APPEAL NO. 001376

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 May 24, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury on _____. The parties stipulated that the claimant did not report her injury to the employer or a person in a supervisory or management position with the employer on or before the 30th day after the date of injury. The hearing officer found that good cause existed for the claimant's failure to timely report her injury to the employer. The appellant (self-insured) appealed the finding that the claimant sustained an injury in the course and scope of employment on _____, and that the claimant had good cause for her failure to timely report her injury to the employer, urging that the determinations of the hearing officer were against the great weight and preponderance of the evidence. The claimant responded that the hearing officer's decision was supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant worked as a physical education teacher for the employer and on _____, the day before school was to be let out for the holidays, she participated in a student/faculty volleyball game which had been organized by the head of the physical education department to raise money and establish better relations between students and faculty. The claimant testified that while playing in one of the volleyball games she sustained an injury to her left thumb when she attempted to hit the ball. The claimant stated that when she hit the ball her left thumb bent back causing her a great deal of pain but she was able to continue playing. Mr. W, another teacher/coach testified that he witnessed the event and the claimant did express pain after attempting to hit the volleyball.

The claimant testified that by the next day her thumb and wrist were bruised and swollen and when she played golf on December 21, 1999, she had difficulty gripping the club without pain. The claimant testified that she believed she had just sprained or jammed her thumb and thought it would be resolved in 4-6 weeks without the need for medical treatment. When questioned about prior workers' compensation claims, the claimant acknowledged that she had several claims over the years beginning in 1993, but she felt they were more serious in nature than her thumb injury. The claimant testified that she attempted to play golf again about 10 days later and became concerned when her thumb was still very painful, but decided to not to file another claim because "she didn't want to file report number 99,000" as it was embarrassing to file for such a trivial injury compared to her other injuries over the years. The claimant stated she "just wanted it to get well on its own." On February 9, 2000, an adjuster recorded her conversation with the claimant with knowledge and approval of the claimant to do so. When the claimant was asked why she waited so long to report an injury, the claimant replied, "because ah at first I thought it was just like a jam or something and it was going to get well on it's own I

get, you know, in P.E. you're going to have injuries here and there. You know, I don't report all of them and I was hoping that it would get well." At the hearing, the claimant responded that "it depends on the extent of injury" as to whether she would report an injury. She was subsequently asked whether she knew to report an injury and she denied that she knew she was supposed to report despite having several prior workers' compensation claims.

The claimant returned to school on January 4, 2000 (the first Monday in January), and Mr. W asked her how the hand was doing. The claimant testified that she told Mr. W that she was still having problems with her thumb but thought it would be all right. In her recorded statement the claimant remarked, "and I can go get Mr. [W] and he will tell you that right when we came back I said you know it's iffy but I may have to fill out a report." The claimant admitted that she did not report an injury to her supervisor or any person in a management position and there was no argument that the employer had actual knowledge of the injury.

The claimant stated that when her thumb did not get better after about 4 to 6 weeks she reported her injury to the employer on January 31, 2000, and sought medical treatment from the doctor who had previously treated her other injuries. Medical records from Dr. H reflect that the claimant presented on February 2, 2000, with complaints of left thumb and hand pain which areas she represented were injured on _____, while playing volleyball. X-rays were taken but the results were not offered into evidence. The claimant explained that a radiologist had not interpreted the film because the carrier had disputed the claim. The claimant testified that she did not lose time from work as a result of her thumb injury but she was off work as of the date of the CCH receiving temporary income benefits because of another injury she sustained on _____.

Section 409.001(a) provides that an employee must notify the employer of an injury by the 30th day after the injury occurs. Failure to do so, absent good cause, relieves the employer and carrier of liability for benefits for the injury. To be adequate, the notice must inform the employer of the general nature of the injury and that it was work related. DeAnda v. Home Insurance Co., 618 S.W.2d 529, 533 (Tex. 1980). A specific medical diagnosis is not required. Whether, and if so when, the employee gave timely notice of an injury is generally a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93761, decided October 4, 1993.

The parties stipulated that the claimant did not notify her employer of her injury by the 30th day after _____. The claimant contended at the CCH that she had good cause for her failure to timely report. The test for good cause is whether the claimant prosecuted her claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948); Texas Workers' Compensation Commission Appeal No. 93494, decided July 22, 1993. The good cause identified by the claimant was her belief that her injury was not serious. Trivialization of an injury, or bona fide belief that an injury is not serious may constitute good cause. Texas Workers' Compensation Commission

Appeal No. 93155, decided April 14, 1993. However, good cause for delay in giving notice of injury is ordinarily a fact question to be determined by the fact finder. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). In addition, the good cause must continue to the date of the notice. Continental Casualty Company v. Cook, 515 S.W.2d 261 (Tex. 1974), except that a reasonable time should be allowed for giving notice after the seriousness of the injury is suspected or determined, Hawkins, *supra*. We have also observed that the totality of the claimant's conduct must be considered in determining ordinary prudence. Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993.

There is a conflict in the evidence as to whether the claimant had good cause for her failure to timely report her injury. The hearing officer resolved that conflict in favor of the claimant. The claimant's testimony that she did not believe her injury to be serious until 4 to 6 weeks after the date of injury raised only an issue of fact for the hearing officer to determine. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993.

In a case such as the one before us where both parties presented evidence on the disputed issues, the hearing officer must look at all of the relevant evidence to make factual determinations and we must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could 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). Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be manifestly

unjust would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Since we find the evidence sufficient to support the determinations of the hearing officer, we will not substitute our judgement for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994.

Kathleen C. Decker
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Tommy W. Lueders
Appeals Judge