

APPEAL NO. 92386
FILED SEPTEMBER 8, 1992

This appeal arises under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on July 6, 1992 to determine two disputed issues, to wit: whether appellant sustained an injury in the course and scope of his employment on _____, and whether appellant provided notice of his injury to his employer not later than the 30th day after the date the injury occurred. With regard to the latter issue, appellant asserted at the outset of the hearing that the evidence would show he had good cause for not notifying his employer before (date) that he had a job-related cervical spine condition. Prior to that date, his physical symptoms had been attributed first to a cervical strain and then to a viral infection. Respondent objected to what it characterized as appellant's attempt to add another disputed issue to the hearing and the hearing officer deferred his ruling, took evidence, and concluded the hearing. The hearing officer ultimately found in his Decision and Order that the good cause issue was not before him for resolution for the reasons that it had not been raised at the benefit review conference (BRC) and appellant had not requested it be added to the statement of disputes. The hearing officer also found that appellant did not notify his employer of a work related injury until after (date), and that the cause of his cervical injury was unknown. Based on these latter findings, he concluded that appellant failed to prove by a preponderance of the evidence that he sustained an injury in the course and scope of his employment on _____, or reported his injury "within thirty (30) days as required by" Article 8308-5.01(a) (1989 Act). In his request for review, appellant, in essence, challenges the sufficiency of the evidence to support the hearing officer's determination that appellant failed to prove he sustained a work-related injury on _____, and asserts the hearing officer erred in determining that good cause for not timely reporting the injury was not an issue at the hearing. In its response, respondent supports the hearing officer's determinations.

DECISION

We view the hearing officer's finding that the cause of appellant's cervical injury was unknown to be against the great weight and preponderance of the evidence, as well as the related conclusion that appellant failed to prove he sustained a work related injury on _____. We also believe that the hearing officer erred in finding that the matter of appellant's good cause for not timely reporting his injury was not before him for resolution. We reverse and render a new decision that appellant is entitled to benefits under the 1989 Act.

Appellant testified that on _____, while working as an assistant kiln operator for (employer), his employer for the past 17 years, he was performing a system check on Kiln 36 and climbed a narrow ladder to check the lignite level in a bin. He knelt down on a platform in a confined area and reached up and pounded on the bin with a steel rod. As he climbed back down the ladder, appellant experienced sharp pains in his

shoulders and legs. He felt disoriented and weak, and could not complete his tasks. He went to the control room to advise his foreman, (Mr. M), as to how he was feeling and that he couldn't complete his tasks. Article 8308-5.01(c) provides that notice of injury may be given to any employee or employer who holds a supervisory or management position. Mr. M asked him what was wrong and appellant told him, and Mr. B who was also present, that his legs and shoulders hurt and that he felt weak. He testified he had not previously experienced such symptoms. He rested in the control room for some time, and then finished his shift. Mr. M's written statement corroborated appellant's coming to the control room on _____, resting, then returning to work. According to Mr. M's statement, appellant then said he felt weak and thought he had the flu or a viral infection, but "did not report any on job incident or accident." Mr. M subsequently inquired several times about appellant's condition and, after several weeks with no improvement, advised him to get a second opinion. Mr. M's first knowledge that appellant was "relating this to a job injury was when the office told me he was having surgery and that the hospital wanted workers' compensation verification." Mr. B's written statement reflected that when appellant came to the control room on _____, he was breathing hard and indicated he probably just had the flu. This statement said that appellant missed work on (day after date of injury), but came to work on (two days after date of injury) and said he just had a virus. Mr. B stated he too inquired of appellant several times over the next few weeks about his condition, and that appellant responded he had seen a doctor and had been told he had a virus. According to the statement of coworker Mr. W, on _____ he had worked with appellant on Kiln 36, and later found him in the control room. Appellant there told Mr. W he had the flu and was numb on one side, but did not mention being injured on the job, nor did Mr. W witness any such injury. He said appellant had been limping for several weeks prior to _____.

On the day after the incident, appellant saw Dr. R, a family practitioner he selected from the phone book. He said Dr. R told him he had a "cervical strain." Dr. R's records of this (day after date of injury) visit reflect appellant's complaints of neck pain radiating down both shoulders, and dizziness. His impression stated "trapezius strain" and questioned a viral syndrome. Appellant returned to work on (two days after date of injury), gave Dr. R's bill to Mr. M, and told him Dr. R had said he had a "cervical strain." He said he filed a group health insurance claim because he didn't then know he had a work related injury. On February 13th, appellant again saw Dr. R, said he was told he had a viral infection, and was taken off work for two days. Dr. R's records of February 13th reflected that appellant's work involves climbing, and his impression stated: "viral? autoimmune?." He took appellant off work for two days, after which appellant returned and worked continuously at his regular duties until March 20th. He saw Dr. R again on February 28th and the record of that visit said appellant had complained of weakness for the past month, and warm sensations in his feet, legs, chest, back, and buttocks. Dr. R's impression on that visit was "viral syndrome." Appellant said his symptoms had persisted and included numbness in his left thumbtip and a fingertip, stiffness and numbness in his left leg, balance problems, limping, and warm flashes.

On March 17th, as he departed from work, appellant said he was stopped in the parking lot by Dr. L, a doctor he said was used by employer, who inquired about his limp. On March 20th, appellant went to see Dr. L because his condition was not improving. Dr. L told him he might have had a stroke, referred him to Dr. A, and took him off work. In a "to whom it may concern" letter, dated March 24, 1992, Dr. L stated that the cause of appellant's "weakness and incoordination of the lower extremities" hadn't yet been determined; that appellant was scheduled to see Dr. A for further evaluation; that in his condition appellant shouldn't be climbing, lifting, crawling, or working around machinery; and that he had advised appellant to go on sick leave until his problem could be resolved. In a report dated April 28th, Dr. L stated that a CAT scan of the brain obtained on March 21st was normal and ruled out a stroke or lesion to explain appellant's left-sided weakness and ataxia. The report also said Dr. L referred appellant to Dr. A, a physical medicine specialist, for diagnostic work-up and that Dr. A had appellant admitted to the hospital to determine the cause of his apparent "cervical level pathology."

On (date), appellant said he was seen by Dr. A who told him something was wrong and had him admitted to (hospital). Dr. A's record of that visit indicates that electrodiagnostic testing revealed cervical myelopathy and that appellant was being admitted to the hospital to ascertain the cause. The hospital record of (date), dictated that day by Dr. A, indicated in the history portion that appellant was admitted on (date)"for a workup of his cervical myelopathy of unknown etiology;" in the "impression" portion, this record stated "cervical myelopathy unclear etiology" and "hypertension;" and in the "plan" portion the record stated that the appellant was "admitted for workup of his cervical etiology including cervical MRI scan and neurology consult." This hospital record also stated that appellant gave a history of the sudden onset of his symptoms while at work when he was climbing a ladder. Appellant testified that an MRI test revealed cervical disc problems and that Dr. A and Dr. S, a neurologist, told him he had two herniated discs pressing on his spine and causing his symptoms. Dr. S's report, dated (date), recounted appellant's history of neck, shoulder, and arm pain about three months earlier, the sudden episode while descending a ladder, the developing weakness in his arm and legs, and the persistence of his symptoms. Dr. S's report stated that an MRI scan revealed "marked disc defects at C3-L4 (sic) and C4-5 levels with marked compression of the dura and spinal cord shadow;" stated his impression as "cervical myelopathy, secondary to cervical disc disease at C3-4 and C4-5 levels;" and recommended surgery for decompression. Such surgery was performed, apparently shortly after (date).

Appellant said it was on (date) when he was first made aware that his _____ on-the-job injury resulted in his cervical disc condition; that he advised his employer immediately of this information and prepared a workers' compensation claim; and that he has been off work since his surgery. Appellant's "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41) bore the date March 25th instead of (date), which was attributed to a typographical error. This TWCC-41 showed

_____ as the date of injury and stated that the accident happened "while climbing ladder to check No. 36 lower feed bin." Appellant testified he never knew he had herniated discs before (date); never had prior back injuries; and did nothing off the job to injure his back. Appellant could not attribute his herniated discs to anything but his work and believed it was his activity when he straightened up and came back down the ladder on _____ that caused his injury. He testified that Dr. A told him his condition was job related. He had described his job duties to Dr. R and Dr. A, and had also told Dr. S what he had been doing on _____. He told them about the pain in his legs and shoulders. _____ was the only point in time that he could recall an injury, and the symptoms commenced as he was climbing back down the ladder. He said his position always was that he was injured on the job on _____ and that he reported the varying diagnostic information to employer as he received it from the doctors.

Employer's personnel and administration manager, Mr. P, testified that employer's first knowledge of appellant's injury was sometime in (month) (year) when appellant filed his claim.

Dr. A rendered a report which mentioned appellant's history of the onset of weakness associated with climbing a ladder at work, the herniated disc, the decompressive surgery, and concluded that "it is my opinion that this herniation occurred while he was climbing his ladder at work." Dr. S prepared a report in which he opined that "[i]t continues to be my feeling that [appellant] sustained his injury while working and climbing the ladder."

As earlier stated, the hearing officer found that appellant did not notify his employer of a work related injury until after (date), and that the issue of good cause wasn't before him for resolution in that it was neither raised at the BRC nor included in the statement of disputes. The BRC report reflected that the following issue was raised but not resolved after the BRC: "Was the injury of [appellant] on _____, reported to the employer within the required 30 day time limit?" This report stated appellant's position to be that his supervisor, Mr. M, knew of his injury on _____; that appellant told Mr. M the next day about his injury; and that he tried to give a medical report to another supervisor on February 13th. It seems clear that appellant's theory was that he sustained an injury (whatever its nature) on _____ at work and that he was not asserting a repetitive trauma injury. Thus the notice requirement relating to occupational diseases (Article 8308-1.03(36)) was not in issue. *Compare* Texas Workers' Compensation Commission Appeal No. 91026, decided October 18, 1991. In the instant case, appellant's testimony was undisputed that he told his foreman of his symptoms on _____, and informed him on (two days after date of injury) of Dr. R's initial diagnosis of cervical strain, and later informed him of Dr. R's subsequent diagnosis of viral syndrome. His testimony, as well as his TWCC-41, showed appellant promptly advised employer of the diagnosis of herniated cervical discs attributable to his work when that diagnosis was eventually reached on (date) after an MRI scan.

The question we must answer is whether, under the circumstances of this case, the good cause matter was subsumed in the disputed issue of timely notice, or whether appellant was required to raise it as a separate and distinct disputed issue. In Texas Workers' Compensation Commission Appeal No. 91007, decided August 28, 1991, we considered a situation where the hearing officer found an employee to have sustained a compensable injury and, on appeal, the self-insured employer contended the hearing officer should have decided whether timely notice of the injury had been given, notwithstanding such issue wasn't listed as a disputed issue at the BRC. We said that the hearing officer may only consider the issues contained in the statement of disputes (citing Article 8308-6.31; Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (TWCC Rules)) and we determined that the hearing officer was correct in not considering the notice issue. However, we observed that if a disputed issue of notice had been raised, the hearing officer could then have considered evidence relative to the employee's having provided notice within 30 days, the employer's or carrier's actual knowledge under Article 8308-5.02, and the employee's good cause for failure to timely notify under Article 8308-5.02. See Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991, in which the hearing officer, in determining the disputed issue of timely notice, made related findings concerning the good cause and actual knowledge exceptions and we reviewed the sufficiency of the evidence on those findings; Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992, where the good cause and actual knowledge exceptions were specifically stated as issues; and Texas Workers' Compensation Commission Appeal No. 92129, decided May 14, 1992, where, under the circumstances in that case, we implied a finding that good cause was not shown.

Article 8308-5.02 relieves the employer and its compensation insurance carrier of liability where an employee fails to notify the employer unless the employer or carrier have actual knowledge of the injury, do not contest the claim, or the commission determines that good cause exists for the failure to give the notice required by Article 8308-5.01(a). Article 8308-5.02 refers back to the notice requirement in Article 8308-5.01 and we believe the statutes need to be read together as we implied in Appeal No.91007, *supra*. See also TWCC Rule 122.1 concerning notice of injury to employer which embodies both Articles 8308-5.01 and 8308-5.02 in a single rule. Under the facts of this case, we view appellant's disputed notice issue to have included the matter of good cause. Appellant, then *pro se*, apparently indicated at the BRC that he had advised employer of his symptoms and the varying diagnoses as he was given them. In other words, appellant was telling employer what he knew. Accordingly, we find that the hearing officer erred in his finding that the issue "of good cause was not before him for resolution."

We observed in an early decision discussing the issue of an employee's timely notice of injury that, "[u]nder the provision of Article 8308-5.01, an employee must `notify the employer' of an injury not later than the 30th day after the date on which the injury occurs. The effect of failure to notify is relief of the employer or its carrier from liability

unless, (1) the employer or his representative has actual knowledge of the injury, (2) good cause exists for the failure to notify, or (3) the employer or its carrier does not contest the claim. Article 8308-5.02." Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991. In Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991, we reviewed certain Texas cases on the issue of an employee's having good cause for failing to give timely notice of an injury and cited Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370, 372 (1948). The Texas Supreme Court stated that the test for the existence of good cause for the employee's not having filed his worker's compensation claim within the six months then required by the statute "is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." The court went on to observe the following:

The law is well settled that a bona fide belief of a claimant 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. (Citations omitted.)

In Appeal No. 91066, *supra*, we stated:

A bona fide belief of a claimant that injuries are not serious is sufficient to constitute good cause for delay in giving notice of injury. (Citation omitted.) The claimant must show that good cause for failure to notify the employer continued up to the date of notice. (Citation omitted.)

We are satisfied that the evidence amply establishes appellant's good cause for not having notified employer not later than 30 days after _____ of his cervical disc injury, and we are convinced the hearing officer could not have found otherwise had he considered and resolved the matter. The hearing officer stated in his Statement of Evidence that "[t]here was no indication that the Claimant or anyone else was aware that his alleged injury may have been work related prior to (date)."

Having decided that the hearing officer erred in not reaching the matter of good cause, we turn to the remaining appealed issue. If the evidence is sufficient to support the hearing officer's finding that the cause of appellant's cervical injury is indeed unknown, as well as the consequent conclusion that appellant failed to prove he sustained an injury in the course and scope of his employment on _____, then the good cause matter would become moot. In Texas Workers' Compensation Commission Appeal No.91038, decided November 14, 1991, we stated that "[a] finding of fact by a hearing officer should

not be overturned unless it is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. (Citation omitted.) On appeal, in determining the sufficiency question, all evidence admitted must be considered and objectively discussed in sufficient detail to demonstrate the correct standards of review have been followed. (Citations omitted.)" Our review of the evidence persuades us that the hearing officer's finding that the cause of appellant's cervical injury was unknown cannot stand. Since that factual finding was the sole finding of fact to support the conclusion that appellant failed to prove he sustained an injury in the course and scope of his employment on _____, that conclusion likewise cannot stand.

In addition to his testimony that appellant was told by Dr. S that his cervical disc injury was caused by his work, appellant introduced a post-operative report from Dr. S, dated May 18, 1992, which reviewed the healing status at his cervical spine fusion site, and noted some improvement in leg function but continued fine movement problems with his hand. Dr. S stated the following regarding causation:

It continues to be my feeling that [appellant] sustained his injury while working and climbing the ladder. Although he experienced no specific fall, nor severe episode of trauma, the onset of the symptoms were definitely related to have occurred at that time. [Appellant's] underlying pathology was that of an extruded disc fragment, the etiology of which is certainly some episode of trauma, albeit, seemingly relatively minor. [Appellant's] subsequent neurologic problems and complications have all centered about the myelopathy produced by the pressure of this disc on the spinal cord.

Appellant also introduced the following opinion of Dr. A, dated May 7, 1992:

[Appellant] is a patient who I initially saw (date) and found him to have a cervical myelopathy. He gave me a history of the onset of weakness associated with climbing a ladder at work approximately four weeks earlier. Workup revealed a herniated disc at the upper cervical region with compression of the spinal cord. He subsequently underwent decompressive surgery by Dr. S, Neurosurgeon. It is my medical opinion that this herniation occurred while he was climbing his ladder at work.

The hospital record of (date) introduced by appellant showed his chief complaint to be "I can't walk," and it contained the following statement:

This 44 year old man gives a history of sudden onset of generalized malaise and diaphoresis 4 weeks ago while he was climbing a ladder at work. He noticed generalized weakness and had to sit down for several hours. He states that the malaise and diaphoresis resolved and he has had increasing muscle weakness since that time. He was initially seen by his family

physician who felt he had a strain in his neck region. As symptoms persisted, he was reevaluated two weeks later and at this time was told he had a "viral illness." The patient continued to work until 1-2 weeks ago at which point he developed increased episodes of falling.

We have already alluded to the statements of appellant's supervisor and coworkers who encountered him in the control room on _____ where he stated he was unable to then complete his tasks due to the onset of physical symptoms. Respondent also introduced Dr. R's records of appellant's first visit on (day after date of injury) which stated diagnoses of both "cervical strain" and "trapezius strain," and questioned "viral syndrome." Dr. R's diagnosis on appellant's February 13th visit was "viral infection" and he questioned an "autoimmune" problem. His records of both visits contained the notation "no injury." Dr. R's records of appellant's February 28th visit contain notations regarding appellant's complaints of weakness for one month, warm sensations in back, buttocks, feet, legs, and chest, a sense of imbalance, stiffness in left leg, and awkwardness in walking. Dr. R's records did not indicate he obtained any imaging tests of appellant's neck region. Respondent also introduced a March 24th record of Dr. L, already discussed above, indicating that neither he nor Dr. R had yet been able to determine the cause of appellant's weakness and incoordination of the lower extremities. Respondent also introduced Dr. S's (date) consultation report upon appellant's referral from Dr. A. This record stated that appellant "had a history dating back about three months of problems with some pain in his neck and into his shoulder and arm . . . about that same time the patient while descending a ladder had a sudden episode of paresthesia with weakness developing in his arm and legs . . . he was not aware of any specific episode of trauma that initiated this but was merely descending a ladder when he noted this to occur."

We believe that, taken together, the evidence rather compellingly establishes that the cause of appellant's cervical injury was not "unknown," as the hearing officer found. We note that in his Statement of the Evidence the hearing officer first mentions the opinions of Drs. S and A, and then adverts to the hospital admission record of (date) saying that exhibit indicates that the Claimant is suffering from "cervical myelopathy of **unknown etiology**." (Hearing officer's emphasis.) The hearing officer emphasized the words "unknown etiology" in citing the hospital record, and then used the words "unknown cause" in his finding concerning the cause of appellant's cervical injury. We believe a fair reading of the records of Drs. A and S, together with the hospital record, indicate appellant was hospitalized to undergo testing to determine the cause or etiology of his cervical myelopathy, earlier revealed by Dr. A's electrodiagnostic testing, and that the MRI scan revealed such cause to be the cervical disc defects. Dr. S's consulting report of (date) stated the impression to be: "cervical myelopathy, secondary to cervical disc disease at C3-4 and C4-5 levels." He recommended cervical discectomy and fusion surgery for decompression. While the cause of appellant's cervical injury was unknown at the time he was admitted, it was later that day revealed by MRI scan to be secondary to cervical disc disease, which Dr. A referred to as a herniated disc and Dr. S referred to as an extruded

disc fragment. We find the evidence "so strong, uncontroverted, and convincing as to render his finding so against the great weight and preponderance of the evidence as to be clearly wrong." Appeal No. 91038, *supra*. Since we determine the challenged factual finding to be against the great weight and preponderance of the evidence, and since that finding is the only finding relating to appellant's injury, the hearing officer's consequent conclusion that appellant "failed to prove, by a preponderance of the evidence, that he sustained an injury in the course and scope of his employment on _____" is unsupported by any factual findings and must fall.

The hearing officer's decision and order are reversed and rendered that appellant is entitled to workers' compensation benefits under the 1989 Act for his injury of _____.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge