APPEAL NO. 950022
FILED FEBRUARY 15, 1995

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 et seq. (1989 Act). A contested case hearing (CCH) was held on June 30, 1994. The Appeals Panel in Texas Workers' Compensation Commission Appeal No. 941187, decided October 21, 1994, reversed the decision of the hearing officer because it was unable to determine whether the hearing officer considered the appellant's (claimant) good cause argument under existing precedent that "a good faith belief of a claimant, based on reassurance of a physician, that injuries are not serious, has been held to constitute good cause" and remanded for the hearing officer to apply this test.

The hearing officer rendered another decision on December 19, 1994, determining that the claimant did not have good cause for not timely notifying the employer of her injury and did not have good cause for not timely filing a claim with the Texas Workers' Compensation Commission (Commission). The claimant appealed disputing Findings of Fact No. 7 through 13 and complaining that the hearing officer did not follow the directions of the Appeals Panel on remand; that the hearing officer did not correctly consider a letter dated December 2, 1994, from (Dr. R); that the hearing officer did not permit her the opportunity to fairly present her case at the CCH held on June 30, 1994; and that the hearing officer improperly admitted medical insurance records at the June 30, 1994, CCH. The respondent (carrier) replied that the determinations of the hearing officer concerning timely notifying the employer of an injury, timely filing a claim with the Commission, and good cause for not timely notifying the employer and not timely filing a claim with the Commission are supported by sufficient evidence; that on appeal of the December 19, 1994, decision and order issued after the remand the claimant for the first time complains of alleged irregularities at the June 30, 1994, CCH; that the claimant had a very thorough hearing of the issues at the first session; and that the hearing officer did not improperly admit records at the first session.

DECISION

We affirm.

The evidence from the CCH held on June 30, 1994, is summarized in Appeal No. 941187, *supra*. On remand the claimant had admitted as Claimant's Exhibit No. 12 the following letter from Dr. R dated December 2, 1994:

[Claimant] is a patient of mine who had a revision of her right total-hip replacement because of failure of the polyethylene insert. This is to certify that this type of injury is definitely the result of excessive force applied to the polyethylene liner, such as occurs in a fall. Although this is not reflected in our office note of May 3, 1991, it is my recollection that this is how [claimant] injured herself

> and caused the fracture of the prosthesis. If you have any further questions concerning this matter, please do not hesitate to contact my office.

Addendum:

Please note that this is a work related injury secondary to a fall.

The decision and order dated December 19, 1994, contains the following Statement of Evidence:

> The Statement of Evidence previously written in the Decision and Order signed August 9, 1994 is incorporated herein. To reiterate, the credible evidence fails to establish that the claimant had good cause for failing to timely report her _____ [sic] because she was aware, immediately, of the seriousness of her injury. This finding is not meant to indicate that she knew what the ultimate result of her injury--i.e., the failure of the polyethylene insert in October 1992--would be immediately. But she knew on _____, how vulnerable her right hip was and that a fall could necessitate further surgery, and by April 26, 1991, she had pain and trouble walking because of this fall. Indeed, the injury was serious enough that she has testified that she did report the injury to her supervisor the following week. While there is no reason to doubt that she may have discussed problems concerning her hip with her supervisor at that time (he was familiar with her history of hip problems), the evidence was insufficient to show that the claimant actually communicated to him that the problem she was speaking of was work-related.
>
> Again, there is no indication from Dr. [R's] records that the claimant's fall was reported to him on May 3, 1991. Claimant's Exhibit No. 12 also fails to reflect that she reported a fall to Dr. [R] on May 3, 1991; it merely demonstrates that Dr. [R's] recollection is that the claimant injured herself by falling, which has already been concluded herein. The evidence is also insufficient to show that the claimant relied on a reasonable reassurance by Dr. [R] on May 3, 1991 that her injury or condition initially was not serious.

The hearing officer then made the following Findings of Fact and Conclusions of Law concerning timely reporting her injury to the employer, timely filing a claim with the Commission, and good cause for not timely reporting her injury and not timely filing her claim:

## FINDINGS OF FACT

5. Because of her medical history relative to her right hip, as of _____, the claimant felt that her right hip area was very vulnerable, and she was very protective of it to prevent further injury or complications.

