APPEAL NO. 950373

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 February 3, 1995, in (city), Texas, (hearing officer) presiding. The appellant (claimant) appeals the hearing officer's determination that claimant did not suffer a compensable injury on (date of injury), and that she did not have good cause for failing to notify her employer within 30 days of the injury. In addition, the claimant appeals the hearing officer's refusal to add as an issue whether the respondent (carrier) timely contested compensability of claimant's injury, thereby waiving its right to contest compensability. The carrier contends that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

We affirm.

The claimant was employed as a custodian at a church (employer). She testified that on (date of injury), as she was vacuuming the altar in the church sanctuary, she fell backwards onto her back, with the vacuum cleaner falling on top of her. She said she experienced pain and soreness that increased over time; however, she continued working and did not seek medical treatment until she saw (Dr. H) on January 3, 1994. The claimant acknowledged at the hearing that she did not inform her employer of the injury within 30 days and that she also did not mention it to the first few doctors she saw. Dr. H's report states claimant's problem "started as a soreness" and that she had been "hurting a month [month]." The following day the claimant went to the emergency room at (center) where she reported "pain since Thanksgiving" and where she was advised to rest in bed for two days. On January 17th she returned to the medical center. The admission assessment was "intractable spinal pain" with leg cramps for five weeks; the report also stated she observed symptoms "3-4 years ago ? doesn't remember why," although the claimant denied making this statement. The report of (Dr. S), who apparently saw her in consultation with her doctor, (Dr. D), wrote that claimant first developed a backache around Thanksgiving which she believed was due to the extra activity she performed at that time. Dr. D's report says claimant denied any history of trauma. Because diagnostic studies revealed a large herniation at L4-5 the claimant underwent surgery on January 31st and was not released from the hospital until February 5th.

The medical evidence shows that on January 24th the claimant told another consulting doctor, (Dr. B), that she first noticed back pain after falling while cleaning at the church. On January 29th she gave the same history to (Dr. C), the neurosurgeon who performed her surgery.

It was claimant's contention that she did not immediately inform her employer or her doctors about the cause of her injury because she was in the throes of a deep depression over her 14-year-old daughter, who had become pregnant just before Thanksgiving. Claimant's husband and two other daughters confirmed that this caused her to spend much

time in bed crying, and isolated from family and activity. Because of these concerns she said she was "not thinking about myself" and said she could not remember what she told the doctors, although she acknowledged that she knew immediately upon falling that she had hurt herself. However, (Mr. OD), who worked closely with claimant on a daily basis, and knew of some of her personal problems, testified that claimant appeared to be in a "good state of mind" and able to think logically during the period between (date of injury) and January 3, 1994. (Ms. MT), employer's secretary, also testified that she was aware claimant had been upset due to family problems but that she knew no reason that claimant could not have reported an injury.

The records from the medical center contain a notation on January 28th stating that the claimant was upset and depressed because of financial problems arising from her inability to work; an earlier report signed by Dr. D included among the doctor's impressions a finding of "severe anxiety and depression, secondary to the lumbar spine illness," and claimant's discharge diagnoses included anxiety and depressive disorder. Also, Dr. C wrote on May 31, 1994, that claimant had insomnia and was feeling depressed due to lack of sleep, adding, "Her Workman's Comp. case is on hold - she had a lot of personal problems at the time of her accident and didn't report it on time." In a brief letter to Dr. D dated August 31st, Dr. C gave claimant's diagnoses as major depression and psychosis, along with failed back syndrome.

The medical evidence also reflects that in June of 1994 the claimant was hospitalized with diagnoses of severe depression and psychosis. Hospital records indicated sleeplessness, and feelings of depression and hopelessness since her back surgery and said she was worried about her increasing medical bills and inability to care for herself. The records also indicated a history of depression, for which she was treated in 1990. While they mentioned claimant's daughter's pregnancy, it was in relation to the claimant's concerns about taking on further family responsibilities.

The claimant in her appeal takes issue with the hearing officer's determinations that the probative medical evidence did not establish a causal connection between claimant's employment and her low back injury, and that claimant did not have good cause for her failure to timely report the injury to her employer. (She also takes issue with the date the hearing officer found she first reported her injury to her employer; however, even if this date were incorrect, it would appear to have no influence on the determination of the issues in this case.)

While this is not a case in which medical evidence of causation is necessary Texas Workers' Compensation Commission Appeal No. 92503, decided October 29, 1992, the hearing officer in his statement of the evidence noted inconsistencies between claimant's rendition of events leading up to the accident and the accounts given in the early medical reports. Although claimant readily admitted at the hearing that she did not immediately tell her doctors that her injury was work related, the early reports show that she denied that any trauma or accident caused her pain, despite the fact that she later told the doctors she had

fallen while vacuuming. When faced with conflicting evidence, the hearing officer is entitled to reconcile such conflicts and inconsistencies. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Further, the hearing officer as sole judge of the evidence and sole fact finder, Section 410.165(a), is not required to accept at face value the testimony of a claimant, an interested witness. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Upon review of the evidence in this case, we cannot say that the hearing officer's decision on the issue of compensability is so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The claimant also contends that the hearing officer erred in refusing to add the issue of whether the carrier had waived the right to contest compensability because of its alleged failure to include the issue of compensability in its Notice of Refused/Disputed Claim (Form TWCC-21). The evidence reflects that this issue was not raised at the benefit review conference (BRC) and was not reported as a disputed issue in the BRC report. The claimant argues, however, that she raised the issue in a response to the BRC report and that, moreover, the issue of waiver was subsumed within the issue of compensability. However, the Appeals Panel has expressly rejected the proposition that a carrier's contest of compensability is a sub-issue under compensability of an injury. *See* Texas Workers' Compensation Commission Appeal No. 941519, decided December 29, 1994, and cases cited therein. Claimant's response to the BRC report also treats carrier's alleged waiver as a sub-issue to compensability. *See also* Texas Workers' Compensation Commission Appeal No. 92538, decided November 25, 1992 (distinguishing a carrier's attempt to add an issue that was not identified as resolved at the BRC from a party's response to disputes identified as unresolved in the BRC report). Further, the 1989 Act provides that an issue not raised at a BRC may not be considered at a contested case hearing unless the parties agree or the hearing officer determines that good cause existed for not raising the issue at the BRC. Section 410.151(b). The hearing officer in this case determined no good cause based upon the fact that the issue was not raised at either of two BRCs despite the fact that claimant was represented therein. Based upon the record from the hearing, we find that the hearing officer did not err in failing to add this issue.

Finally, the claimant contends that her severe depression and its disabling effects constituted good cause for her failure to timely notify her employer of the injury. Once again, the evidence was conflicting, with the claimant and her family members contending she was distracted and debilitated by personal problems while her coworkers did not observe such a marked change. In addition, while she showed signs of depression during her first hospitalization, it appeared to be related to financial problems arising out of her medical treatment. As noted earlier, these types of conflicts are a matter for resolution by the hearing officer. An appellate body does not normally pass upon the credibility of witnesses or substitute its judgment for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); this is true even where the record contains evidence which would

have supported different inferences. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.). In this case, we find sufficient probative evidence to support the determination that the claimant, in failing to timely notify her employer of an alleged injury from a fall at work, did not exercise that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370 (1948).

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge