APPEAL NO. 980280
FILED MARCH 30, 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 22, 1998, in (City) Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the respondent, CH, who is the claimant, sustained a compensable injury on _____; whether she had the inability to obtain and retain employment equivalent to her preinjury wage (disability); and whether she gave timely notice of injury to her employer within 30 days after it occurred or had good cause for the failure to give notice.

The hearing officer determined that the claimant sustained a back injury; that she had disability from her injury beginning August 14, 1997; and that although she did not timely notify her employer, she had good cause for the failure to do so, so that the appellant (carrier) was not discharged from liability for the claim.

The carrier has appealed. The carrier argues that all of the determinations of the hearing officer are wrong "as a matter of law." The carrier asks that we impose the requirement that a back strain's connection to work be established through expert medical evidence, which is wholly lacking here. The carrier asks that even if the Appeals Panel agrees that an injury on the job occurred, it be found as having occurred outside the course and scope of employment as the claimant was not exposed to greater risks than the ordinary public. The claimant responds that the decision must be affirmed.

DECISION

We affirm the decision, notwithstanding that a contrary inference could be drawn from the fact determinations herein.

The claimant was employed by (employer). She said that on the day of _____, she bent over in her chair to pick up a pencil. When she straightened up in her chair, she said she felt a pain in her left side above the hip. It was not where her kidneys were located. The pain did not go away. The next day claimant called in sick and the following day she sought attention at a minor emergency center at the local hospital.

Claimant agreed she had a chronic urinary tract infection problem, causing her to have such infections on a monthly basis. She did not attribute her back pain to her chronic urinary infection, however, because back pain was not typically a symptom. She thought at the time it was a gas pain. What she eventually worried about, when the pain persisted, was that she might be having a recurrence of a kidney disease for which she had been hospitalized in 1990. Therefore, she described her concerns to the minor emergency in terms of this past medical experience. She said that testing

showed negative for urinary tract problems. Claimant said she went across town to another clinic for a second opinion. She was given anti-inflammatory, pain, and antibiotic medications until she could see her family doctor, Dr. B. To greatly shorten the testimony at this juncture, claimant was tested by Dr. B for a recurrence of her kidney disease and when this was negative, he diagnosed a lumbar strain on August 25th. Claimant said he asked her if she had done anything to precipitate this and she told him she had not. Claimant said it would not have occurred to her that picking up a pencil could cause back problems.

Dr. B prescribed physical therapy, but there was a problem in that claimant's regular health insurance program required coinsurance and 30% paid up front, which claimant said she did not have. On September 15th claimant moved her family to be with her husband in the city where the CCH was held. She said she was able to sit down with her husband at this time to discuss exactly what she had been doing when the pain came on. He informed her of his opinion that something as innocuous as picking up a pencil could cause back strain. The claimant said she called some names "out of the phonebook" (presumably medical practitioners) and they told her it was indeed possible. Claimant said she notified her employer on September 24th that she hurt her back at work by leaving a message on the voice mail of Mr. R. A statement from Mr. R indicated that he received this message and also was contacted by the carrier about filing a Employer's First Report of Injury or Illness (TWCC-1). The claimant's Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) which was filed on September 26, 1997, stated that the cause of her back injury was not known, although she had bent over to grab a pencil and felt pain straightening up.

Claimant also said that her second treating doctor in the city to which she moved, Dr. L, agreed that it was possible to strain one's back picking up a pencil. She said that he was unwilling to write down his hypothetical opinion in this regard because he had not been the first doctor who treated her. Claimant went back to Dr. B and asked him for a written statement after the benefit review conference but even though causation was at the heart of the matter, she surprisingly did not ask Dr. B to comment, in a November 25th letter, whether picking up the pencil could cause her lumbar strain. Her explanation was that there would have been no point to this because the last time he had seen her he had diagnosed a back strain of unknown etiology. Claimant said that she understood that Dr. B was of the opinion that the action could lead to back strain and this opinion was transmitted to her by Dr. B's receptionist, who ferried her question and his response to her at a time that she did not have a regularly scheduled appointment. Claimant said she was not able to work since August 14th and would not be able to until she had treatment for her back.

Dr. B wrote on November 25th that he had treated the claimant for lumbar strain of unknown etiology on August 25th and she had not returned since that time.

Likewise, a note from Dr. L dated a month earlier states that claimant has lumbar strain with no cause mentioned.

We do not agree with the carrier that the hearing officer's resolution of conflicting evidence rises to the level of error "as a matter of law." The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence, as here, that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He made these determinations in that capacity and we will not substitute our judgment for his. Rather than speculate and discuss at length what the hearing officer could have believed, we will merely note that his holding on the matter of occurrence of an injury in the course and scope of employment has precedent in cases such as Hanover Insurance Company v. Johnson, 397 S.W.2d. 904 (Tex. Civ. App.-Waco 1965, writ ref'd n.r.e.), Texas Workers' Compensation Commission Appeal No. 950103, decided March 3, 1995, and Texas Workers' Compensation Commission Appeal No. 952057, decided January 16, 1996. The "ordinary disease of life" analysis does not apply to a discreet injury which arguably occurs from ordinary movements while one is at work. *See* Texas Workers' Compensation Commission Appeal No. 970100, decided February 28, 1997. We are not going to adopt, and find no support for, a principle whereby each activity throughout the working day and on the employer's premises must be analyzed in terms of whether it could also occur outside working hours or to someone not employed by the employer.

A claimant's testimony alone may establish that an injury has occurred and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.-Houston [1st Dist.] 1987, no writ). While an opinion from a doctor as to causation in this case would have been desirable, it was not required; the occurrence of a sprain or strain, even from seemingly innocuous force, may be inferred through common experience. *See* Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The long delay that occurred between the incident and claimant identifying it as the cause, as well as whether financial constraints were a factor, was for the trier of fact to weigh, based upon his observations of the witnesses and evaluation of the evidence.

Likewise, determinations of good cause for not giving notice within 30 days of an injury are fact calls for the hearing officer to make. In this case, he could and obviously did evaluate her understandable failure to attribute her back strain to picking up a pencil at work until she said she was able to explore this as a possible cause more with Dr. L, whereupon she reported it promptly. Although an inference from conflicting evidence, we cannot say that the hearing officer's resolution was wrong as a matter of law.

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); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Elaine M. Chaney
Appeals Judge