APPEAL NO. 001973

This appeal is brought 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 July 21, 2000. The hearing officer determined that the appellant (claimant) injured her low back in the course and scope of her employment on _____; that the claimant and her doctor knew that the claimant's lumbar problems were a new injury by _____; that the claimant gave notice of a work injury to the respondent (self-insured) on March 10, 2000; that good cause for not reporting the injury did not continue after 30 days after the date of the injury; that the claimant did not report her injury within a reasonable time after her good cause for not reporting it had expired; that due to the back injury, the claimant was unable to obtain and retain employment at wages equivalent to her preinjury wage beginning on February 11, 2000, and continuing through June 6, 2000; that because the claimant did not timely report the injury and did not have good cause for not timely reporting it, she did not sustain a compensable injury; and that since she did not sustain a compensable injury, she did not have disability. The claimant appealed; said that the ombudsman assisting her should have objected to the admissibility of notes made by the adjuster handling the case because they were not timely exchanged; stated why she thought she had good cause for not reporting the injury earlier; attached a copy of a report from Dr. P that was admitted at the CCH; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that she reported the injury to the self-insured in a reasonable time after she knew that it was work related, that she sustained a compensable injury, and that she had disability. The self-insured responded, stated that the adjuster's notes were timely exchanged and were not objected to at the CCH, urged that the evidence is sufficient to support the appealed determinations of the hearing officer, and requested that her decision be affirmed.

DECISION

We affirm.

The Decision and Order of the hearing officer contains a thorough statement of the evidence. Only a summary of the evidence related to reporting the injury to the self-insured will be included in this decision. On _____, the claimant, a licensed vocational nurse, was pushing a medication cart; a wheel of the cart hit a hole in the floor; the claimant thought the cart was going to tip over and took action to keep it from tipping over; and the claimant felt pain in the area of her back and abdomen. Prior to _____, the claimant had a low back injury and surgery to remove an ovarian cyst. The claimant testified that on _____, she did not know what her problem was; that she went to the doctor on February 10, 2000; that she was referred to another doctor; that tests were performed and it was determined she did not have another ovarian cyst; that she had an MRI; that after the results of the MRI were received, the doctor thought she had a low back injury, but was not sure; that she had an EMG; and that after the report of the EMG was received, the doctor told her she had a low back injury and sent her to a neurologist. The claimant said she spoke with an adjuster who works for a third party administrator on

February 24, 2000, and asked about what forms she needed to fill out. She testified that she filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on March 10, 2000.

A note of the adjuster, who works for the third party administrator, dated February 24, 2000, indicates that the claimant called; that the claimant was told she had reached maximum medical improvement and was not entitled to temporary income benefits for the 1998 injury; and that the claimant asked about a new injury. The note states that the claimant told about pushing the medical cart and that the claimant said she first thought she had "female problems," that the pain started going down her right leg, that an MRI showed two herniated discs, and that she attributed her current problems to pushing the cart. The adjuster did not testify, but a claims supervisor who works for the third party administrator did testify. She stated that she was testifying from memory and provided information in addition to that in the note of the adjuster. She was asked to review the notes of the adjuster, and said she thought the notes were accurate.

In a narrative report dated May 19, 2000, Dr. P wrote:

> On 2/10/00 the patient presented with right groin and abdominal pain. An ultrasound was ordered which was essentially normal. On 2/16/00 she presented again with pain radiating down the right leg and foot associated with paresthesia, numbness, and tingling of the foot. The patient stated that she was wheeling medical carts and fell in a hole on several occasions wrenching her back. The pain apparently was not bad enough at this time to seek medical attention and the patient was not specific about the date of the accident, which apparently occurred within a two week period in the last part of January or the first part of February. The patient was put on conservative treatment and an MR scan was ordered which showed L5-S1 disk degeneration with a 5-6 mm broad based right posterolateral soft disk protrusion, and a 5 mm broad based left paracentral disk protrusion. The patient was sent to [Dr. L], a physiatry specialist, and on 2/28/00 an EMG was reported on which was compatible with a bilateral L4 radiculopathy. Consultation recommended epidural steroid injections at L5-S1.
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> * * * *
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> It should be noted that prior to February 21 we believed this was not a job-related problem, however, after ruling out abdominal pathology it was then decided that this was a back problem, and the symptoms became localized to the back of the leg in keeping with the lumbar radiculopathy which I believe was related to the job-related injury.

We first address the claimant's complaint that the ombudsman should have objected to the admissibility of the notes of the adjuster. In its response to the claimant's appeal, the carrier stated that the adjuster's notes were exchanged. However, nothing in

the record indicates whether or not they were exchanged. There is no indication that they were not properly admitted. An ombudsman assists a claimant and does not represent a claimant. If the claimant thought there was a basis to object to the admissibility of the notes, she could have done so. Considering the narrative report of Dr. P and the testimony of the claims supervisor, the hearing officer's having considered the adjuster's notes would not result in an improper decision. Even if it had been error for the hearing officer to have admitted the adjuster's notes, which it was not, such error would not have resulted in reversible error.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, determines the weight to assign to each witness's testimony, and resolves conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. The record does not indicate that the self-insured received notice of the injury from the third party administrator prior to March 10, 2000, when it received notice from the claimant. Good cause for not timely reporting an injury to an employer must continue up until the time the report is made. Texas Workers' Compensation Commission Appeal No. 950148, decided March 3, 1995. The standard of review as to whether a hearing officer erred in making a determination concerning good cause for delay in providing notice of an injury is abuse of discretion by the hearing officer. Texas Workers' Compensation Commission Appeal No. 961948, decided November 13, 1996. The hearing officer did not abuse her discretion in determining that good cause did not exist until March 10, 2000, when the claimant reported the injury to the self-insured.

Since the clamant did not timely report the injury to the self-insured and did not have good cause for not timely reporting the injury until the time that it was reported, she did not sustain a compensable injury. Sections 409.001 and 409.002. 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). Disability, by definition, depends upon there being a compensable injury. Since the claimant did not sustain a compensable injury, she cannot have disability.

We affirm the decision and order of the hearing officer.

Tommy W. Lueders
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge