APPEAL NO. 94316

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held in (city), Texas, on February 11, 1994, (hearing officer) presiding. The appellant, hereinafter claimant, appeals the hearing officer's determination that claimant was not injured in the course and scope of her employment, and did not have good cause for failing to report her alleged injury to her employer. In her appeal she cites evidence that she contends supports her position. The respondent, hereinafter carrier, contends that the evidence sufficiently supports the determination of the hearing officer.

DECISION

We affirm the decision and order of the hearing officer.

The claimant had worked as a part-time cashier for (employer). It was her testimony that on (date of injury), when she was on her way to the restroom, her foot slipped on an oily substance that another employee had put on the floor to repel ants. She said she did not fall to the ground, but that her feet did the "splits" before she caught herself on the water fountain. She finished working the rest of her shift that day, but said that her back hurt that evening. Claimant never returned to work for her employer after that day, and she acknowledged that when she called in to talk to one of her supervisors she told him that her ulcers had been bothering her and did not mention a back injury.

Claimant contended that despite her pain she believed she merely had a pulled muscle that would resolve by itself. However, she said that the pain persisted to the point that it caused her to be unable to return to work and to miss many of the college classes she was taking. When the pain did not go away, she sought treatment with (Dr. C) in early December of 1993, using her husband's group health insurance. In a transcription of a statement she gave to carrier's adjuster she said she filed a workers' compensation claim in December because she realized how she had hurt her back and also because her insurance, which had a maximum $1,000.00 limit, was going to run out. At the time of the hearing she was still treating with Dr. C, who she said told her she had a pinched nerve that was causing muscle weakness in her leg.

Employer's manager, (Mr. H), who was also one of claimant's supervisors, testified that neither he nor anyone else was aware claimant was claiming a work-related injury until December 15, 1993. He said she called in periodically to say she could not work, but she always complained about her ulcers. He and two other of claimant's coworkers testified that they were aware that claimant had missed considerable amounts of time due to her ulcers and also because of certain personal problems; one coworker also remembered claimant complaining of back problems prior to (date of injury). Mr. H also knew that claimant was a part-time student. Claimant was ultimately terminated because she failed to return to work.

The hearing officer made the following findings of fact and conclusions of law which were challenged by the claimant:

FINDINGS OF FACT

4.The claimant did not slip in insect repellent while going to and from the ladies room and did not injure her back.

7.The claimant testified that she did not report her alleged injury to her back when she contacted her employer on any date after (date of injury), although she testified that her back was causing her so much pain that her back, not her ulcers, was the reason she did not return to work.

10.The claimant knew her alleged back injury was serious on (date of injury), because her alleged back injury prevented her from returning to work or attending classes at (city) College.

12.A reasonable person in the same situation as the Claimant would have reported the alleged back injury to the Employer within 30 days of (date of injury).

CONCLUSIONS OF LAW

4.The claimant was not injured in the course and scope of her employment on (date of injury).

5.The Claimant did not have a good cause for failing to timely report her alleged injury to her Employer.

In support of her position on the issue of injury, the claimant notes that one of her coworkers testified that they saw the oily substance on the floor which claimant said caused her to slip. Nevertheless, the claimant in a workers' compensation case has the burden to establish by a preponderance of the evidence that an injury occurred in the course and scope of employment. Reed v. Aetna Casualty and Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). While the claimant by her own admission was the sole witness to the incident she contends caused her to suffer a back injury, as an interested party, a claimant's testimony only raises issues of fact for the determination of the fact finder. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Further, the hearing officer as fact finder is entitled to judge the credibility of witnesses and may believe all, part, or none of the testimony of any witness. Section 410.165(a); Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.). While one other person testified to the presence of the oily substance, the hearing officer may have found claimant's version of the events of (date of injury), not credible, in light of claimant's somewhat inconsistent actions thereafter.

The 1989 Act provides that an employee's failure to notify his or her employer of a work-related injury within 30 days excuses the carrier for liability, unless good cause for such delay is shown. Section 409.002. Texas courts have held that a bona fide belief by a claimant that an injury is not serious is sufficient to constitute good cause. Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). However, the claimant in this case testified that while she thought her initial pain was not serious or indicative of a permanent condition, the pain persisted to a degree that she was never able to return to work after the date of injury, and that she missed classes during the ensuing months due to her inability to sit. Thus, we hold that the evidence was sufficient for the hearing officer to determine that claimant did not, in essence, prosecute her claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. *See* Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992, *citing* Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948).

Upon our review of the evidence in this case, we find that the hearing officer's decision was not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge