APPEAL NO. 950413

The appeal in this case arose pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On January 24, 1995, a hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent/cross-appellant (claimant) was injured in the course and scope of employment but did not timely report the injury, without good cause for his delay. Appellant/cross-respondent (carrier) asserts that the determination of injury in the course and scope of employment is against the great weight of the evidence, but urges affirmance of the determination that notice did not meet statutory requirements. Claimant, in his cross-appeal, asserts that the decision regarding an absence of good cause for late notice is against the great weight of the evidence.

DECISION

We affirm.

Claimant worked for (employer) on (date of injury), when he asserts he injured his back. Claimant described his injury as occurring when he fell while carrying a bag of sand with another employee, (Mr. WD). Claimant said he tripped over a pallet lying on the ground, at which time Mr. WD held the sandbag to some extent, but it still fell across claimant's leg. The sandbag weighed either 100 pounds, according to claimant; or 50-60 pounds, according to Mr. WD. Mr. WD's deposition says that claimant did not fall down while carrying a bag of sand with him and further, that claimant could not have fallen while carrying sand with Mr. WD without Mr. WD seeing the fall. In addition, claimant offered the statement of (Mr. T), who worked with claimant. His statement of June 9, 1993, indicates that claimant told him "about 4 months ago" that he hurt his back picking up a sandbag. His statement indicates that claimant also told (Mr. D). Mr. D's statement does not recall claimant telling him of an injury. The medical evidence shows that claimant had to have surgery to his low back for a herniated disc later in 1993. While the evidence as to injury was conflicting, the hearing officer is the sole judge of the weight and credibility of the evidence (*see* Section 410.165). It is conflicts such as this that he is charged with reconciling. The evidence sufficiently supports the determination that an injury occurred in the course and scope of employment.

Claimant agreed at the hearing that he did not give notice to a supervisor or manager within 30 days of the (date of injury), injury. He indicated that the reason he did not give notice to the employer before (date), is that he thought the injury was trivial and only upon visiting (Dr. V) on (date), did he learn of its seriousness. He added that his pain increased about two weeks before he saw Dr. V. Claimant stated that when he saw Dr. V, Dr. V took an x-ray and "he told me what it was." Claimant said Dr. V then told him not to work. Claimant said, "[r]ight away that's when I called." (Claimant reported his back was injured on (date)). Dr. V's Initial Medical Report shows "x-rays were taken and revealed subluxation complex with components." Summaries of Dr. V's treatment of claimant show that on (date) x-rays were taken, and "patient is to return to the clinic for discussion of the

report of the diagnostic findings." Then on April 19th, Dr. V's summary reads, "[t]he patient returned today for a report of diagnostic findings." (The findings are not revealed in this entry.) Dr. V's summary of (date) does not address whether claimant should work or not.

On April 30, 1993, Dr. V provided a report of his treatment of claimant. In this report he described onset as "two and one-half months ago he began having continuous low back pain which gradually worsened." In this report Dr. V described the (date of injury) incident as "a couple of weeks after initial onset," indicating at that time that claimant was loading a sandbag on a truck and twisted, falling to the ground. Later in the report of April 30th, Dr. V says that claimant "was totally temporarily disabled from the date of the accident for a period of two to four weeks."

Claimant did have surgery on a herniated disc that was finally discovered on August 25, 1993. Surgery in September 1993 was followed by more surgery in December 1993, both in the L4-5 area of the back. The surgeon, (Dr. N), stated that claimant was injured on (date of injury), "and it was a couple of weeks later before the pain really got severe."

Prior to his call to employer to report his back injury on (date), claimant acknowledged that he called employer on (date), and reported that he had injured his ankle. In testifying, claimant agreed that he had not injured his ankle; he said he made such a statement to obtain some time off from work to see if his back would get better.

As stated, the hearing officer is the sole judge of the weight and credibility of the evidence. While claimant stated that he thought his injury trivial and did not know how serious it was until Dr. V told him on (date), the record does contain other evidence. Dr. V's records of (date) do not show the seriousness that claimant describes; for one thing they indicate that claimant was to return on a later date to discuss the result of "diagnostic findings." In addition, Dr. N said that claimant was in severe pain approximately two weeks after the accident, which would be no later than the middle of March. Claimant acknowledged that the pain got worse, but he said it was approximately two weeks before he saw Dr. V. Dr. V also said that claimant was "totally disabled from the time of the accident." As in the evidence relating to the injury, the evidence as to whether the injury was reasonably thought to be trivial until shortly before claimant's notification to employer is in conflict. In addition to claimant's statements, an inference can be made that the injury was not considered trivial from physicians' statements as to severe pain and total disability. Finally, with claimant as the main source of evidence as to how he considered the injury prior to (date), the hearing officer could also consider the credibility of the claimant. The evidence sufficiently supports the findings of fact and conclusions of law that claimant failed to show good cause for delay in notifying his employer. The evidence does not indicate that the hearing officer abused his discretion in not finding good cause for late reporting based on all the evidence.

Finding that the decision and order are sufficiently supported by the evidence, we affirm. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge