APPEAL NO. 94271

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 25, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the appellant (claimant) sustained a compensable injury on or about (date of injury), and whether she timely reported the injury or had good cause for failing to timely report it. The hearing officer found against the claimant on all issues. The claimant appeals contending that in the Statement of the Case, the hearing officer neglected to mention evidence favorable to the claimant and expressing disagreement with findings of fact and conclusions of the law on the issues in dispute. The respondent (carrier) replies that the decision is "well grounded in both law and facts."

DECISION

Finding the evidence sufficient to support the decision and order of the hearing officer, we affirm.

The claimant worked part time in various capacities at an (employer). She suffered a low back injury on (date of injury), which was variously described as a musculoligamentous injury, degenerative disc disease, low back strain, lumbar strain with spasm, mechanical low back pain, sacroiliac joint strain and lumbosacral radiculitis. Over the following two years, she worked intermittently for the employer because of this injury and finally returned to work on May 4, 1992, under a work release with limited lifting and limited standing. An MRI of the lumbar spine taken on October 3, (year), was normal with no signs of herniation. On December 7, 1992, the claimant entered into a settlement of her (year) injury which included future medical expenses through November 24, 1995. On January 11, 1993, according to a letter from the claimant's attorney which was admitted into evidence, the claimant mailed her notice of injury and claim for compensation in connection with the alleged injury of (date of injury), to the carrier. The notice and claim were not introduced into evidence.

The claimant testified that on (date of injury), she was assigned limited duty working as a checker at the express check-out lane. She said this assignment was supposed to accommodate her work limitations stemming from her February (year) injury because customers would place their groceries on the counter instead of her reaching into a grocery cart to retrieve them, and because a bagger was to be dedicated to her check-out station so she would not have to lift and bag the groceries herself and she had a stool to sit on. She was scheduled to work this day from 10:00 a.m. to 4:00 p.m. According to her testimony, she began to feel back pain that morning, but continued working until after lunch. She said that a bagger was not always available even though she called for help. Because she was twisting and bagging groceries as well as scanning them, she said her back pain became so severe that she told her supervisors she would have to go home. She described her pain from this work as worse then her previous pain and extending to her hip (where it had not been before), and including numbness and pain in her legs and toes. She left two hours earlier than scheduled. She also stated that at least once prior to her return to work in May 1992 she experienced back pain and muscle spasms and she was released to go home.

The claimant also contended that on (date of injury), she told her supervisors, (Ms. L) and (Mr. A), that "I would need to go home" because she could get no help bagging the groceries. She next returned to work on July 16, 1992, scanning inventory and affixing price tags and had no problems with pain. She said she worked as a checker on (date), and experienced pain similar to that on (date of injury), and returned home three hours earlier than scheduled. She testified that she told the manager on duty that she was having more back pain and that "I wasn't going to be able to finish my shift checking." She was next scheduled to work on July 30, 1992. She stated she had a conversation on July 27, 1992, with (Mr. W), the store manager, about returning to work. She testified:

Q.Did you tell [Mr. W] anything on the 27th about your back?

A.From prior conversations with him and [[Ms. F]], he knew about my back problems.

Q.But did you tell him you hurt your--there was a new injury, that you reinjured your back?

A.At that time, no.

The claimant testified that she began working in the photo department on July 31, 1992, where she states she was able to accommodate her pain, until she was terminated for cause on August 16, 1992. She was terminated, according to her testimony and that of Mr. W, for giving herself credit for coupons by entering the amount herself in the register while going through the check-out line while not on duty. She testified that she has not worked since August 16, 1992.

Although the claimant has been seen by numerous doctors, not all of whom are mentioned in this opinion, according to her testimony, her treating doctor was (Dr. N), a chiropractor. In a letter of July 27, 1992, Dr. N states:

Please be advised that having [claimant] check on (date of injury) and (date of injury) without a bagger has extremely exacerbated her condition of her lumbar spine.

Also, in a undated letter, Dr. N refers to the date of injury as (date of injury), and to a re-evaluation of her complaints on August 28, 1992, with findings of "pelvic unleveling and hyperlordosis of the lumbar spine," muscle spasms, denervation supersensitivity and myalgia hyperalgesia, or excessive tenderness of muscle groups to digital pressure. Dr. N referred the claimant to (Dr. B).