6. On _____, the claimant sustained harm to her right hip when she fell while engaged in an activity that originated in and had to do with [employer's] business and that was performed by the claimant in furtherance of the business or affairs of [employer].

7. The claimant's fall on _____ frightened her because she had hit the most vulnerable part of her body, and she was alarmed and concerned that the fall may require a fourth right hip surgery. The fall also caused the claimant's right hip to be sore on April 26, 1991, such that she had trouble walking.

8. By April 26, 1991, the claimant was sufficiently aware of the seriousness of her injury in light of both her past medical history and the symptoms and concerns she had as a result of her _____ fall.

9. The claimant did not report her _____hip injury to [employer] until October 16, 1992.

10. The evidence is insufficient to establish that: 1) the claimant reported her _____ fall to Dr. [R] on May 3, 1991; 2) Dr. [R] reassured the claimant that her condition resulting from the fall was not serious; and 3) the claimant relied on any such reassurance.

11. The claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to report her _____ injury not later than the 30th day after _____.

12. The claimant did not file a claim for compensation with the Commission until sometime in 1993.

13. The claimant did not act like an ordinarily prudent person under the same or similar circumstances when she failed to file her claim for compensation not later than (date).

## CONCLUSIONS OF LAW

3. On _____, the claimant sustained a compensable right hip injury while in the course and scope of employment with [employer].
4. The claimant failed to timely report her _____ injury to her employer without good cause.

5. The claimant failed to timely file a claim for compensation without good cause.

Before addressing the issue of the sufficiency of the evidence, we will address some specific complaints of the claimant. First, the claimant says that she agreed not to appear in person after the remand and had admitted a letter dated December 2, 1994, from Dr. R. She writes that she fully expected the hearing officer to go over all of the facts including Dr. R's letter. The claimant also writes "[hearing officer] makes no mention of the contents of that letter, as if she did not even take it into consideration." The Statement of Evidence clearly indicates that the hearing officer considered the letter dated December 2, 1994, from Dr. R. Second, the claimant states that under the provisions of Section 409.008 she did not have to file her claim until one year after the employer filed its report of injury on February 19, 1993. Although the only issues remanded concerned good cause for not timely reporting an injury and good cause for not timely filing a claim, we note that the provisions of Section 409.008 do not apply since there has been no showing that the employer or the carrier had been given notice of an injury or had knowledge of an injury and neglected or refused to timely file the report of injury. Third, the claimant also complains that she did not receive a thorough hearing and that the hearing officer erred in admitting medical records at the first CCH. Although these matters should have been raised in the first appeal, we have nonetheless again reviewed the record and have determined that the hearing officer did not commit reversible error in the manner in which she conducted the hearing or in admitting the complained of records. The claimant disputes the findings that she did not timely report her injury and did not timely file her claim. We reassert our own holdings on those issues in Appeal No. 941187, *supra*.

We now move to the question of the sufficiency of the evidence to support the determinations of the hearing officer that the claimant not have good cause for either failing timely to notify the employer or failing timely to file a claim. Our review of the record, including the discussion of the hearing officer in her decision and order, indicates that she considered the evidence from the hearing held on June 30, 1994, and the December 2, 1994, letter from Dr. R and applied the precedent in Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993, and Texas Workers' Compensation Commission Appeal No. 931135, decided January 27, 1994, in making her determinations that the claimant did not have good cause for either not timely notifying the employer or not timely filing a claim. See the Statement of the Evidence, Findings of Fact, and Conclusions of Law set forth earlier in this decision. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153

(Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The testimony of the claimant as an interested party as an interested party only raises an issue of fact for the hearing officer to resolve. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); 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). While the evidence could support inferences different from those deemed most favorable to the fact finder, this is not a legal basis to disturb her decision where there is sufficient evidence to support it. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). Only were we to conclude, which we do not in this case, that the hearing officer's factual determinations concerning the absence of good cause for late notification and late filing were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Finding the evidence to be sufficient to support the determinations of the hearing officer and no reversible error, we affirm.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge