APPEAL NO. 94296

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 13 and February 7, 1994, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) did not compensably injure his back on (date of injury), that claimant did not give timely notice to his employer, did not have good cause for failure to give such notice, and does not have disability. Claimant asserts that the medical evidence shows that he was injured in (year) and states that he did tell his employer that he was hurt on the job. Respondent (carrier) replies that the evidence sufficiently supports the decision of the hearing officer.

DECISION

We affirm.

Claimant worked for (employer) since March 1992; he had worked for the same employer previously from September 1989 to October (year). Claimant's testimony, and that of his wife, (FG), indicates that he hurt his back in (years), (year), prior to the time of the claimed injury on (date of injury). The injury of (year) was considered compensable by the employer's insurance carrier at that time and for a period of time the medical treatment provided after (date of injury), was considered as related to the (year) injury. The carrier in 1993 is not the same as was used in (year).

Claimant testified that he felt pain in his back on (date of injury), while using a weedeater weighing approximately 20 pounds. He states that he told his boss, Andrew (supervisor) of the pain at that time. He went to the doctor on February 23, 1993. On cross-examination, claimant said that he told his supervisor he hurt his back using the weedeater.

The notes of (Dr. P), who claimant saw on February 23rd, indicate "pt. was weedeating property at work for about 3 days - after which pt. felt pain in (lt) hip going up to (lt) low back & (lt) side." Dr. P then referred him to (Dr. E), an orthopedic surgeon, who recorded in April 1993 that claimant was injured in (year) and, "[n]ow he has chronic back pain associated with any lawn work. It flared in January and February of this year when he went for several periods in a row he had to use a weedeater." Claimant described FG as having gone with him to see his doctors and as being a person who could add to the chronology of events.

FG testified that claimant had injuries to his back prior to (year). She said that Dr. E thought claimant had a spondylolysis, and claimant quit seeing him in August 1993. Claimant had seen (Dr. H) in April 1993 for an independent medical examination and FG said he chose to return to Dr. H on September 20, 1993. Dr. H, in April, had commented that the CT scan was consistent with spondylolysis, just as Dr E had. At that time, he recorded a history of the (year) injury and that claimant said he last worked on March 23, 1993, "and then he quit because he felt that he did not want to injure his back when light

duty status was not available. He states he quit his job so as to 'save my back'." In September, Dr. H thought that claimant's problem was the "spondylysis that has been documented on his CT and previous studies;" Dr. H also added that there was "some degeneration at the L5-S1 disc." On October 12, 1993, Dr. H recorded that a diskogram had been performed on claimant. Dr. H assessed the situation as follows:

> It is my impression there are three problems that have followed a very consistent pattern over the last 2 to 2-1/2 years. The first one has been a spondylysis, which has been recognized since (year) and also again on plane films in 1993. The second problem is gradual degeneration of the facet joints with osteoarthritis and hypertrophy as a response to the initial movement of the lamina. The third problem has been progressive degeneration and now an actual rupture and a totally abnormal pattern with a positive provocation test on diskogram, with a rupture of the disk and the degeneration of the disk.

On November 16, 1993, claimant had surgery, a laminectomy diskectomy with fusion. At this time, on November 12, 1993, Dr. P provided a letter to Texas Workers' Compensation Commission (Commission) in which he said that the injury in (year) and (year) were "separate injuries."

FG testified that the diskogram was done after claimant told Dr. E that he wanted to have surgery. In response to questions from the hearing officer concerning when claimant complained in (year), FG said that it was around (date of injury). She said he told her, "I think using the weedeater is stressing my back out." When the hearing officer asked if there were a specific event, FG replied that there was a little spasm that got worse over time. She then said that claimant told her between the (day) and (day), "rub my back; it's a little sore." FG then said that claimant told his supervisor that his back was hurting. She stated that supervisor told claimant that if the back got worse, to see Dr. P again.

Claimant agreed on cross-examination that employer had paid for his visits to Dr. P in February and March 1993, and employer considered his condition to be related to the (year) injury. Claimant also agreed that employer had filed his workers' compensation report promptly in 1990 and (year) and that claimant received workers' compensation for the (year) injury. Carrier introduced claimant's claim dated September 10, 1993, which shows injury on (date of injury), and carrier's first report of injury, dated September 23, 1993, which says that claimant did not report any injury "on that date." Carrier did not provide any statement or testimony from the employer as to what was said or not said in regard to claimant's condition concerning the weedeater on (date of injury). Carrier did introduce a signed letter from supervisor to the (company) dated September 16, 1993, in which it was noted that claimant quit work in regard to use of a company vehicle after having been employed from March 10, 1992, to March 23, 1993, (and previously from September 1989 to October (year).) Supervisor added in that letter that he learned of the workers'

compensation claim several weeks after claimant quit, but does not address when he first learned or was given notice of the injury.

Also admitted as a carrier exhibit was a short, handwritten, letter from claimant dated March 23, 1993, which said:

> I [claimant], have made several requests for a raise, and was put-off each time. I requested one more time for a raise and was denied. I feel that for the amount and quality of work I was doing I should have received a raise.
>
> So for this reason I am resigning from my duties with [employer].
>
> [Signed by claimant.]

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Section 410.165. Claimant in his appeal refers to Texas Workers' Compensation Commission Appeal No. 93839, decided October 29, 1993. That appeal correctly stated that an aggravation of a prior injury is an injury and affirmed the hearing officer's decision finding the injury compensable as based on sufficient evidence of record, further stating that the hearing officer's determination would only be set aside if the evidence supporting it were "so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust."

In this case, the evidence of injury put forward by the diskogram indicates that there was a ruptured disk. While Dr. H's records do not attribute this condition to a (date of injury), injury, Dr. P's letter in November 1993 states that there was a separate injury in 1993. Dr. H's records after the diskogram do not compel an interpretation that trauma occurred in the last "2 to 2-1/2 years." *See* Texas Workers' Compensation Commission Appeal No. 92316, decided August 21, 1992, in which reference was made to a medical doctor's deposition which said that disk herniation can happen without trauma.

In addition, claimant testified that he worked until March 18th (not March 23rd when he went to employer to receive his last check). He saw Dr. P on February 23rd, who recorded then that claimant felt pain after working with a weedeater for three days. We note that Hartford Accident & Indem. Co. v. Contreras, 498 S.W.2d 419 (Tex. Civ. App.-Houston [1st Dist.] 1973, writ ref'd n.r.e.) affirmed a fact finder's decision for claimant based on feeling pain at night after loading 50 pound sacks all day, which was said to be sufficient to support a showing of an undesigned, untoward event traceable to a definite time, place and cause. In affirming the fact finder on the basis of sufficient evidence, the appellate court was not ruling that it would have acted differently had the fact finder found no compensable injury from the evidence presented. In this case, the claimant's continued working, the discovery of herniation only after eight months after claimant quit work for

employer, the basis for leaving work as stated by claimant at the time, together with some medical evidence which did not point to an accidental injury in (year), provide sufficient evidence to support the finding that claimant suffered no injury or aggravation in (month year).

While claimant said that he told supervisor that he hurt his back at the time, the claimant acknowledged that supervisor considered his condition to be based on the (year) injury. Employer's report of injury when filed months later did say that claimant had not reported any injury on the date in question; as such, it can be viewed as denying that notice of injury was given. In addition, FG's testimony in regard to what claimant told her was consistent with an interpretation of the complaint as one of pain without attribution to any trauma or injury. Again, the claimant's letter at the time of quitting the job did not reflect an injury. The evidence is sufficient to support the hearing officer's finding that claimant did not give timely notice of an injury.

The hearing officer did not abuse his discretion in determining that good cause did not exist for claimant to fail to give timely notice. Claimant never testified that he thought the injury was trivial. Claimant's appeal appears to say his good cause for not giving timely notice was the change in carriers. He says he thought the employer filed the claim, but claimant offered no evidence of this at the hearing, so it will not be considered for the first time on appeal. *See* Texas Workers' Compensation Commission Appeal No. 93943, decided December 2, 1993. The test of good cause for delay in giving notice of injury is whether the claimant used the degree of diligence that an ordinarily prudent person would have used, and this point is for the fact finder to decide. *See* Texas Workers' Compensation Commission Appeal No. 93893, decided November 8, 1993.

Finding that the decision and order of the hearing officer are not against the great weight and preponderance of the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge