APPEAL NO. 92471

On August 6, 1992, a contested case hearing was held in (city), Texas, before (hearing officer) as hearing officer. The issues from the benefit review conference were as follows: (1) whether appellant (claimant below) sustained a back injury in the course and scope of employment on (date of injury); (2) whether appellant gave timely notice of the alleged back injury to employer; and (3) whether appellant had disability after December 2, 1991, resulting from the alleged injury on (date of injury).

The hearing officer rendered a decision that appellant did not sustain a compensable injury to his back in the course and scope of his employment on (date of injury); that he did not timely notify his employer that he claimed a back injury on that date; and that the issue of disability was thus moot. The appellant essentially contends that the evidence supports a determination that he suffered a compensable injury to his back on (date of injury). With regard to notice, he contends that he was unable to notify his employer of an injury before it was diagnosed, which was more than 30 days after the accident. Respondent notes inconsistencies in the evidence below and the lack of medical correlation between appellant's back problems and an injury on (date of injury), and asks that we affirm.

DECISION

We affirm the decision and order of the hearing officer.

Appellant was working as a trimmer helper for (employer) on (date of injury), when he fell forward from a roller on which he was standing. He said when he fell his main objective was to keep his hands away from the rollers, which could crush them. After he fell he looked at his right leg and saw a six inch abrasion. He went to his supervisor, (Mr. RC), and said he had hurt his leg and was going to the medical unit. There, a company nurse bandaged his leg and gave him a tetanus shot.

Appellant testified that three days later he began to have pain down the left side of his back and his left thigh. He went to (Dr. R), his HMO primary care physician, who prescribed pain medication and sent him for x-rays. He said the medication allowed him to go back to work. While he was on vacation around Thanksgiving, he said his back began hurting while he was jogging. He went home and rested during the remainder of vacation, then went back to work December 2nd. On that day, he said, standing was nearly impossible for him. He told a supervisor named (Ms. LC) that he was going to see a doctor because of pain in his upper left leg. He went back to see Dr. R, who referred him to a specialist, (Dr. G) who set up an MRI and an EMG. These disclosed a herniated disk for which he was scheduled for surgery in January. Appellant said it was not until mid-January, when talking with a coworker who had also fallen at work, that he related his back injury to the fall on (date of injury), and notified his employer. Appellant said he has not been back to work since December 2nd and he has not applied for work anywhere else.

(Ms. R), who is a staff nurse for employer, said that clinic cards which were admitted

into evidence showed that appellant was treated at the medical unit for a leg abrasion on (date of injury), and was also seen on the 9th and the 12th for dressing changes. She said appellant did not mention a back injury on any of those occasions. Appellant disputed the October 12th date on the report, saying that that was a Saturday and he was not at work that day. Ms. R also said on December 2nd appellant reported he had a doctor's appointment concerning pain in his upper left thigh. The clinic card entry for that date also says, "[i]nstructed emp. to keep medical informed as to his medical problem and RTW status." The card shows appellant telephoned on December 5th to say he had an appointment with Dr. G the following day. The notation also said, "[h]e stated his back and thigh hurt--That he couldn't stand up more than a few minutes...Emp. states he does not know how or why his back started hurting . . ." An entry dated February 14, 1992 summarized a telephone call to (Ms. SC) in employer's personnel office, and said "[r]elayed to [Ms. SC] that there never was a word on clinic cards which would indicate that the employee felt his back problem was work related. [Ms. SC] said that she had received a phone call from [appellant] back in January and [appellant] had suggested this back problem was work related."

In a sworn transcription of a telephone conversation between a representative of respondent and Mr. RC, which was made part of the record, Mr. RC said appellant never reported a job-related injury to him, either in December or in October. He also stated appellant did not seek permission from him to get medical treatment. He said the first he knew of an injury was when he looked in the call-in book around December 6th or 7th. He said that book reflected that appellant called Ms. LC on December 2nd to tell her that he had a leg problem.

Medical records admitted into evidence show appellant was first seen by Dr. G on December 6th for severe low back pain radiating into the left lower extremity. He was found to have a lumbar herniated disk, and underwent a laminectomy on January 31, 1992. When asked about a medical history contained in a December 9th report from the (Clinic), which stated that appellant began to notice lower back pain in May of 1991, appellant agreed he had had back pain since that time. However, he said the prior pain was controllable with aspirin and was different from the pain he experienced after (date of injury). He acknowledged that his medical reports mentioned onset of pain while jogging but did not mention a work-related incident because he said at that time he did not relate his condition to the (date of injury) fall. A notice of injury filed by appellant on February 11, 1992 said the accident happened "[i]n the course and scope of my employment. I was having back pains since 5/91. Then 12/22 had to leave work cause pain had gotten worse . . ."

A compensable injury means an injury arising out of and in the scope of employment for which compensation is payable under the 1989 Act. Article 8308-1.03(10). The claimant in a workers' compensation case has the burden to establish by a preponderance of the evidence that an injury occurred in the course and scope of employment. Johnson v. Employers Reinsurance Corp., 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). In determining whether a claimant has incurred a compensable injury, the hearing officer is

the sole judge of the weight and credibility to be given the evidence. Article 8308-6.34(e). As the trier of fact, the hearing officer weighs all the evidence and decides what credence should be given to the whole, or to any part, of the testimony of each witness. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App. - Amarillo 1974, no writ). In the instant case the hearing officer was entitled to weigh the appellant's testimony against the other evidence including medical evidence and the circumstances surrounding the onset of his back problems, and determine that he had not met his burden of proof. Upon our review of the record, we find that the hearing officer's decision is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

The hearing officer also found that, on or before November 8, 1991, appellant did not tell or otherwise notify anyone holding a supervisory or management position with employer that he claimed an injury to his back, and that neither employer nor any person in a supervisory or management position with employer had actual knowledge of a back injury claimed by appellant on or before November 8th. Accordingly, the hearing officer found that appellant did not timely notify the employer that he claimed that a back injury occurred on (date of injury).

Article 8308-5.01 provides that an employee or a person acting on the employee's behalf shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs; such notice may be given to the employer or any employee of the employer who holds a supervisory or management position. The Act further provides that actual knowledge upon the part of the employer or person eligible to receive notification or the insurance carrier may suffice as to notice of injury. Article 8308-5.02. Appellant testified that he told his supervisor, Mr. RC, that he had hurt his leg and was going to the medical unit, although Mr. RC denied this fact. There was sufficient evidence in the record to raise a question of fact as to whether there was timely notice of injury, and the hearing officer as trier of fact was entitled to make a determination on that issue.

We note that the purpose of the timely notice provision is to give the insurer an opportunity immediately to investigate facts surrounding an injury, and such purpose can be fulfilled without need of any particular form or manner of notice. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). Neither must it specify the exact nature of the injury. Houston General Ins. Co. v. Vera, 638 S.W.2d 102 (Tex. Civ. App.-Corpus Christi 1982, writ ref. n.r.e.). "To allow the insurer an opportunity to investigate the facts, the employer need only know the general nature of the injury and the fact that it is job related. More details of the occurrence will be supplied by the claim." DeAnda, *supra*, at 533.

The 1989 Act also provides that an employee's failure to notify the employer of an injury within 30 days does not relieve the insurance carrier of liability if the Commission determines that good cause exists for failure to give timely notice. Article 8308-5.02(2). We have previously held that a mistake as to the cause of an injury or disability may

constitute good cause. Texas Workers' Compensation Appeal No. 92047 (Docket No. redacted) decided March 25, 1992. The test for the existence of good cause is that of ordinary prudence, that is whether a claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances, which is ordinarily a question of fact. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). Appellant's testimony and the evidence show a series of doctor's appointments for treatment of back problems from early (month), continuing through mid-January, when appellant said he first realized that his injury could have been related to his fall and when he said that he notified Ms. SC. The hearing officer in this case found no good cause existed for appellant's failure to timely notify. We have held that good cause is a determination left to the discretion of the hearing officer. Texas Workers' Compensation Commission Appeal No. 91009 (Docket no. redacted), decided September 4, 1991. Upon a review of the record, we find that the hearing officer did not abuse his discretion.

The decision and order of the hearing officer are affirmed.

_____

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____

Robert W. Potts
Appeals Judge

_____

Susan M. Kelley
Appeals Judge