APPEAL NO. 980146
FILED MARCH 10, 1998

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 29, 1997. The issues at the CCH were injury, timely report of injury, and disability. The parties stipulated that the respondent (claimant) injured his low back in the course and scope of his employment on _____, and that he had disability from September 29, 1997, through November 9, 1997. The parties also stipulated that the claimant first notified his employer of his _____, injury on March 24, 1997. That left as the only remaining issue to be resolved by the hearing officer whether the claimant had good cause for not timely reporting his injury. The hearing officer found that the claimant had good cause because he trivialized his injury and did not learn of the seriousness of his injury until March 21, 1997. The appellant (carrier) files a request for review challenging certain findings of the hearing officer and arguing that her decision that the claimant had good cause for timely reporting was contrary to the evidence. There is no response from the claimant in the appeal file.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer summarized the evidence in her decision and we adopt her rendition of the evidence in which she stated, in part, as follows:

> Claimant testified, and the parties stipulated, that he was injured on _____, while in the course and scope of his employment with Employer. On that date, Claimant had been employed for thirty-one years by Employer as an electrician. Claimant testified that his work included some light work and some extremely heavy work, including pulling heavy wire and lifting transformers weighing over 1000 pounds.
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> Claimant further testified that he had experienced many aches and pains over the years in this job, but that he had always treated them with over the counter muscle relaxants and pain medications.
>
> Claimant injured his low back on _____, when he was pulling several wires, weighing well over 100 pounds, over his shoulder and above his head into a conduit. He testified that he had to bend and lift the weight of the wires several times during this job, and that following the day's work he felt back pain, but did not think much about it. He further testified that the pain continued for two or three days and then went away for a few more days. The pain then came back in the form of a dull pain which progressively got

worse and included left leg numbness in the mornings and pain in his left hip. Claimant testified that at some point, he had to cut back on his overtime hours and work his regular forty hour shift because of the pain.

Claimant testified that he went to the doctor on Friday, March 21, 1997, when he realized the pain was not going away and had gotten much worse, and that the doctor told him he had a herniated disk at L4-L5. On Monday, March 24, 1997, Claimant informed his supervisor of the injury. He testified that he did not report the injury before that date because aches and pains were common in his job and he knew it sometimes took a couple of months for a pulled muscle to get better, and he did not think his injury was serious. When he realized the injury was serious, e.g., when he was told he had a herniated disc, he reported it to his employer the next business day.

Even though all of the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all the evidence presented.

The carrier challenges the following findings of fact and conclusions of law in the hearing officer's decision:

FINDINGS OF FACT

2. Claimant believed in good faith that his _____ injury was trivial and tried to treat it with over-the-counter medications.

4. Claimant learned of the seriousness of his work-related injury on March 21, 1997.

6. Claimant acted as a reasonably prudent person in reporting his injury on the first business day following his discovery of the serious nature of the injury.

8. Claimant had good cause for failing to provide timely notice as required under Section 409.001.

CONCLUSION OF LAW

3. Carrier is not relieved from liability under Texas Labor Code Ann. Section 409.002 because of Claimant's failure to timely notify his employer pursuant to section 409.001.

In arguing that these determinations were contrary to the evidence, the carrier points to written statements of the claimant's coworkers that he complained of pain and problems from the date of his injury forward and testimony from the claimant that he not only lost

overtime but missed days from work due to his injury. The carrier argues that this belied the claimant's contention of trivialization and established that he should have known that he had a serious injury well before March 21, 1997. Carrier summarized this argument as follows in its request for review:

> Claimant may have reasonably trivialized his injury for a week or two after the injury. However, this good cause did not exist for two months. It is not reasonable for an employee to have pain continuing for over a month, that was known to result from an injury and to continue to trivialize and ignore such an injury. While Claimant may not have known the extent of his injury, he surely knew well before March 24, 1997, that he had received a workplace injury.

The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The 1989 Act provides that a determination by the Texas Workers' Compensation Commission that good cause exists for failure to provide notice of injury to an employer in a timely manner or actual knowledge of the injury by the employer can relieve the claimant of the requirement to report the injury. Section 409.002. We have held that good cause for failure to timely report an injury can be based upon the injured worker's not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonable or ordinarily prudent person standard. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker.

Whether or not good cause existed is generally a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 951546, decided October 26, 1995. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. 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). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, 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). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight 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 Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard of review, we cannot say the hearing officer erred by finding that the claimant had good cause for not timely reporting his injury. There was evidence that the claimant trivialized his injury up to March 21, 1997. Even though there was evidence to support a contrary finding, it did not rise to the level of constituting the overwhelming evidence.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Elaine M. Chaney
Appeals Judge