APPEAL NO. 000946

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 12, 2000. With regard to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury to the low back on _____ (all dates are 1999 unless otherwise noted); that claimant had disability from July 7th and continuing through December 31st; and that appellant (carrier) is not relieved of liability because of claimant's failure to timely notify her employer of the claimed injury. The carrier appealed, contending that claimant had failed to note an injury on her time card and had preexisting back complaints; that claimant did not have disability because she voluntarily quit her job after having been released to full duty by her doctor; and that claimant had failed to timely report her injury to the employer and did not have good cause for failing to do so. Claimant responds to the points raised by carrier and urges affirmance.

DECISION

Affirmed.

Claimant was employed as a pipefitter helper. Claimant testified in detail how, on June 1st, she was stepping off a "burning table" (about two feet high), that she slipped or her leg got caught on the table and that she fell backwards onto her back on a cement floor. Claimant's testimony is supported by the statement of a coworker, DC, who in a recorded statement said that while she did not actually see claimant fall:

> A. Yes ma'am. I had to help her get up. I didn't actually see her get hurt, but I did have to help her get up. She was rolling around and her pants were stuck. And I had to help her. So yeah she did get hurt.
>
> Q. Okay.
>
> A. That quick second I turned around there was no way she could of sprang an accident like that.

GZ, claimant's lead man and immediate supervisor, also testified that DC told him about claimant's fall. (This apparently was a surprise to the parties because carrier was proceeding on a theory of failure to timely report and claimant was arguing good cause.) Claimant testified that she was in pain but finished her shift and worked the next few days until she could get an appointment to see her doctor, Dr. W. Claimant saw Dr. W on June 8th.

It is undisputed that claimant had had some previous back problems and was treating with Dr. W for "arthritis." In evidence are Dr. W's handwritten progress notes showing treatment for various matters since February 23, 1998. A note dated June 8th notes complaints of low back pain and "DOI _____." Claimant testified that she told Dr. W about her fall and that the pain was different than her arthritis pain, "but he [Dr. W] kept saying it wasn't." Claimant said that she returned to work and continued to work in

pain until July 2nd or 6th when she quit work. Claimant testified that she told LS, the warehouse superintendent, that she was leaving for medical reasons without specifying the June 1st fall. The termination slip gives a reason of "different kind of work and moving out of state, other employment." Claimant testified that that notation is not her handwriting and was not what she told LS.

Claimant subsequently began treating with Dr. V on August 5th. Claimant testified that Dr. V told her that her back pain was not due to arthritis but was work related. In a Initial Medical Report (TWCC-61) of the August 5th visit, Dr. V recites the fall off the burning table and diagnoses strains and sprains of the lumbosacral area. Dr. V took claimant off work. Claimant subsequently contacted the Texas Workers' Compensation Commission and completed a Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on August 11th. Claimant testified that she was unable to work from July 7th until January 1, 2000, because of her back injury except one day in September when she attempted to work at a carnival but was unable to do so and was not paid. Claimant testified that she returned to work for another employer on January 1, 2000.

The hearing officer, in her Statement of the Evidence, summarizes the evidence and the parties contentions in some detail and made the following findings:

FINDINGS OF FACT

2. During the course and scope of her employment in _____, Claimant fell backwards on her back onto a cement floor.

3. Claimant sought medical advice for her low back pain on June 8, 1999 with [Dr. W] who advised Claimant it was probably her arthritis.

4. Due to Claimant's inability to perform her job duties without pain, Claimant left employment on July 6, 1999.

5. On August 5, 1999, [Dr. V] advised Claimant her low back pain was due to her _____ fall at work.

6. Claimant filed a TWCC-41 on August 11, 1999 and the employer was notified of Claimant's claim of a _____ work related injury.

7. Claimant did not timely notify the employer of her _____ fall and injury but had good cause for failing to do so and did so within a reasonable time after learning from [Dr. V] how her back pain was work related.

8. Due to the claimed low back injury, Claimant was unable to obtain or retain employment at wages equivalent to Claimant's re-injury wage

beginning on July 7, 1999 and continuing through December 31, 1999.

Both parties agree that "this case turns on the credibility of the witnesses." Carrier contends that claimant's failure to note her injury on her timecard and to timely report the accident and injury "strongly suggests that no incident took place and no injuries were sustained on the job." Carrier also contends that MRIs taken in 1998 and after the incident show no change and were normal, leading to the inference that there was no injury. Those inferences were rebutted by not only claimant's testimony, but also by DC's statement and, to some extent, even GZ's testimony. On the issue of timely reporting, carrier points to and quotes testimony by claimant that she knew she had sustained a new and different injury on June 1st and that the lump on her back "was something different than arthritis." While claimant did testify as carrier points out, claimant also said that Dr. W disagreed with her and kept telling her it was just her arthritis. This is not so much a matter of the good cause being trivialization because claimant, by seeking medical care, clearly was not trivializing her injury, but rather was lead by Dr. W to believe it was just her arthritis acting up and that it was not until August 5th, when Dr. V told her otherwise, that she had support for her belief that she had, in fact, sustained a work-related injury.

Section 409.001 requires generally that an employee notify the employer of an injury not later than 30 days after the injury occurs. Failure to do so absent good cause relieves the employer and carrier of liability for benefits. Section 409.002. The purpose of the notice provision is to give the carrier the opportunity to expeditiously investigate the circumstances of the claimed injury and determine whether to initiate benefits or not. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The test of good cause to excuse an untimely reporting is that of ordinary prudence, that is, whether the employee has prosecuted the claim with the same degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 207 S.W.2d 370 (Tex. 1948). Commonly recognized good cause excuses included trivialization of the injury, mistakes about the cause of the injury, reliance on the representations of employers or carriers, young age of the claimant, reliance on medical advice, and physical or mental incapacity. Ignorance of the law, reliance of the advice of third parties, or lack of a precise diagnosis are generally not considered good cause. *See* Texas Workers' Compensation Commission Appeal No. 94050, decided February 25, 1994. Although immediate reporting upon the termination of good cause is not necessarily required, the good cause relied on by a claimant for untimely reporting an injury must continue more or less up to the time the report is actually made. Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. Whether good cause exists is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 990494, decided April 22, 1999. In this case, the good cause was on the reliance on medical advice.

Regarding disability, carrier contends that claimant voluntarily quit her job after Dr. W had released her to return to full duty on June 8th without restrictions. Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). The hearing officer could

certainly consider the circumstances of claimant's voluntary receiving her job, but whether it was that or claimant's injury that caused claimant's inability to obtain and retain employment at the preinjury wage was a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992.

On all three issues there was some conflicting evidence and, as the parties agreed, the case turns on the credibility of the witnesses. 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).

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.

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:

Elaine M. Chaney
Appeals Judge

Tommy W. Lueders
Appeals Judge