APPEAL NO. 000009

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On December 8, 1999, a contested case hearing (CCH) was held. At issue was whether the appellant, _____, who is the claimant, sustained a compensable injury on _____; whether he had disability as a result of that injury; whether he gave timely notice of the injury to his employer within 30 days; and whether he made an election of remedies. The election of remedies issue was dismissed at the beginning of the CCH by agreement of the parties.

The hearing officer held that the claimant had not proven that he sustained a compensable injury or that he was unable to obtain or retain employment from the alleged injury that was equivalent to his preinjury average weekly wage (AWW). The hearing officer further held that the claimant had not timely informed his employer of his injury within 30 days after it occurred, and had no good cause for untimely reporting of the injury.

The claimant appeals and argues facts that underlie his belief that he proved his case. He asserts that he made a timely report of the injury. He disputes the hearing officer's interpretation of certain facts. The respondent (self-insured) responds with facts that it believes counter those argued by the claimant.

DECISION

We affirm.

The dates in this decision refer to 1999 unless otherwise stated. The claimant worked as lead special transit mechanic for the self-insured (also referred to as employer, depending upon the context of the reference). He had been working for the employer for 21 years at the time of his alleged _____, injury.

The claimant said that on that date, he stepped down from a grate from the area where he had been working and slipped in some liquid on the floor. He said he fell and landed on his tailbone. The claimant said he was aware 10 days after the accident, when pains became persistent, that his fall had resulted in some type of injury. The claimant speculated that the lifting that he did at work "probably had something to do with it also." He sought treatment on March 26th from Dr. D, his family doctor. Claimant agreed he had been treated in 1997 for possible arthritis in his back when he saw Dr. D about morning back pain. He could not recall if he mentioned to Dr. D, when he first saw him on March 26th, that he had fallen, and then said he thought he did.

Claimant contended he informed his supervisor, Mr. E, about his injury on March 29th when it was clear he would begin losing time from work from the effects of the injury. The claimant testified that absences from work that were unexcused, and the failure to report such absences, were the basis for disciplinary action. He said he told Mr. E about how the accident happened, although he was not yet sure at that time what was wrong with his back. The claimant also said he went in and spoke to Mr. L on April 8th. He said he

told Mr. L how the accident happened and that he thought it was workers' compensation and that he would need some time off, but then Mr. L asked him if he had short-term disability insurance. After this meeting, claimant denied that he filled out paperwork for a Family Medical Leave Act (FMLA) absence, stating that he did not think it was available then, although he testified that Mr. L said it would be fine if he went on FMLA leave.

According to claimant, when asked about the discussion about workers' compensation during that meeting, Mr. L asserted that he could try to apply for them "later" but he did not talk "too favorable" about that and indicated that one Ms. M was not too favorably inclined toward work-related injuries. He also said he was "afraid" of workers' compensation because he was unsure how much they would pay. The claimant said he decided to apply for workers' compensation benefits when his sick leave and vacation time were exhausted and he was not sure how much time he would need off from work for recovery from surgery. The claimant said that although he had sustained previous work-related injuries, he was not sure of the time period for reporting them.

The hearing officer questioned claimant about his doctor's record, noting that while it was not very legible, a notation on the report, in different handwriting, was very legible and said that claimant had slipped in oil. Claimant said he did not know who wrote it although it did not look like the doctor's handwriting.

The claimant said that while he was on leave, he was paid his full salary by using his sick leave and vacation time. He said that the first time he went without a full paycheck was sometime in the first part of June. He contended that disability began on April 1st, and he probably made less money while out than he had before his injury, if overtime were considered. No testimony ever developed the amount of overtime that claimant contended should be part of his preinjury AWW.

The claimant had back surgery on June 30th and returned to work on July 16th. He understood that his back surgery was paid for by his group health insurance, and he had not gone through the second opinion process under the workers' compensation laws as a result. He said that he understood that a large mass was removed from his spine during the surgery.

Mr. L testified that he was the employer's FMLA coordinator. He said he had no responsibility in his position for filing paperwork on workers' compensation. He said that when claimant came to apply for FMLA leave, he said he had back pain, but did not contend it was work related until his FMLA leave was exhausted. Mr. L said that claimant came in to see about extending his FMLA leave and then said it was a work-related injury.

Mr. E testified that he was a supervisor for a contractor of the employer that oversaw the mechanics for the special transit, and he was claimant's direct supervisor. He said he first became aware that claimant had some back problems in late May or the first part of June. He said that before he was contacted at that time about whether claimant had reported a back injury, he was not even sure why the claimant was out. Mr. E contended

that he was just told that claimant did not feel good, and denied that he would necessarily know the reason why the claimant was not at work for several weeks, although he understood it was FMLA leave. He said that one was really not supposed to talk about FMLA leave and the reasons it was being taken. Mr. E said that claimant was gone again within a week after coming back from vacation in March. He was absolutely certain that claimant had never reported a work-related injury to him.

The report on which the additional handwriting was made, that the claimant agreed did not resemble the rest, was an Initial Medical Report (TWCC-61). The copy in evidence is not date stamped by the Texas Workers' Compensation Commission (Commission). It was dated June 18th, and filed for a March 26th visit, with the history of injury being a pain radiating down the left leg that had begun a month prior to the visit and grown worse over the previous seven days. The actual notes of Dr. D for that visit note that claimant complained of hip pain down to his left knee. There are no notes of any accident on this document. An MRI that was taken on April 1st was reported as showing disc dessication at L5-S1 with a shallow central and left protrusion with a possible compression. Dr. D put the claimant on light work effective March 29th and diagnosed a herniated disc on April 16th. Claimant's first off-work slip for a work-related injury is dated June 21st, the date that Dr. D's records note that claimant said he needed a statement from Dr. D saying that his back condition was work related.

The statement presented from claimant's coworkers are not sworn, as the hearing officer indicated in his decision. While one witness stated that he was told by claimant that he had slipped, the other two statements state that claimant slipped, without saying one way or the other that this is what they saw, perhaps leaving it somewhat open to interpretation whether this reflected what was seen or what they understood had happened. Pictures of the work bays at the employer's shop show they are somewhat dirty and greasy.

Plainly, the evidence was conflicting. The hearing officer is the sole judge of the relevance, 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 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). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza. The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

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). We note that while claimant contends he has been unjustly "accused" of altering the doctor's record, or collaborating with other witnesses, we do not read the decision this way. Rather, the hearing officer is attempting to give notice to the claimant of what was persuasive, what was not, and why. He evidently found more corroboration of the employer's version of events than in the claimant's. He may have determined that the employer had no motivation not to have the claim filed as a workers' compensation claim from the outset, had it been reported as such, whereas the claimant's behavior could be explained by his expressed fear at the CCH about the amount he would be paid from workers' compensation, and the fact that he was not sure of the 30-day reporting deadline.

While it may have assisted in clearing up the discrepancy in the handwriting on the TWCC-61 had the copy of that record in the official Commission file been consulted (as it is filed directly with the Commission by the doctor), this was not requested by either party and the hearing officer is not required to do this on his own. 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