APPEAL NO. 990765

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 March 17, 1999. She determined that the appellant (claimant) did not sustain a compensable injury on _____; that he failed without good cause to give his employer timely notice of the injury; that he did not have disability; and that he was not barred from pursuing workers' compensation because of an election to use group health benefits. The claimant appeals the adverse determinations, contending that they are against the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct and is supported by sufficient evidence. The election of remedies determination has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The claimant worked in the cardiac catheterization laboratory of the employer hospital. He testified that after he and Ms. W, a nurse, had transferred the last patient of the day on _____, from a table to a stretcher for return to the cardiac care unit, Ms. W, with whom the claimant admitted he did not get along, threw a plastic armrest against the control panel. This, in turn, he said, activated the "C-arm" part of the medical equipment just has he was stepping over the bottom portion of it, causing the top part to strike him on the left side of the head. He said he then yelled for Ms. W to turn off the equipment and, as he staggered somewhat, pointed out to Ms. W that the armrest was engaging the machine. He said he then called Ms. C and Ms. B, both nurses, into the room to show them what had happened. He said he next completed an accident report form and placed it in the desk drawer, but it had disappeared the next morning.

The claimant first saw Dr. W on April 13, 1998, and was eventually diagnosed with cervical herniation. On the patient information questionnaire for Dr. W, the claimant circled "NO" as the answer to the question, "Is this a work related injury visit?" Despite this, he insisted that he described the incident at work to Dr. W on this and subsequent visits. The claimant's wife testified that she was present in the examination room for the first visit and heard him tell Dr. W what had happened at work, but that he, the claimant, thought it was his word against the word of Ms. W, so he did not think he could report it as a workers' compensation injury. In a letter of October 1, 1998, Dr. W wrote that the claimant denied any trauma on his first two visits, and only mentioned the head trauma when Dr. W wanted to continue the work restrictions. Only on the third visit did the claimant say that he thought he would jeopardize his job if he reported a workers' compensation injury. He denied a history of prior neck problems.

The position of the claimant was that he reported the injury to Ms. L, his supervisor, in a telephone conversation on April 10, 1998 initiated by Ms. L about Ms. W's returning to work in the catheterization laboratory. The claimant testified that he told Ms. L he wanted a

meeting to talk to her about this, but she said "later" and hung up. The meeting was never held. The testimony does not reflect that the claimant actually reported an injury to Ms. L. He also testified that he reported the incident to Ms. D, a former supervisor, and to Ms. H, a nurse, at some unspecified time. The claimant underwent a cervical fusion on June 8, 1998.

Ms. C testified that she was working with the claimant in the catheterization laboratory on _____. She described it as an ordinary day where nothing happened. She said she heard the claimant say "no, no" at the end of the day and tell her the C-arm caught his leg. She said she asked him if he was ok and he said yes. She denied that the claimant ever said the C-arm ever struck him in the head. Only in a conversation with the claimant's wife on the day of his surgery was she told by the claimant's wife that the surgery was caused by what Ms. W did. She said she knows Ms. W and that it is not consistent with her personality to throw things. In Ms. C's opinion, the armrest cannot wedge itself into the control board nor is it heavy enough to activate the C-arm. Ms. W submitted an affidavit in which she denied ever throwing an armrest or anything at the medical machine or that the claimant ever told her to shut off the machine and said she never saw the claimant being hit by the C-arm. Ms. L, in an affidavit, also stated that she first received notice of the claimed injury in a telephone call from the claimant's wife about the time of his surgery.

The claimant had the burden of proving that he sustained an injury in the course and scope of his employment as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact to be determined by the hearing officer and could be established by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. This case in large measure depended on an evaluation of the credibility of the evidence, particularly the testimony of the claimant. The hearing officer could well have found that the incident of throwing the armrest to actuate the C-arm was implausible as described by the claimant or simply did not occur. This was generally consistent with the evidence from the various nurses, including Ms. W's denial that she threw the armrest and Ms. C's testimony that throwing things was not consistent with Ms. W's personality. Pursuant to Section 410.165(a), the hearing officer was the sole judge of the weight and credibility of the evidence. She resolved the question of credibility against the claimant. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer, but find the evidence she considered credible and persuasive sufficient to support her finding that the claimant did not sustain a compensable injury as claimed.

Section 409.001 generally requires that an injured worker give the employer notice of the injury no later than 30 days after it occurs. Failure to do so, in the absence of good

cause, relieves the carrier and employer of liability for benefits. The claimant appeals the determinations that he did not give timely notice and did not have good cause for this failure. He testified that his telephone call with Ms. L on April 10, 1998, resulted in her hanging up after he asked for a personal meeting about problems he had with Ms. W and before he actually told her he hurt himself in the Catheterization laboratory. In his appeal, he argues that this communication constituted notice. It has been held that notice is adequate if it gives the general nature of the injury and conveys the fact that it was work related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Whether and, if so, when notice is given are questions of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. We can not agree that the testimony of the claimant that he complained about Ms. W and sought a meeting with Ms. L, without more, constituted notice of the injury in this case. With regard to notice to Ms. D, who held a supervisory position, the claimant did not say when he mentioned the incident and what he said "about" it to her. In response to interrogatories, Ms. D said she recalled a conversation about an injury, but could not recall when it occurred. The claimant had the burden of proving notice. Even if one were to assume that notice was given to Ms. D, there was no evidence of when this conversation took place. Given this state of the evidence, we find no error in the hearing officer's failure to find timely notice was given to Ms. D.

Alternatively, the claimant appeals the finding that he had good cause for not giving timely notice, specifically his fear of reprisal for making a workers' compensation claim because, as is stated in the appeal, "he had heard only bad things happening to employees when such claims were filed." We question whether the tenor of the claimant's testimony was anything more than a generalized fear of reporting the incident without reference to the experience, real or perceived, of other injured workers. The test of good cause is whether the employee acted as a reasonably prudent person would have acted under the same or similar circumstances. In Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994, we summarized various conditions that typically could constitute good cause. Ignorance of the law or fear of job loss generally are not held to constitute good cause. Absent some evidence that the employer caused the claimant to delay reporting the injury by threatening job loss or other adverse consequences, we cannot agree that reluctance to report an injury constitutes good cause for an untimely report. In this case, the claimant simply asserted a fear of job loss. The hearing officer obviously did not consider the claimant credible in this assertion. Under our standard of review, we decline to reverse the finding of no good cause.

Finally, we find no error in the hearing officer's determination that the claimant did not have disability, as the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability. Section 401.011(16).

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge