APPEAL NO. 980159
FILED MARCH 16, 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 18, 1997. With regard to the issues at the CCH, he (hearing officer) determined that the appellant (claimant) did not sustain a compensable injury on _____, that the respondent (carrier) is relieved of liability due to the claimant's failure to provide (employer) timely notice of injury and inability to show good cause for failing to provide timely notice, and that the claimant does not have disability. The claimant appeals, seeks a reversal of the decision and argues he sustained a compensable injury, either provided timely notice of injury or had good cause for failing to provide timely notice and had disability. The carrier responds and seeks an affirmance of the decision.

DECISION

We affirm.

The hearing officer fairly summarizes the facts in the decision and we adopt his rendition of the facts. We discuss only those facts necessary to our decision.

The claimant testified at the CCH that on or about _____, he worked for employer and sustained a hernia injury while lifting several pieces of Sheetrock. The carrier presented the claimant's Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41), wherein he wrote that he was injured lifting one piece of Sheetrock. His son, Mr. T, who also worked for the employer, testified at the CCH that he witnessed the alleged injury. The claimant said he felt pain for five or 10 minutes, stopped working for five or 10 minutes, worked the rest of the day and worked until August 25, 1997. He maintained that he did not think the injury was serious until he had excruciating pain and checked into the hospital emergency room (ER) on August 25, 1997. The ER doctor, Dr. H, noted the claimant's complaint of "lifting something at work several months ago," diagnosed a left inguinal hernia and instructed the claimant not to work until he had the hernia repaired. The claimant followed up with Dr. A on August 28, 1997, who diagnosed a bilateral hernia. On October 7, 1997, the claimant consulted a Veterans Administration doctor, Dr. G, who also diagnosed a bilateral hernia. On November 20, 1997, Dr. G performed a left inguinal hernia repair surgery and directed the claimant not to work for six weeks. The claimant testified that the reason for the delay in having the surgery was the carrier's denial of the claim. The claimant testified that on _____, he informed his supervisor, Mr. B, of his injury. Mr. T said that the claimant told Mr. B about the injury. Mr. B, the claimant's foreman, Mr. M, and one of the employer's employees, Mr. G testified at the CCH. Mr. B said he did not remember the claimant reporting an injury on August 25, 1997. Mr. M said the claimant first reported an injury to him on August 1, 1997. Mr. G said the claimant made no mention of the injury until he went to the hospital on August 25, 1997.

An injury is "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). A compensable injury is one "that arises out of and in the course and scope of employment. . . ." Section 401.011(10). An employee has the burden of proving, by a preponderance of the evidence, that he sustained a compensable injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. The hearing officer noted, in the "Statement of the Evidence" portion of the decision, that the claimant's testimony regarding immediate pain on _____, was inconsistent with his two and a half month delay in seeking medical treatment. The contested case 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. Section 410.165(a).

It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will not substitute our judgment for that of the hearing officer when the determination is not 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995. We conclude that the compensability determination is not so against the great weight and preponderance of the evidence so as to be clearly wrong or manifestly unjust.

An employee, or one acting on his or her behalf, must notify his employer of a compensable injury on or before the 30th day after the injury. Section 409.001(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 122.1(a) (Rule 122.1(a)). An insurance carrier is relieved of liability unless the employee can show good cause existed for his failure to provide timely notice, the employer had actual notice or the carrier fails to contest the claim. Section 409.002; Rule 122.1(d). The test for the existence of good cause is that of ordinary prudence or whether the employee prosecuted her claim with that degree of diligence that an ordinarily prudent person would have energized under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 951546, decided October 26, 1995. "The law is well settled that a bona fide belief of an employee that his injuries are not serious but trivial is sufficient to constitute good cause for delay in filing a claim. It also has been held a number of times that the advice of a physician, upon whom a claimant relies, that injuries are not of a serious nature, but are temporary or trivial, is sufficient to justify a claimant's delay until he learns, or by the use of reasonable diligence should have learned, that his injuries are serious." Texas Workers' Compensation Commission Appeal No. 92386, decided September 8, 1992, citing Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370, 372 (1948).

Whether a claimant timely reported an injury or, if he did not, whether he showed good cause for her failure to timely report was a question of fact for the hearing officer to

determine. Appeal No. 951546, *supra.* We conclude that the notice and good cause determinations are not so against the great weight and preponderance of the evidence so as to be clearly wrong or manifestly unjust. The record, including the testimony from Dr. B, Mr. B, and Mr. G, support a determination that the claimant failed to provide timely notice of injury. The determination that the claimant did not trivialize the injury is also supported by the record.

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). The determination as to an employee's disability is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992. Disability, by definition, depends upon there being a compensable injury. *Id*. Since we affirm the compensability determination, we affirm the disability determination also.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge