APPEAL NOS. 000027
AND 000362

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). By agreement of the parties, the two cases were consolidated for hearing purposes. The hearing officer recited that a separate decision and order would be rendered in each case and, consequently, we will initially consider both cases. On November 16, 1999, a contested case hearing was held. In Docket No._____, Appeal No. 000362, the issue was whether appellant's (claimant) compensable _____, injury was a producing cause of his current back/herniated disc condition. The hearing officer determined, in that case, that the _____ compensable injury was a producing cause of claimant's present herniated disc. That decision was not appealed and therefore has become final pursuant to Section 410.169.

In Docket No. _____, Appeal No. 000027, the issues were:

1. Did the Claimant sustain a compensable injury to his back on _____?

2. Is the Carrier relieved from liability under Tex. Labor Code Ann. Section 409.002 because of the Claimant's failure to timely notify his Employer pursuant to Section 409.001?

3. Did the Claimant have disability resulting from an injury sustained on _____, and if so, for what periods?

With regard to those issues, the hearing officer determined that claimant had not sustained a (new) compensable (low back) injury on or about _____, and that claimant had not timely given notice of his injury to the employer. While the hearing officer makes no specific finding regarding the "good cause" provision in Section 409.002(2), she does find that claimant had not exercised the degree of diligence of a ordinarily prudent person, which we infer to be that no good cause exists for failure to provide timely notice. The hearing officer also finds that because there is no compensable injury, "there can be no resultant disability."

Claimant appeals, asserting that his fall "of _____, _____, or _____" was witnessed by two coworkers; that employer's management knew about the fall and therefore should have realized that he had an injury; that testimony by the employer was contradictory ("continually impeached by her own record"); that at least two doctors' records show that claimant's fall was a producing cause of his injury; and that disability flows from the _____ injury. Employers Insurance of Wausau (Carrier W), the carrier that had coverage for the employer on the _____ injury, responds, urging that claimant's appeal was not timely filed or, in the alternative, urging affirmance. There is no response from American Motorist Insurance Company (Carrier A), the carrier that had

coverage for the _____ injury (and pursuant to Section 408.021 and the hearing officer's decision and order in Docket No. _____), and was liable for medical benefits for claimant's "current back/herniated disc condition."

DECISION

Affirmed.

First, addressing the timeliness of claimant's appeal, although the hearing officer's decision and order cover letter is dated December 10, 1999, other Texas Workers' Compensation Commission records indicate that the decision and order was not distributed until December 13, 1999. Claimant states that he received the decision on December 20, 1999, and we note applying the "deemed receipt" date, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), as amended effective August 29, 1999, the fifth day after distribution was Saturday, December 18, 1999, and applying Rule 102.3, as amended effective August 29, 1999, the effective date under Rule 102.5(d) would be Monday, December 20, 1999. Claimant's appeal was mailed January 4, 2000, and was received on January 5, 2000. Claimant's appeal was timely. *See* Rule 143.3(c).

Both Carrier A and Carrier W were present and actively participated in this case (the _____ injury). On the merits, as the procedural history indicates, claimant sustained a compensable low back injury in _____. Claimant apparently last saw the treating doctor for that injury in 1995. Exactly how much that injury continued to bother him is not entirely clear. In any event, claimant was eventually employed by (employer) as a cook and/or kitchen manager in _____. Claimant testified that on or about _____ or _____, while going around a dishwasher, he slipped and fell on the wet floor. Claimant testified that about an hour later, just after lunch, he approached Ms. MC and Mr. FC, employer's managers or operators, in the dining room and told them he had fallen and that something needed to be done to keep the dishwasher from getting the floor wet. Claimant admitted that he did not indicate that he had hurt himself in the fall, just that he fell. Claimant testified that his fall was witnessed by SK, who was washing dishes, and SK's girlfriend (and perhaps another coworker) who just laughed. Neither SK, the girlfriend or coworker testified nor are there any statements from them in evidence. Ms. MC testified that she had talked with SK and that SK had denied that he had seen claimant fall. Ms. MC testified that claimant had not reported either a fall or an injury in _____.

Claimant apparently continued to work his regular duties until either December 29 or 30, 1998, when his back "locked up." Ms. MC and claimant agree that claimant approached Ms. MC around December 30, 1998, and told her that he needed to be off to go to the doctor. Exactly what was said is in dispute. Ms. MC testified that she thought claimant was referring to his _____ injury and suggested a leave of absence so that the employer could keep claimant's job open. In evidence is a request for leave of absence (under the Family Medical Leave Act (FMLA)) where claimant checked "no" to the question whether the leave was for "a job-related injury."

Claimant testified that he attempted to see Dr. PP, claimant's doctor for the _____ injury, but was unable to do so because Dr. PP wanted preauthorization from Carrier A to treat the _____ injury. Claimant said that he treated with a family doctor who prescribed pain mediation. This is apparently Dr. M, who, in a handwritten report dated January 7, 1999, recites a history:

> Pt reports pain in lumbar region x 1 week after sleeping on it wrong[.] Lifetime back disability. He denies any trauma or significant injuries to the back in previous 2 weeks. Pain stops in lumbar.

Dr. M diagnosed chronic lumbar strain. A note dated January 14, 1999, indicates that Dr. M spoke with Ms. MC about claimant's condition. This note makes no reference to a _____ slip or fall, but does say claimant wants to return to work. Eventually, claimant was able to see Dr. PP, who, in a report dated January 25, 1999, references the _____ injury and has an impression of "[l]umbar exacerbation." Dr. PP notes that claimant has been "temporarily disabled from work since 12-29-98." Claimant testified that he did not initially tell Dr. PP about his fall, but then, when his back became worse, he did tell Dr. PP. In a note dated February 9, 1999, Dr. PP states:

> We have some additional information about this patient's current status which we were not aware of when we evaluated him on 1-25-99. Specifically, he had a new injury sustained at his current job, which he failed to disclose to us, but did ultimately mention it to our physical therapist during a subsequent session.

Claimant testified that he was first aware in February 1999 that he had sustained a new injury after seeing Dr. PP. Claimant filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) dated February 16, 1999, alleging a _____, injury. Ms. MC testified that she first became aware that claimant was alleging a new back injury sometime in February 1999.

Claimant began treating with Dr. P, who lists the following after his name: "MD/PHD/DC." In a February 2, 1999, report, Dr. P lists a history of a fall on _____, a complaint of low back pain, and a series of tests. Claimant apparently sees Dr. P almost daily with complaints of back pain, and, in a note of February 11, 1999, Dr. P recommends a lumbar MRI. If an MRI was performed, that record is not in evidence.

Dr. O did a record review for Carrier W and, in a report dated September 16, 1999, commented:

> Based on the records reviewed, it is noted that [claimant] now has a central herniation abutting both nerve roots and the anterior thecal sac at L5-S1. This is a new finding on MRI, thus showing a new aggravation that could be correlated with a new injury. The new findings cannot be correlated to an old injury which he stopped seeking treatment for over three years ago. In

> addition to this, the patient appears to report new symptomatology such as weakness and numbness in both lower extremities. A herniation is usually caused by a traumatic event, such as lifting, slipping, or falling. If [claimant] indeed had a recent slip and fall in December of 1998 this is [sic] more likely correlates to the cause of his problems.

Dr. PP, in a series of reports, has claimant off work. In a note dated September 27, 1999, Dr. PP notes "some controversy as to compensability for a new injury which I think is clearly present." In a letter dated October 20, 1999, to claimant's ombudsman, Dr. PP states that claimant's "current condition rises to the level of a new injury because the patient was asymptomatic, pain-free, and fully functional prior to that injury event and then became dysfunction with disabling back pain thereafter."

Dr. PP goes on to discuss the MRIs, stating,

> The 1991 and 1999 MRI scans both confirmed degenerative spondylosis only. There has been no progression in his spondylosis of significance as represented by these two MRI scans, but that in and of itself is an irrelevant consideration. The primary focus here is on the patient's level of symptoms and his functional abilities as dictated by those symptoms.

Carrier A contends that claimant sustained a new injury when he fell in _____. Carrier W contends that claimant was not at work on _____; that there was either no slip and fall, or if there was, claimant did not sustain an injury as defined in Section 401.011(26); that claimant did not timely report his injury until February 1999; and that when claimant requested a leave of absence under the FMLA, he indicated that it was not due to a work-related injury.

While claimant, in his appeal, contends the slip and fall was witnessed, no evidence from the alleged witnesses was presented. Claimant also contends that certain correspondence from the employer indicates that the employer was aware of a work-related injury before February 1, 1999. What, if anything, that correspondence indicated is strictly a factual determination for the hearing officer to resolve. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

Claimant, in his appeal, seems to state as fact that he "did report his injury, and did so nearly immediately, to a supervisor for Employer." This is only claimant's version, as that is disputed by Ms. MC, and the hearing officer could believe Ms. MC over claimant's testimony. If Ms. MC's testimony was inconsistent and "impeached by her own records," it was the hearing officer's duty to resolve those inconsistencies and/or contradictions and she did so by accepting Ms. MC's version.

As previously indicated, the hearing officer makes no specific findings on good cause. Claimant, in his appeal, suggests trivialization might be such good cause. We would note that any good cause of trivialization would have ceased on December 29 or 30, 1998, when claimant's back "locked up" and he was forced to take a leave of absence.

While claimant has substantial evidence that he has disability (is unable to obtain and retain employment at his preinjury wage, Section 401.011(16)), the hearing officer found that was due to the _____ injury rather than anything that occurred in _____. (The hearing officer found that claimant did not sustain an injury in _____.) In that we are affirming the hearing officer's decision that claimant did not sustain an injury on or about _____, claimant cannot, by definition in Section 401.011(16), have disability from the _____ occurrence, if any.

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:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge