APPEAL NO. 000485

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 February 4, 2000. The issues at the CCH were whether the appellant (claimant) sustained a compensable injury in the course and scope of employment on _____; whether the respondent (carrier) waived the right to contest compensability of the claimant's injury by not specifically raising the issue of course and scope within 60 days of being notified of the injury; whether the claimant reported an injury to the employer within 30 days of the injury and, if not, whether good cause exists; and whether the claimant had disability and, if so, for what periods. The hearing officer determined that the carrier disputed the claim based on failure to give timely notice to the employer within 30 days; that the carrier did not dispute the claim based on injury in course and scope of employment; that the claimant sustained an injury in the course and scope of employment on _____; and that because the claimant did not timely report the injury to the employer within 30 days and did not have good cause for failing to report the injury timely, the claimant did not sustain a compensable injury on _____, and did not have disability. The claimant appeals the hearing officer's decision regarding the notice of injury and disability, requesting that we reverse the hearing officer's decision and render a decision in his favor. The carrier responds, urging affirmance.

DECISION

Affirmed.

On _____, the claimant injured his left knee when he was drilling on a platform and his left leg fell into a hole. The claimant testified that he had an onset of pain, that he applied ice water to his knee at lunchtime, and that his knee was swollen by the end of the workday. The claimant continued working until he was laid off on November 6, 1998. The claimant testified that he reported the injury to his supervisor, Mr. M, on _____, and that Mr. M said that he would report it to Mr. M's supervisor, Mr. JB. The claimant said that after the injury, he did not want to go to the hospital for treatment, and wanted to see an old man (no further identification) who had helped him previously with medical problems. According to the claimant, he had problems locating the old man for a month or two, and after he went to see him, the old man told him that he needed to seek medical treatment.

The claimant sought medical treatment for his left knee on December 21, 1998, was diagnosed with a knee sprain, and was referred to a doctor for follow-up care. An MRI was performed on February 5, 1999, which showed a medial meniscus tear, and surgery has been recommended. According to the claimant, he did not discuss his injury with the employer after _____, until February 5, 1999, when he was told that he needed knee surgery.

Mr. M testified that the claimant did not report an injury to him on _____; that he did not see the claimant limping; and that he did not see the claimant apply ice water to

his knee during lunchtime on _____. Mr. M stated that he did not have any knowledge that the claimant was claiming a work-related injury until he received a telephone call in February or March 1999. Mr. BB, Mr. M's supervisor, testified that he saw the claimant everyday on the job site; that he saw the claimant limping but did not ask him about it; and that he had no knowledge that the claimant was claiming a work-related injury until February or March 1999. It was the claimant's position that he gave timely notice of the injury to the employer on _____. The claimant argued, in the alternative, that he had good cause for failure to give timely notice because he trivialized the injury and that the employer had actual knowledge of the injury.

Section 409.001 requires that an employee notify the employer of an injury not later than the 30th day after which the injury occurs. Failure to do so, absent a showing of good cause or actual knowledge of the injury by the employer, relieves the carrier and employer of liability for the payment of benefits for the injury. Section 409.002. An employee who fails to give the employer notice of the injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). The test for good cause is that of ordinary prudence, that is, whether the employee has prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). Good cause must continue up to the date when the claimant actually notifies the employer. Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993.

The claimant's testimony was in direct conflict with the testimony of Mr. M. Whether, and, if so, when, notice is given is a question of fact for the hearing officer to decide. The hearing officer, after considering all of the conflicting evidence, found that the claimant did not give notice to his employer until after the MRI was performed on February 5, 1999; that the claimant knew that his knee injury was serious no later than December 21, 1998; that the claimant did not give notice to the employer until after the MRI was performed on February 5, 1999; that the claimant did not have good cause for failure to give timely notice; and that although Mr. BB saw the claimant limping at work, that fact alone does not give rise to actual knowledge of a work injury. The hearing officer considered the claimant's delay in seeking medical treatment, and determined that the claimant did not trivialize the injury, but sought alternative methods of treatment.

The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of a witness' testimony. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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). 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). Applying this standard of review to the record of this case, we find the evidence sufficient to support the hearing officer's determination that because the claimant did not give notice within 30 days and no good cause existed for untimely reporting, he did not sustain a compensable injury.

Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The decision and order of the hearing officer are affirmed.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Elaine M. Chaney
Appeals Judge