APPEAL NO. 980015

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 December 5, 1997. He (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury on _____; that, without good cause, he failed to give timely notice of his claimed injury; and that he did not have disability. The claimant appeals these determinations, contending that they are contrary to the great weight of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed.

DECISION

Affirmed.

The claimant, a motor man on an oil rig, testified that on _____, he was working below the elevated floor of a drilling rig on the blow-out preventers when he slipped on some oil. As he was about to fall into the cellar, he said, his left arm pit caught on a pipe and prevented him from falling. He identified (MB), (PF), and (CB) as witnesses to this event. He said he was able to get himself out of this position and that MB asked him if he was okay and could continue working. According to the claimant, he said he thought so and did work the next three or four days until the rig shut down and was moved to a new location. The claimant said that at first he thought he was not seriously hurt and would recover, but every day his arm got a little worse. About a month later, he said, he decided he had to do something about his arm and shoulder because by then he thought it was serious. Sometime toward the end of June he called the local office of the Texas Workers' Compensation Commission (Commission) to report the injury, was sent a copy of an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) to fill out, and was told to notify the employer. The claimant said that in late June or early July he called his employer to speak with (MS), but because MS was not available he reported the injury to the secretary who gave him the telephone number of the adjuster. The claimant submitted a TWCC-41 which was received by the Commission on July 7, 1997. On July 15, 1997, he signed and presumably sent to MS a letter informing the employer that he sustained a compensable injury at an oil rig on _____. He said he sent this letter because he was never able to talk to MS.

Because the claimant had no medical insurance and there was a dispute over the carrier's liability, the claimant attempted to see a (Dr. D) on August 6 or 7, 1997. Either Dr. D or the claimant's attorney referred the claimant to (Dr. S), D.C., for a free first visit on August 7, 1997. He next was referred by the Commission to (Dr. B) for an examination on October 22, 1997. Dr. B, with limited medical testing, diagnosed a possible rotator cuff tear which he believed, based on the claimant's history, occurred in the slip and fall incident on _____.

The claimant testified that he has not worked since on or about May 19, 1997, when he terminated his employment with the employer. At that time he told (RN), the driller, that he did not wish to drive the distance to where the rig was being relocated and that he had some building repair work he had to do. He also said he told RN that he wanted to return to work for the employer when the rig was moved to a closer site. He also admitted that in July 1997 he did a roof repair job at a building he owned. He said this was light patchwork and that he was assisted by two others. He also conceded that someone from the employer may have called him about returning to work, and that when he received the telephone call, he never mentioned a work-related injury. In November 1997 he inquired of another driller whether work was available.

(KW), the tool pusher, testified that when the claimant left his employment, he told him that he wanted to come back to work for the employer. KW said he talked with the claimant on May 27, 1997, and offered him a job. The claimant, according to KW, told him he was too busy at the time and never mentioned a work-related injury. KW also said he was not aware of any such injury.

MB testified that he did not observe any injury on _____; was not aware of any; and that the claimant did not appear injured from that day until May 19, 1997, when he quit. He said he did not recall if he asked him if he was okay on _____.

CB, a derrick man, but not a supervisor, testified that he did not remember an incident on _____; that the claimant never told him he hurt himself; and that he never observed the claimant acting hurt. He also testified that he did not know whether the claimant fell or not because he was 60 feet in the air on the derrick and was not able to see everything on the derrick. In rebuttal, the claimant testified that "everyone" was down working on the blow-out preventers and that CB was not up on the derrick when he fell.

In a transcribed telephone conversation admitted into evidence without objection, RN stated that he was the driller at the rig. He said he could not recall the accident as described by the claimant and that the claimant never indicated to him that he sustained any kind of injury at work. According to the statement, the claimant continued working his normal duties from _____, until the rig closed down a few days later without showing any signs of being hurt.

The claimant had the burden of proof on all the disputed issues. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Texas Workers' Compensation Commission Appeal No. 941098, decided September 29, 1994; Texas Workers' Compensation Commission Appeal No. 94114, decided March 3, 1994. In addition, each issue presented essentially a question of fact for the hearing officer to decide from conflicting evidence. As set out above, the claimant asserted that he fell and caught himself on a pipe on _____. He identified four witnesses. None of the witnesses confirmed his account of the accident, although Dr. B, in reliance on the claimant's history of what happened, concluded that he did sustain a possible rotator cuff tear at work. The claimant speculated that his coworkers were motivated to be less than

candid because they were still employees who did not want to jeopardize their employment. The claimant's attorney suggested, without evidence, that a pattern of "see no evil, hear no evil" is prevalent with this employer. The hearing officer, as the trier of fact, was the sole judge of the weight and credibility of the evidence. Section 410.165(a). It was his responsibility to consider the evidence and to determine what facts had been established. While the claimant's testimony alone may be sufficient to prove this injury, that testimony is not conclusive, but only raises a factual issue for resolution by the hearing officer. Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. In this case, the hearing officer did not find persuasive the claimant's testimony about how he injured himself. Similarly, the facts set out by Dr. B in his medical report, which were obtained from the claimant, do not necessarily prove that an accident occurred in the manner recorded. Presley v. Royal Indemnity Insurance Company, 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). As an appellate review body, we do not reweigh the evidence or substitute our opinion of the credibility of a witness for that of the hearing officer. Rather, we will reverse a factual determination of a hearing officer only if it 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). Having reviewed the record of this case, we find the evidence deemed credible by the hearing officer and contrary to the claimant's position sufficient to support his determination that the claimant did not sustain a compensable injury on _____, and decline to reverse that determination.

Section 401.011(16) defines disability as the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." As the 1989 Act requires a finding of the existence of a compensable injury as prerequisite to a finding of disability, we also find no error in the hearing officer's determination that the claimant did not have disability. The hearing officer, nonetheless, also found that the claimant was able to obtain or retain employment at preinjury wages "at all times subsequent to _____." Finding of Fact No. 16. The claimant appeals this determination. The ability of the claimant to earn his preinjury wage after _____, was a question of fact. There was evidence that the claimant continued working after _____, and only quit when the rig shut down to be moved to a new location, that he expressed a willingness to return to work when the rig was relocated back to a more convenient location, that he participated in a roof repair job after _____, which the claimant said was not strenuous, and that he was applying for work as late as a few days before the CCH. Opposed to this was the claimant's testimony that he could not work because of his deteriorating shoulder condition and Dr. B's opinion that the claimant could not work. The hearing officer resolved the conflicts in this evidence and determined that the claimant could earn his preinjury wage after _____. Under our standard of review, we find the evidence sufficient to support this determination.

Finally, the claimant appeals the determination of the hearing officer that the claimant, without good cause, failed to give timely notice of his injury as required by Sections 409.001 and 409.002. The claimant does not contend that he gave notice within the requisite 30-day period after the injury. Rather, he contends that he had good cause for

late notice. The test for good cause is that of ordinary prudence or "that degree of diligence that an ordinary person would have exercised under the same or similar circumstances," and it is within the purview of the hearing officer to determine what ordinary prudence is under the circumstances. Appeal No. 94114, *supra*. Whether good cause for failure to timely report an injury exists is a question of fact. Trivialization of an injury, that is a bona fide belief that an injury is not serious, is commonly considered good cause for late notice. *See* Texas Workers' Compensation Commission Appeal No. 93155, decided April 14, 1993. Although good cause must generally continue up to the date notice is given, a reasonable time should be allowed for the preparation and filing of a claim after the seriousness of the injury is suspected or determined. Texas Workers' Compensation Commission Appeal No. 93649, decided September 8, 1993.

The hearing officer found that the claimant first gave notice of his injury to his employer on July 15, 1997, in the letter discussed above. The claimant argues that notice was given as early as June 25, 1997, in the phone call by the claimant to MS's secretary. Claimant argues that even if MS did not receive actual notice on that date, he should be considered to have received constructive notice when his secretary received the telephone call and that such a conclusion necessarily recognizes the reality of a business organization.

With regard to the duration of the trivialization, the claimant himself testified that after about a month, that is mid-June 1997, he decided he had to do something about his shoulder because by then he thought it was serious. Thus, there is sufficient evidence, and the claimant in his appeal concedes, that good cause ended on or about June 15, 1997. Claimant argues that he still acted prudently in waiting yet another 10 days to call his employer. Even were we to assume that notice to the secretary in the telephone call of June 25, 1997, was notice to MS, a serious question remains of whether the 10-day delay was prudent. In any case, Section 409.001(b)(2) provides that notice must be given to an employee of the employer "who holds a supervisory or management position." We decline to expand this provision to encompass the concept of constructive notice as suggested by the claimant.

The hearing officer found that notice was first given to the employer on July 15, 1997. This was approximately two weeks after the claimant first said he contacted the Commission about his claimed injury and one week after he filed his TWCC-41 with the Commission. He provided no explanation of why he waited this long after trivialization ceased in mid-June 1997 and after he made inquires to the Commission about his rights and responsibilities under the 1989 Act. Under these circumstances, we conclude that the evidence was sufficient to support the conclusion of the hearing officer that the claimant, without good cause, failed to give his employer timely notice of his injury.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge