APPEAL NO. 990976

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 7, 1999, a contested case hearing was held. With regard to the issues before her, the hearing officer determined that appellant (claimant) did not sustain a compensable injury (on _____) (all dates are 1998 unless otherwise stated), that claimant did not have disability because he had not sustained a compensable injury and that claimant had not timely reported an injury to the employer and did not have good cause for failing to do so.

Claimant appealed, contending that he had fallen from a ladder on _____, had reported the fall to his supervisor the same day, had trivialized his injury and had disability. Claimant requests that we reverse the hearing officer's decision and render a decision in his favor. Respondent (carrier) responds that the evidence is sufficient to support the hearing officer's decision and urges affirmance.

DECISION

Affirmed.

Claimant was employed as a welder for the employer for over 20 years. It is also undisputed that claimant had been in a nonwork-related motor vehicle accident (MVA) in February and had missed a week or more of work due to injuries from that accident. Claimant received some weeks of physical therapy (PT) for that injury. Claimant testified that he had fully recovered from that accident and had returned to his regular full-time work. Claimant further testified that on _____, he fell eight to 10 feet off a ladder and that two witnesses had seen the fall. Two coworkers gave sworn statements that they saw claimant "fall from a ladder" and that he fell on his left leg in a "hard fall." Claimant testified that he did not immediately feel pain but reported the fall to his supervisor, Mr. V, telling Mr. V that he was "O.K." and was not hurt. (Mr. V denies that a fall was reported to him.) It is undisputed that claimant continued working his regular job. Mr. V did testify that he observed claimant limping and complaining about back and foot problems but he thought they were related to the February MVA. Claimant testified that although he continued to work, his foot and back pain worsened in late June. The hearing officer, in her Statement of the Evidence, notes that "[e]ven then Claimant believed that his foot and back pain was from twisting and not the fall at work." Ms. F, a lady that gave claimant massages, in a sworn statement, said that she first saw claimant on June 20th "because his left leg[,] left lower back was giving him pain problems." Ms. F went on to state:

> I massaged his leg and back to alleviate his pain. He saw me three more times after that. His last visit was on 9/30/98 when I told him to go and see a doctor for his problem.

Claimant testified through a translator and at various times seemed to say he knew the pain that he was having was due to his fall and at other times "I really didn't know what it was, or what it was from." (Claimant's appeal.)

Exactly where and by whom claimant was next seen is unclear. The hearing officer comments that claimant "sought medical attention in September 1998," apparently based on claimant's testimony, however, we only find a handwritten progress note dated October 5th by Dr. T, apparently claimant's primary care doctor under his group health coverage. Dr. T's history in that note comments on lower back pain "3-98 following a [MVA]" and PT for that injury but makes no reference to the ladder incident. Claimant continued to work until October 9th, when he was taken to a hospital emergency room (ER) for back and chest pain. Claimant was seen by Dr. F, a consultant, on October 11th, who in a report of that date noted claimant had been seen in the ER for left-sided chest pain. Dr. F recited a history of lower back pain "for about two years. There is no definite specific injury. However, he feels he may have injured his back at work." There is no reference to the ladder incident. Claimant was referred to Dr. B for another consultation and in a report dated October 13th, Dr. B recited a "[t]wo to three year history of low back pain radiating to the left leg which developed during work as a welder." No reference is made to a _____ ladder incident. Dr. B's impression was:

> Myelogram, cat scan and MRI confirm herniated disc at L4-5 on the left. The patient has an L5 radiculopathy which has been present intermittently over the last two to three years.

Claimant had lumbar spinal surgery by Dr. B on October 15th. Claimant has not worked since October 9th and was formally taken off work by Dr. B on October 13th.

About a week or two after surgery, Mr. V and another bilingual coworker went to visit claimant at his home while he was recuperating. According to Mr. V, it was during that visit that claimant first attributed his injury to the ladder fall incident on _____. Mr. V testified that this visit was around October 20th and that claimant asked Mr. V if he could help claimant. The testimony of the bilingual coworker that accompanied Mr. V was that he did not remember anything from the conversation.

At some point, claimant was seen by Dr. G, on referral by an attorney. The first medical report to mention the ladder incident is a report dated November 18th from Dr. G, who recites the fall, treatment and surgery by Dr. B and subsequent treatment. A PT report dated December 30th also notes the ladder incident and that claimant continued "to work before he realized that he just could not tolerate the pain any longer." Claimant returned to work for the employer on February 15, 1999.

The hearing officer, in her Statement of the Evidence, commented:

> Claimant also asserts that he continued working and trivialized his injury. However, it cannot be overlooked that Claimant sought medical attention in September 1998. At that time the medical records indicate that Claimant was diagnosed with a herniated disc and medication was prescribed. At this point, Claimant knew that his injury was serious. The medical report mentions continuing back pain and medication was prescribed. Claimant knew, at the latest, that his injury was serious and not improving and still did

not report a back injury. Claimant did not have good cause for not giving notice to his Employer before the end of October.

Claimant's position is that he sustained a compensable injury when he fell on _____, that he reported the fall to Mr. V but said he was "O.K.," that the claimant trivialized this injury and that "the doctors" just did not write down the ladder incident.

An injury is defined as "damage or harm to the physical structure of the body . . . ." (Section 401.011(26).) The hearing officer apparently believed that claimant fell as he claimed, and as supported by two sworn statements, but that he did not sustain an injury in the fall. Although Mr. V denies that a fall or injury was reported to him on _____, by claimant's own testimony he told Mr. V that he was fine. Neither Ms. F's statement nor any of the medical reports link claimant's complaints and subsequent herniated disc to the June fall off the ladder. In fact, Dr. F, in his consultation note, specifically says there was no history of a specific or definite incident. The hearing officer apparently believed Mr. V's testimony that claimant did not report an accident on _____. As the hearing officer notes, although claimant may have trivialized his injury, he began receiving massages and by September 30th, Ms. F told him to see a doctor and, subsequently, when claimant did so, he was diagnosed with a herniated disc in early October. When claimant reported the work-relatedness of the injury is also unclear, as it could have been as early as October 20th, or at some subsequent time. The hearing officer found claimant reported the injury "within one to two weeks following his surgery" and that claimant should have known the seriousness "of his injury in September 1998 when he sought treatment." Generally, a claimant must report an injury to his employer within the requisite 30-day period, Section 409.001, unless there is good cause for the failure to timely report the injury. Section 409.002(2). The question of good cause for failure to timely report an injury is a question for the fact finder. Texas Workers' Compensation Commission Appeal No. 93550, decided August 12, 1993. A claimant must act with diligence in notifying the employer of a claim. Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993. A reasonable time should be allowed for the preparation and filing of a claim after the seriousness of the injury is suspected or determined. Appeal No. 93649. The claimant has the burden to prove good cause. Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. The test for good cause is that of ordinary prudence or "that degree of diligence that an ordinary person would have exercised under the same or similar circumstances," and it is within the purview of the hearing officer to determine what ordinary prudence is under the circumstances. *Id*. A reason or excuse generally recognized as good cause for late reporting is the belief of the employee that the injury is trivial. Appeal No. 94114. Good cause must continue to the date when the worker actually files the claim. Appeal No. 93649, *supra*.

Whether claimant sustained an injury when he fell off the ladder on _____ and whether he reported the incident to Mr. V that same day are factual determinations for the hearing officer to resolve. In this case, the hearing officer chose to believe Mr. V that claimant did not report the incident on _____ as he alleges. The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that he sustained a compensable injury in the course and scope of employment. Johnson v.

Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The hearing officer resolves conflicts and inconsistencies in the medical evidence and judges the weight to be given to expert medical testimony. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. The testimony of a claimant as an interested party raises only an issue of fact for the hearing officer to resolve. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight 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). Injury may be proven by the testimony of the claimant alone and objective medical evidence is not required to establish that particular conduct resulted in the claimed injury, except in those cases where the subject is so technical in nature that a fact finder lacks the liability from common knowledge to find a causal basis. We find the evidence sufficient to support the hearing officer's decision.

In that we are affirming the hearing officer's decision that claimant did not sustain a compensable injury, claimant cannot, by definition in Section 401.011(16), have disability.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Alan C. Ernst
Appeals Judge