X-rays of the lumbar spine taken on August 15, 1992,[1] as a result of the claimant's visit to a local hospital emergency room because of her pain were negative for any abnormalities and a diagnosis of "acute lumbalgia" was given by the attending physician, (Dr. R). An MRI of the lumbosacral spine taken on October 29, 1992, at Dr. N's request disclosed disc narrowing and desiccation at L5-S1, and a "narrow posterior disc protrusion, (subligamentous herniated nucleus pulposus), in contact with the thecal sac only." On May 18, 1993, (Dr. S), professor and head of the division of neurosurgery of the (center) at (city) examined the claimant at the carrier's request. He compared the (year) and 1992 MRIs and concluded:

> . . . there is similar evidence of slight disc degeneration of the L5 S1 level and a slight bulge of the intervertebral disc. I cannot with certainty say that there has been any change in the disc bulge in comparing the two MRI scans. They are of different technique and of different magnification . . . I cannot say that there has been any substantive change in the intervertebral disc at the L5 S1 level between the first and second MRI scans.

Ms. L testified that she was in charge of the checkers on (date of injury), and recalled that the claimant worked in the express lane that day and that she "usually" had a bagger. She did not recall if the claimant reported an injury on that day and stated that the claimant did not say why she went home early that day. She also testified that employer's policy is to immediately fill out accident reports, and she was certain if the claimant reported an injury to her she would have filled out a report.

Ms. F testified that she was the service director on (date of injury), and that she gave the claimant light duty that day to accommodate her previous ((year)) injury. She tried to ensure she had a bagger for her shift. She only remembers the claimant complaining of pain and thought they were symptoms of her old injury. She said she relied on the claimant when she said she could not do the work as checker. Ms. F also insisted that if the claimant reported a new injury to her, she would have filled out a report. She testified that some time after August 12, 1992, she annotated an "Employer's Supplemental Report of Injury" form that claimant "had to leave early [on (dates of injury)] due to pain" but did not believe that when she filled this out, either she or the claimant were reporting a new injury. The form itself was signed by Mr. W.

Mr. W testified that he was never made aware that the claimant was alleging a new injury on (date of injury), until sometime in 1993 when an adjuster called him. He also testified that sometime after July 27, 1992, the claimant told him she could not be a checker because her doctor told her she could not bag groceries and that is why she left work early. He stated he had signed the supplemental form mentioned above, but when he signed it, it did not contain Ms. F's annotations.

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[1] It is unclear from the record whether these were seen by Dr. N at the time of claimant's August 28, 1992, visit.

In her appeal of the essential finding of the hearing officer that the claimant did not sustain a new injury on (date of injury), as alleged, the claimant points to evidence which she believes supports her position, particularly (but not exclusively) her own testimony about the work she was doing on (date of injury), the new, more severe and extensive pain she experienced as a result of bagging groceries, and the results of the MRI taken after the alleged injury and the opinion of Dr. N. It is apparent that the hearing officer was skeptical of the testimony of the claimant that she suffered a new injury or an aggravation of her old injury on (date of injury). The claimant in a worker's compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether the claimant sustained a new injury (possibly through aggravation of the February (year) injury) or whether the symptoms of her old injury merely continued and became worse in July 1992 was a difficult factual matter for the hearing officer to resolve. *See* Texas Workers' Compensation Commission Appeal No. 94128, decided March 15, 1994; Texas Workers' Compensation Commission Appeal No. 93866, decided November 8, 1993; and, Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992.

As fact finder, 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. 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). 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 (Tex. 1986).

In this case, the reports of Dr. N and other physicians reflect that the claimant continued to have pain for at least two years after her injury of February (year). Dr. B's report of an April 14, 1992, visit (before the claimant returned to work more or less continuously until her termination) reflects that the claimant reported a flare-up of radicular symptoms. Other reports made after the July incidents continue to list the date of injury as (date of injury), which the claimant attributes to "insurance and billing purposes." And though the claimant contends that the incident of (date of injury), caused disc herniation which was not present before, Dr. S found no substantive change from the (year) to the 1992 MRI. While there is conflicting evidence in the record, we cannot say there is insufficient evidence to support the hearing officer's determination that the claimant was not injured in the course and scope of her employment on (date of injury), or that this conclusion is so against the great weight and preponderance of the evidence as to be clearly wrong

and manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The claimant also appeals the decision of the hearing officer that she did not timely report her alleged injury. Section 409.002 provides, in relevant part, that the failure of the employee to notify the employer of an 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 provide notice in a timely manner." Whether or not a claimant provided her employer with notice is a question of fact to be determined by the hearing officer based on an evaluation of whether the facts and circumstances in evidence "would lead a reasonable man to conclude a compensable injury had been sustained." Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.). The claimant contends that she notified both Ms. L and Mr. A on (date of injury), of a new injury or aggravation before she went home and that Mr. W's signature of August 12, 1992, on the employer's supplement report of injury is proof that the claimant notified the employer about her injury. Even disregarding evidence that Mr. W signed this form before it was annotated by Ms. F to the effect that the claimant left work "due to pain," the hearing officer could construe the claimant's notice as at most advising the employer that she had pain. Notice of pain is not in itself necessarily notice of a claimed injury in the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 92357, decided August 31, 1992. Given the history of her symptomatology over the preceding two and one-half years, the hearing officer could have found this information about pain did not reasonably give an indication that a new injury or aggravation was claimed or when and where the new injury happened. *See generally*, Texas Workers' Compensation Commission Appeal No. 93761, decided October 4, 1993.

Alternatively, the claimant contends that if actual notice on (date of injury), is not found, she had good cause for not reporting her injury until after she reviewed the results of the second "abnormal" MRI with her doctor "whereby she timely filed her new Notice of Injury" on January 11, 1993. The test for the existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted the claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. This is ordinarily a factual determination. Texas Workers' Compensation Commission Appeal No. 93102, decided March 22, 1993. We first observe in response to this contention, that on July 27, 1992, Dr. N wrote that the incidents of (dates of injury) "extremely exacerbated" the claimant's condition and that the MRI was taken on October 29, 1992. Secondly, good cause for failing to timely report an injury must continue up to the time an otherwise untimely report of injury is filed. *See* Texas General Indemnity Company v. McIlvain, 424 S.W.2d 56 (Tex. Civ. App.-Houston [14th Dist.] 1968, writ ref'd). It is well settled that unawareness of the seriousness of an injury, commonly known as trivialization of the injury, may amount to good cause for not reporting the injury within the statutory time constraints. Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1992. The claimant offered no evidence as to when she reviewed the results of the second MRI with her "treating physician" and what caused her to continue

to delay reporting after this review until January 11, 1993. We believe this lack of identification of what caused her to delay reporting, especially in light of Dr. N's early and firm opinion as to the cause of her new pain, provided sufficient evidence on which the hearing officer could base his finding that the claimant did not establish good cause for failing to timely report her injury.

Finally, the claimant notes in her appeal that the hearing officer "neglected to discuss" evidence favorable to the claimant and points out evidence and conclusions from the evidence that support her position. The 1989 Act requires the hearing officer to recite in a decision findings of fact, conclusions of law, whether benefits are due, and an award of such benefits. Section 410.168. As long as the recitation of the evidence reasonably reflects the record, we will not consider on appeal questions as to why part of the evidence was or was not discussed. *See* Texas Workers' Compensation Commission Appeal No. 93791, decided October 18, 1993. We believe the decision of the hearing officer in this case does not erroneously characterize the evidence. Claimant's contention in this regard deals more with inferences she believes are raised by the evidence rather than mischaracterization of that evidence. Of course, the hearing officer is the sole judge of the relevance and materiality and of the weight and credibility of the evidence. Section 410.165. We find this allegation of error to be without merit. Without going into each and every discrepancy in the testimony and evidence and range of interpretations that could be based on that evidence, we simply do not believe the evidence presented by the claimant constituted the great weight and preponderance of the evidence on the disputed issues.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge