date in question the claimant assisted three others (two co-employees and the owner of the employer) in lifting a "gang box," which was described as a box used to transport tools to construction sites. Various witnesses stated that this gang box weighed anywhere from 140 to 600 pounds. One co-employee, who no longer worked for the employer, testified that the claimant did indicate immediately that he felt pain after lifting the box. Another employee, who still worked for the employer, and the owner testified that they did not hear the claimant complain.

The claimant and his wife testified that the claimant thought he had suffered some type of strain. According to their testimony, symptoms of pain and swelling came and went so the claimant expected that the problem would resolve itself. Because the claimant did not believe that he had sustained a serious injury he did not report it to his employer and continued to work. On January 19, 1993, the claimant was laid off due to a slowdown in employer's business. The claimant applied for work with another company in the same industry and was hired subject to a pre-employment physical. The claimant underwent this pre-employment physical on (date), and was informed he had a hernia. Claimant reported a (date of injury), hernia injury to the employer the same day.

The carrier disputes the following Findings of Fact and Conclusions of Law in the hearing officer's decision:

FINDINGS OF FACT

4.On (date of injury), the Claimant sustained an injury in the course and scope of employment.

6.On or about (date), the Claimant discovered that he has (sic) suffered a hernia in the course and scope of his employment on (date of injury).

9.Due to his (date of injury) injury, the Claimant has been unable to obtain and retain employment at the pre-injury wage from (date) through the date of this hearing.

CONCLUSIONS OF LAW

2.The Claimant sustained a compensable injury on (date of injury).

3.Good cause exists for the Claimant's failure to notify the Employer on his (date of injury) injury in a timely manner.

4.As a result of his (date of injury) injury, the Claimant had disability from (date) through the date of this hearing.

The carrier essentially argues that the above determinations by the hearing officer are not supported by the evidence. Section 410.165(a) provides that the 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).

Applying this standard of review we cannot say that the hearing officer erred in finding that the claimant suffered an injury in the course and scope of his employment. The question of whether an injury occurred is one of fact. Texas Workers' Compensation Commission Appeal No. 93854, decided November 9, 1993; Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Corroboration of an injury is not required and may be found based upon a claimant's testimony alone. Gee v. Liberty Mutual Fire Insurance Co., 765 S.W.2d 394 (Tex. 1989). In the present case the claimant's testimony that he was injured on the date claimed is supported by the coworker who states

the claimant immediately complained he felt pain and his wife who testified that from the date of the injury the claimant continued off and on to have difficulties. While there was contrary evidence in the testimony of the other coworker and the employer's owner, we cannot say that the decision of the hearing officer was against the overwhelming weight of evidence.

Disability can be established by a claimant's testimony alone, even if contradictory of medical testimony. Texas Workers' Compensation Commission Appeal No. 92285, decided August 14, 1992; Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. The carrier argues here that the fact the claimant had worked prior to the discovery of the hernia proved he could work after its discovery. Without examining the validity of this argument, let it suffice for us to point out that in the present case the claimant sought employment and was refused employment solely because of his hernia and the claimant was advised by a doctor to stay off work until his hernia was surgically repaired.

As to the issue of good cause the 1989 Act provides that the Texas Workers' Compensation Commission (Commission) may determine that good cause exists for failure to provide notice of injury to an employer in a timely manner. Section 409.002(2). We have held that good cause for failure to timely report an injury can be based upon the injured worker not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonable or ordinarily prudent person standard. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker at 449. In the present case, there is evidence that the claimant considered his injury trivial in both his and his wife's testimony. The carrier argues that the claimant should have known he was injured, but failed to report his injury. If one chooses to believe the testimony of the claimant, as the hearing officer did in this case, then he clearly trivialized his injury and was reasonable in doing so.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Susan M. Kelley
Appeals Judge