APPEAL NO. 000975

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 April 12, 2000. The hearing officer determined that the appellant (claimant) did not sustain a compensable injury in the course and scope of his employment on _____; that the claimant did not report the alleged injury to his employer within 30 days of the date of the alleged injury and did not have good cause for failing to report the alleged injury in a timely manner; and that although the claimant's inability to work was due to his back condition, this did not constitute disability due to the lack of a compensable injury. The claimant appealed and argued that the time the pain occurred connects it to his work and there is no evidence of another cause. He argues that the hearing officer has made a medical decision that he was not qualified to make. The respondent (carrier) responded by reciting evidence that supports the hearing officer's findings and conclusions.

DECISION

We affirm the hearing officer's decision.

The claimant was employed to perform welding and various other tasks for (employer). He had been employed for nine months at the time of his alleged injury. He said that on _____, a Friday, he stayed late (as he had several times before) to move some "levelers," which he performed with a forklift. Although generally the claimant testified that his job could entail heavy lifting and "repetitive" bending, his description of his activities on _____ involved pretty much forklift work.

The claimant said he woke up the next morning sore. The claimant contended he did nothing over that weekend. He reported for work on the following Monday, saying that he figured he just had sore muscles. However, the claimant said his back got progressively worse and by three weeks after the accident he could hardly do his job. The claimant mentioned his sore back to supervisor Mr. R just before the upcoming Thanksgiving weekend, on November 24th. He declined medical treatment, stating that maybe the upcoming four-day weekend would help. However, he said that by the following Monday, he could hardly stand around at work. He was sent to the doctor that day.

He was treated by Dr. M, who suspected that he had a disc problem. The claimant had a previous injury to his back in 1996 for which he had surgery, but he testified that he had worked since then with no problems. Dr. M took him off work. He said that he told Dr. M that driving a forklift had caused his current back problem. At the CCH, the claimant explained that he believed it to be the "jarring" of the forklift which resulted in injury. The claimant did not go to the referral doctor recommended by Dr. M because the claim was denied. He consequently went through his primary care physician and received a referral from that doctor.

The claimant subsequently had back surgery on February 11, 2000, after an MRI showed problems at L4-5 and L5-S1. He said that his surgeon, Dr. C, told him that this was a new injury as opposed to a recurrence. Dr. C drew this conclusion because of the lack of scar tissue from the old injury, according to the claimant. The claimant was still off work at the time of the CCH.

Mr. R testified that all of the employer's forklifts were new. He said that the claimant reported a forklift-related injury on November 24th and said it happened sometime near the end of October. Mr. R said he did not see how this would have happened. He said that the forklift generally was a nice ride and would not bounce unless there was a heavy load, and then would bounce a little.

Medical evidence in the record shows the claimant initially said he experienced twisting or jarring at the waist. A December 13, 1999, note from Dr. C is silent as to any conclusions about the cause of the back injury and a brief history is recited that the claimant was "injured" (in a manner not described in this report) while working on _____.

A March 29, 1997, MRI reported some post surgical changes at L5-S1 with a residual bulge but no nerve root compression. There were no changes at L4-5. The December 19, 1999, MRI reported a large herniation at L5-S1 with some thecal sac impingement and an annular tear and small herniation at L4-5 with some thecal sac indentation.

The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The carrier does not have to prove that something else happened to cause an asserted injury.

Clearly, there was some change between the two MRIs in this case. What the hearing officer was faced with, however, was analyzing whether any activity specifically at work caused these changes to occur. 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, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). 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). The hearing officer accepted the claimant as a truthful person, as he indicates in his discussion, but simply was not persuaded with the claimant's contention that it was the forklift at work that somehow

caused the damage to his back, as opposed to activities of life in general. Because a finding of "compensable injury" must be made to support a finding of disability as defined in Section 401.011(16), the hearing officer's determination that there was no disability was the correct application of the law.

We also find sufficient evidence to support the hearing officer's finding that the claimant did not timely report his injury and did not have good cause for this. Section 409.001(a)(1) and (b) require that the injured employee give notice of an accidental injury to a person in a supervisory or management capacity within 30 days. However, the notice given, while it need not be fully detailed, should at a minimum apprize the employer of the fact of an injury and the general area of the body affected. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.- El Paso 1989, writ denied). Belief that an injury is trivial can constitute good cause for failure to give timely notice. Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.- Corpus Christi 1991, no writ). Good cause must continue up to the time that notice was actually given. Texas Workers' Compensation Commission Appeal No. 94975, decided September 2, 1994. In this case, the hearing officer could note that the claimant described a progressive worsening that caused a significant impact on the claimant's ability to work, by his testimony, three weeks after he awoke with back pain. He could determine that pain at this level could no longer be trivialized and the claimant was still within the 30-day period for reporting.

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). We cannot agree that this was the case here and affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge