APPEAL NO. 980237
FILED MARCH 26, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 9, 1998, in (City), Texas, with (hearing officer) presiding as hearing officer. With regard to the issues at the CCH, he determined that the appellant (claimant) sustained an injury in the course and scope of his employment with (employer), on _____; that the respondent (carrier) is relieved of liability because of the claimant's failure to provide the employer timely notice of injury, without good cause for the failure; and that the claimant does not have disability. The claimant appeals the notice and disability determinations, seeks a reversal of the decision and argues that he continues to suffer the effects of an injury in the course and scope of his employment. The carrier does not respond. Neither party appeals the course and scope of employment determination and, therefore, it became final by operation of law. Section 410.169; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.16(f) (Rule 142.16(f)).

DECISION

We affirm, as reformed.

The hearing officer fairly summarizes the facts in the decision and we adopt his rendition of the facts. We discuss only those facts necessary to our decision. The claimant testified at the CCH that on _____, he was weeding a flower bed outside of the employer's building and felt pain and stiffness in his left leg and low back after jumping down from a 20-inch-high retaining wall. He said the pain initially subsided but intensified two weeks later. On July 18, 1997, his last day of work, his family doctor, Dr. S, took low back and left hip x-rays, which were normal. Dr. S's July 18, 1997, prescription form stated "no work requiring constant [left] leg movement/standing." On August 15, 1997, Dr. S referred him to Dr. D, who ordered a myelogram, which revealed an L4-5 herniation and an L5-S1 protrusion.

The claimant testified that he did not provide notice of his injury to the employer until September 9, 1997, when he telephoned the employer's secretary, Ms. M. He said he delivered Dr. S's prescription form to his supervisor, Mr. P, on July 18, 1997, and left Mr. P a telephone message regarding a "medical problem" sometime between July 19 and September 5, 1997. Ms. M testified that the claimant had reported a prior December 2, 1995, compensable injury but did not report the claimed injury until September 12, 1997. The September 29, 1997, Employer's First Report of Injury or Illness (TWCC-1) indicated that Mr. P received notice of the claimant's _____, injury on September 12, 1997.

The hearing officer found that the claimant provided notice of his injury to the employer on September 12, 1997, and that he failed to show good cause for failing to

provide timely notice to the employer. An employee, or one acting on his behalf, must notify his employer of a compensable injury on or before the 30th day after the injury. Section 409.001(a); Rule 122.1(a). An insurance carrier is relieved of liability unless the employee can show good cause existed for his failure to provide timely notice, the employer had actual notice or the carrier fails to contest the claim. Section 409.002; Rule 122.1(d). The test for the existence of good cause is that of ordinary prudence or whether the employee prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 951546, decided October 26, 1995.

The claimant argues on appeal that he did not know the severity of his _____, injury until his September 5, 1997, visit to Dr. S. "The law is well settled that a bona fide belief of a claimant that his injuries are not serious but trivial is sufficient to constitute good cause for delay in filing a claim. It also has been held a number of times that the advice of a physician, upon whom a claimant relies, that injuries are not of a serious nature, but are temporary or trivial, is sufficient to justify a claimant's delay until he learns, or by the use of reasonable diligence should have learned, that his injuries are serious." Texas Workers' Compensation Commission Appeal No. 92386, decided September 8, 1992, citing Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370, 372 (1948). Whether a claimant timely reported an injury or, if he did not, whether he showed good cause for his failure to timely report was a question of fact for the hearing officer to determine. Appeal No. 951546, *supra*.

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. Section 410.165(a). In the "Statement of the Evidence" portion of the decision, the hearing officer noted inconsistencies in the claimant's testimony regarding good cause for failing to provide timely notice of injury. 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). 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). We will not substitute our judgment for that of the hearing officer when the determination is 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, 176 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We conclude that the notice and carrier liability determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability, by definition, depends upon there being a compensable injury. *Id*. A compensable injury is one "that arises out of the course and scope of employment for which compensation is payable . . . ." Section 401.011(10). The hearing officer found that since the carrier is not liable and no compensation is payable, the injury is not compensable and, therefore, the claimant cannot have disability. Since we affirm the notice and carrier liability determinations, we affirm the disability determination also.

Ms. M testified at the CCH, but her testimony is not reflected in the decision. We reform the decision to reflect her testimony. The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm, as reformed.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge