APPEAL NO. 972190
FILED DECEMBER 12, 1997

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On October 2, 1997, a contested case hearing (CCH) was held. With respect to the issues before him, the hearing officer determined that respondent (claimant) had sustained a compensable low back injury on _____ (all dates are 1997), that claimant first reported that injury to the appellant (self-insured) employer on May 5th, but that claimant had good cause for not reporting the injury within 30 days and that claimant has had certain periods of disability.

The self-insured appealed, contending that claimant had not sustained a compensable injury and, if he did, it was not timely reported, and that claimant had not sustained any disability. Self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. The file does not contain a response from the claimant.

DECISION

Affirmed.

Claimant has been employed by the self-insured school district for about six years, apparently as a custodian. Claimant testified that he hurt himself (got a pain in his side) on _____ moving a file cabinet in the principal's office. Claimant testified through a translator that he did not think the injury was serious and continued working. Claimant said that the pain became worse in the following weeks and began radiating down his left leg. Claimant said that he finally sought medical attention from (Dr. R) on April 22nd and that Dr. R took him off work for nine or 10 days and ordered an MRI. Claimant called his immediate supervisor, (Mr. P), and told him that he would not be at work. Exactly what claimant told Mr. P is in dispute, but claimant agrees he did not report a work injury at that time. Mr. P said that claimant told him that he hurt himself at home. Claimant adamantly denies saying that. An MRI was performed on April 29th and claimant returned to Dr. R on May 5th when Dr. R told him he had a herniated disc. It is undisputed that claimant reported his work-related injury on May 5th.

On cross-examination, claimant conceded that he heard a pop in his back on (date), and that at the urging of a coworker, who was present, reported that incident. Claimant testified that that incident did not cause him any pain and he missed no work due to that back pop incident. Claimant conceded that he paid a $20.00 copay for his April 22nd visit to Dr. R (apparently the remainder was paid by a group health policy).

Mr. P, the head custodian, testified that the Monday after _____ he saw claimant wearing a back brace and later that week noticed claimant limping. Mr. P said that he asked claimant if he had been hurt at work and claimant said "no" and that he had probably been hurt at home. (Ms. G), the school secretary, testified that Mr. P had told

her that claimant had told him (Mr. P) that he (claimant) had hurt himself at home. Ms. G confirmed that claimant was moving furniture in the principal's office on the day in question.

The only medical report of claimant's April 22nd visit is a form allowing the patient to check his complaints and a handwritten reason for the doctor visit as "(L) leg pain, starts at hip and radiates down to thigh and calf x 2 weeks." An off work slip takes claimant off work until "4/31/97" (sic, April only has 30 days). A physician's report and Initial Medical Report (TWCC-61), both dated May 5th, give a history of "pushing file cabinet," list claimant's symptoms and have a diagnosis of "[d]isc hernia L4 L5." The MRI of April 29th confirms a "disc herniation L4-L5 to the left." Claimant was released to light duty on May 5th.

The hearing officer, in a fairly extensive Statement of the Evidence and Discussion, summarizes the evidence, including transcribed statements, and comments that he finds the claimant credible. The hearing officer determined that claimant had sustained a compensable injury on _____, that claimant trivialized his injury and that claimant had good cause for failing to report the injury at the time. The hearing officer concluded:

> The trivialization of his pain by the Claimant and his continued working certainly show good cause up through 4/22/97, and the Claimant's belief that a few days off without knowledge of the seriousness of the injury until 5/5/97 and then immediately reported the injury. The Claimant's good cause did continue up through May 5, 1997, under the specific facts of this case. *See also* Texas Workers' Compensation Commission Appeal No. 970430, decided April 16, 1997.

Self-insured's first complaint is that the hearing officer did not give enough weight to Mr. P's testimony that claimant hurt himself at home. Claimant has adamantly denied that and the hearing officer could find that the circumstances where Mr. P arrived at that conclusion were somewhat unclear. The self-insured argues that the hearing officer "placed the burden of proof on the Carrier to prove that the injury occurred at home. . . ." Our review of the hearing officer's extensive discussion and determinations show that clearly not to be the case. The hearing officer correctly placed the burden of proof but just did not give Mr. P's recitation of what he was told much weight. Self-insured also contends that the claimant's testimony was "so inconsistent" that it should not be given any weight. Self-insured recites what it perceives some of those inconsistencies are. The Appeals Panel has often stated that Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth

1947, no writ). The hearing officer gave greater weight to claimant's testimony than Mr. P's as he was privileged to do.

The self-insured also contends that the hearing officer "abused his discretion" in finding good cause on trivializing claimant's until May 5th. The self-insured recognizes that trivialization may in some circumstances constitute good cause for failure to timely report the injury and contends that "the Appeals Panel has never stated that trivialization will always constitute good cause, and each case must be examined individually." Although the self-insured gives no authority for that proposition, we do not disagree with it, but only point out that it is the hearing officer who makes the factual determination of good cause, not the Appeals Panel, which only reviews that determination for legal sufficiency as not being against the great weight and preponderance of the evidence. Self-insured points to the fact that claimant reported the (date), incident as showing he reported even minor injuries. The hearing officer addressed that point in the Statement of the Evidence, referring to claimant's testimony that he only reported the 1995 incident at the urging of his coworker. Self-insured also correctly contends that "good cause must continue until notice is given . . ." citing Texas Workers' Compensation Commission Appeal No. 950428, decided May 3, 1995. Claimant sought medical treatment on April 22nd and Dr. R took claimant off work that day. Exactly what occurred then and what Dr. R may have told claimant is unclear. Dr. R clearly ordered an MRI at that time and the MRI was not performed until April 29th. Although the parties argue the standard of Section 408.007 (the date of injury being the date the employee knew or should have known that the occupational disease may be related to the employment), the actual standard is whether a reasonable employee would have realized on April 22nd that his injury could no longer be trivialized and must be reported. Again, what Dr. R may have told claimant on April 22nd is not clear, and perhaps another fact finder would have determined that when claimant was taken off work he should have realized the seriousness of his injury, even before being told that he had a herniated disc. Whether claimant could continue to trivialize his injury after he saw a doctor and was taken off work on April 22nd is a close question for the hearing officer to resolve. The hearing officer obviously considered that aspect as indicted in his discussion that claimant "did not believe he had a serious injury and did not learn of the herniation until May 2nd at the earliest. . . ." While the reasonably prudent standard of good cause does not necessarily excuse a claimant's delay in reporting an injury pending the completion of objective tests, the hearing officer, in this case, obviously believed that claimant continued to trivialize the injury. The hearing officer cites Appeal No. 970430, *supra*, which noted that the Appeals Panel has "affirmed findings of good cause during the time that a treating doctor was unsure of the cause of a medical condition . . ." citing Texas Workers' Compensation Commission Appeal No. 970195, decided March 10, 1997. Under the circumstances of this case, we find sufficient evidence to support the hearing officer's determinations on this point.

On the issue of disability, the self-insured merely argues that without a compensable injury and timely reporting, claimant cannot have disability as defined in Section 401.011(16). Having affirmed the hearing officer's determinations on the

compensable injury and good cause for failing to timely report the injury, we also affirm the hearing officer's determinations on disability.

The hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Elaine M. Chaney
Appeals Judge