APPEAL NO. 94345

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 February 15, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing were whether the respondent (claimant) suffered a compensable injury on (date of injury); whether he had good cause for failing to timely report this injury to his employer; and whether he had disability as a result of this injury, and if so, for what period. The hearing officer found that the claimant suffered a compensable injury as alleged, that he had good cause for failing to timely report it and that he had disability from July 13, 1993, continuing to the date of the hearing. The appellant (carrier) appeals these determinations as contrary to the great weight and preponderance of the evidence. The claimant replies that these are essentially factual determinations supported by sufficient evidence in the record.

DECISION

We affirm.

The claimant worked as a laborer for a plastering company (employer). He testified that on (date of injury), his work involved disassembling scaffolding at (employer) in (city), Texas. As he pulled on a stuck piece of the scaffold, he felt a sharp pain in his back. He nonetheless continued working at various sites, often doing heavy labor, mixing plaster and carrying 70 to 80 pound buckets of plaster. He stated he took over the counter pain medication and just continued to work out of determination until the pain got so severe that, at his mother's urging, he went to an emergency room (ER) on (date of injury). He said that he only realized how serious his problem was as a result of this visit. He stated that he reported his injury to his employer, (Mr. B), on (date of injury), and has been unable to work since. He admitted during his testimony that he was, at least initially, unsure of the date of his injury. He said that he gave May 13, 1993, as the date of injury at the emergency room, because the person there wanted a date and told him to pick any date since he did not know the exact date. Subsequent hospital visits also record different dates of injury. He said he was not sure of the date of his injury until he was able to review his employment records, but insists that he has always claimed he injured himself while taking apart scaffolding on a job at .

Employment records introduced into evidence disclose that the claimant worked only on (date of injury), for the period from March 11 to March 17, 1993. A CT scan on (date of injury), disclosed a large L4 herniated nucleus pulposus with significant radiculopathy. On July 23, 1993, (Dr. M) recommended surgery which, according to the claimant, has not been scheduled because the carrier has refused to authorize it.

Mr. B confirmed that the claimant worked on a job in (city) but never notified him or anyone of his injuries even though the employees lived in the same house when in (city). He said the claimant had not reported for work the Friday before he went to the ER, and he first learned of the injury when a co-worker, (Mr. D) told him in July that the claimant had to

go to the emergency room. Mr. B said he called the claimant on July 11, 1993, about why he was not at work that day and the claimant said he was drunk. When he called on (date of injury), to see if the claimant was going to work, his mother said he was at the ER. He said that the claimant kept changing the date of injury until he saw the payroll records to make it coincide with a day he was on the job in (city).

Mr. D testified that he was a plasterer and worked with the claimant on the job in (city) on (date of injury). He said the claimant never told him that he was injured and never asked to slow down.[1] They shared a room in (city) and the claimant never said his back hurt.

Based on this evidence, the hearing officer determined that the claimant sustained a compensable low back injury on (date of injury); that he had good cause (trivialization) for not reporting the injury within 30 days after it occurred and that he had disability from July 13, 1993, to the date of the hearing.

The carrier, in its appeal, asserts that "the overwhelming weight of the credible evidence is contrary to the Hearing Officer's determination that Claimant sustained an injury in the course and scope of employment." It contends that the testimony of Mr. D and Mr. B are more credible and points to the several attempts of the claimant to pinpoint the date of injury and the fact that he continued working at a strenuous job despite his claim of constant pain, as evidence that he did not injure himself on the job. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). It is the responsibility of the hearing officer under the 1989 Act to resolve conflicts and inconsistencies in the evidence and to determine what facts have been established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); St. Paul Fire & Marine Insurance Co. v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). In making findings of fact, the hearing officer 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 Co., 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).

The hearing officer clearly found the claimant's testimony that he was injured on (date of injury), credible after considering both the claimant's explanation of how he settled on this date as the date of his injury and the other evidence that he made no complaints to anyone of an on the job injury until July 1993. We have frequently observed that the testimony of

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[1] Other transcribed statements introduced into evidence also assert that the claimant never mentioned an injury of (date of injury), or appeared to be in any pain.

a claimant alone, if found credible by the trier of fact, can be sufficient evidence that an injury occurred in the course and scope of employment. *See* Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992. We believe that the testimony of the claimant in this case about the circumstances of his injury, bolstered by medical evidence of herniation, was sufficient evidence on which the hearing officer could base his decision that the claimant suffered a compensable injury. His explanation that he was unsure of the date because he at first did not consider it, like the injury itself, important and could only deduce the date once he saw his employment records was not implausible especially in view of his persistent claim about the nature of his injury and the location in (city) where it occurred. While we may have reached a different conclusion had we been fact finders, this alone is not a sufficient reason to reverse a decision of a hearing officer. 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, a standard not met in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier also argues that the hearing officer's decision that the claimant had good cause for not timely reporting his injury was against the great weight and preponderance of the evidence. It contends that the claimant should have known earlier than (date of injury), from the pain he was suffering not only at work but in his daily activities of walking, sitting and sleeping, that he had been injured on the job and that he did not act prudently in waiting until after he went to the emergency room on (date of injury), to notify his employer of the injury.[2] 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 give notice in a timely manner." 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. 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 also well settled that a bona fide belief that an injury is not serious, commonly known as trivialization of the injury, may amount to good cause for not reporting the injury within the statutory deadlines. *See* Texas Workers' Compensation Commission Appeal No. 93201, decided April 23, 1993. It was undisputed that the claimant's work routinely involved strenuous activity. The claimant testified that he thought his injury of (date of injury), was slight and that it would eventually go away. He treated it with over the counter medication and from sheer "bullheadedness" he tried to keep on working. From the evidence, the hearing officer could have concluded that the claimant continued in his belief that his medical problems would resolve themselves until he had no choice, but to seek

[2]Only the timeliness, not the adequacy, of the notice is in issue.

medical help which he did on (date of injury). Having been advised of the seriousness of his injury, he almost immediately told Mr. B. While this record could support contrary inferences that the claimant knew much earlier of the seriousness of his injury and that it was work related, we cannot say that the determination of the hearing officer based on the claimant's testimony, that the claimant trivialized his injury up to the day he went to the emergency room is subject to reversal or without sufficient evidence in the record. *See* Texas Workers' Compensation Commission Appeal No. 93620, decided September 7, 1993.

Finally, on the question of disability, the carrier only argues (quite correctly) that disability must be premised on the existence of a compensable injury. Section 410.011(16). Because in the carrier's view, no compensable injury was established, there can be no disability. Having affirmed the decision of the hearing officer, that the claimant suffered a compensable injury, we need only note that whether disability exists is a question of fact for the hearing officer to decide and a finding of disability may be based on the testimony of the claimant alone. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. In this case, there is uncontradicted testimony from the claimant that he could not work after (date of injury). Dr. M's diagnosis of a herniated disc on July 23, 1993, is consistent with the claimant's assertion of disability. We conclude that the determination of the hearing officer on the question of disability, is supported by sufficient evidence in the record.

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

Alan C. Ernst
Appeals Judge

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge