

APPEAL NO. 92084
FILED APRIL 15, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On February 3, 1992, (hearing officer) presided at this hearing in _____, Texas. He found appellant, claimant herein, did not give timely notice of injury to his employer. He did not decide the issue of whether the injury occurred in course and scope of employment. Claimant asserts that he had good cause for not giving notice within 30 days.

DECISION

Finding that the decision is not against the great weight and preponderance of the evidence we affirm.

Claimant had been a cook for the (employer) for approximately 18 months. The Notice of Injury form he filed, dated February 27, 1991, was the first notice of injury given to his employer and showed that he "felt sharp pains radiating around my chest and back." Such event was said to have occurred on January 3, 1991, when claimant reached overhead for a pot that was heavier than he expected because it had pots inside it. As he braced himself when its weight became apparent, he felt the sharp pain described in the notice of injury. He was taken to the hospital that day where his presenting complaint was said to be "pain rt side of chest with SOB" (pain right side of chest with shortness of breath). The onset was said to be "2 days" and his blood pressure was recorded as 170/120. When he was moved within the hospital, he was noted to have fallen on his side in a football game four days before and to have strained at work two days before. This record said he had "musculoskeletal pain." Claimant took issue with the hospital report where it said he fell in a football game. He said he never had played football but felt pain as he watched a football game on January 1st. Claimant, on January 3rd, thought he was having a heart attack. He had had a problem with high blood pressure before in 1988. As of January 17, 1991, his blood pressure at the hospital was shown to be 130/80.

Claimant did not report an injury within 30 days because he testified he was not aware of what happened to him. In an interrogatory his answer to a question about delay in reporting the accident was, "he did not realize that the symptoms of his musculoskeletal pain were work related until later in February when although his blood pressure was brought under control, his body pain persisted and upon his recollection associated the commencement of each manifestation of pain with his work activity at the time." (We note above that his blood pressure was 130/80 on January 17th and add that the hospital found his blood pressure to be 110/80 on January 24th.)

Claimant and carrier stipulated that LC would testify that he helped claimant after he apparently experienced severe chest pains on January 3, 1991.

Claimant's supervisor, BH stated he was not aware of any injury at work. He was under the impression that claimant had a heart problem. On January 20, 1991, claimant was fired because he had two jobs and was not producing at this job. Claimant did a good job as a cook, but never told him he was injured.

With no decision on the issue of injury during the course and scope of employment, claimant only appeals the determination that notice was not timely given. Claimant states there was good cause to delay based on his delayed ability to relate his persistent body pain to the work activity. He further states that claimant had "good cause in relying on his physician's diagnoses" and believed that the pain was due to another cause.

Claimant cites four cases. In three, Hawkins v. Safety Casualty Co., 146 Tex. 381 207 S.W.2d 370 (1948); Texas Employment Ins. Assoc. v. Harkey, 208 S.W.2d 915 (Tex. Civ. App.-El Paso 1948) *aff'd* 146 Tex. 504, 208 S.W.2d 919 (1948); and Farmland Mut. Ins. Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ), at least one physician in each case told the respective claimant that his condition was not serious, while one, American Gen. Ins. Co. v. Amerson, 187 S.W.2d 912 (Tex. Civ. App.-Galveston 1945 writ *ref'd w.o.m.*) dealt with a claimant who was not told by two examining doctors that he had a hernia (at least one found it and did tell the carrier). Both Amerson and Alvarez labeled the question of good cause to be one of fact for determination by the trier of fact. Only one, Hawkins, ever dealt with the issue as a matter of law and that was because the lower court had so declared in instructing that good cause was not shown. Hawkins said the lower court should not have so ruled and should have put the question before the trier of fact.

In the case before us, there is no evidence that any doctor misled claimant prior to his notice of injury on February 27, 1991. To the contrary, on January 3rd, his diagnosis included "musculoskeletal pain" as the primary problem and he was given Motrin which he took continuously until March. On January 24, 1991, the hospital entry said the onset of his complaint was "3 wks" and "health status" was "Hx chest injury." There is no indication claimant was told his injury was trivial, or that he thought it to be so, and although claimant asserts that he had pain and once testified his injury was "real serious. I, I couldn't breathe (sic)," he never said when he first believed his condition was serious. The reference to "couldn't breathe" (sic) could be inferred as a reference back to the time of the original belief in regard to a heart attack. No doctor labeled the "lumbo-sacral strain" reported by Dr. A as "serious." (We note that claimant was subsequently referred by Dr. A, to whom claimant says he had been referred by his attorney, to (clinic) by TWCC-64 dated August 23, 1991, duly admitted in evidence.)

While the record reveals that claimant at one time asserted actual knowledge of the injury by employer, the hearing officer's questions on this aspect of Article 8308-5.02(1) of the 1989 Act went without an answer upon which to base a finding of actual knowledge. Also on appeal, claimant did not raise actual knowledge as a basis for seeking reversal of the decision. Rather, the appeal was consistent with the thrust of the hearing and argued

that claimant showed good cause.

The previous examination of claimant's cases does not find that they control the disposition of this case except that they affirm that the question of good cause is a fact question. The hearing officer is the sole judge of the evidence. Article 8308-6.43(e) of the 1989 Act. An appeals panel in Texas Workers' Compensation Commission Appeal No. 91120, decided March 30, 1992, found that the hearing officer did not abuse his discretion in finding that "carrier believed the injury was trivial or non-existent and there was good cause for delay in notification by carrier." That case also dealt with an injury that was not recognized immediately. However, in that case the claimant had never thought her pain to be serious--had thought it part of "soreness" in beginning a job that required effort and muscles she had not used for years. When the general soreness subsided but her wrist pain increased, she went to a doctor who found that she had inflamed tendons. She filed a claim two days after her doctor told her of the nature of the injury. In the case before us the hearing officer could reasonably infer from claimant's testimony that he thought the injury to be serious from the inception. We find no abuse of the hearing officer's discretion in regard to whether good cause existed for not giving notice until February 27th of an injury that occurred on January 3rd. As stated in Alvarez, supra, this question is viewed as one of fact as opposed to one of law. We will not disturb the hearing officer's decision that claimant did not give notice as required by the 1989 Act and is therefore not entitled to benefits since it is not against the great weight and preponderance of the evidence. TEIA v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

We affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge

