APPEAL NO. 931005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing (CCH) was held on October 13, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were: 1. whether the appellant (claimant herein) sustained a compensable repetitive trauma injury on (date of injury); 2. whether the claimant reported a repetitive trauma injury to the employer within 30 days of the date he knew or should have known his injury may have been work related; 3. whether the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under his wife's group health insurance plan; and 4. whether the claimant had disability resulting from a compensable injury entitling him to temporary income benefits beginning on December 15, 1992 and continuing.

The hearing officer ruled that claimant suffered a compensable repetitive trauma injury, but that he did not timely report his injury or have good cause for failing to do so, relieving the respondent (carrier herein) of liability for this claim. The hearing officer further ruled that the claimant did not make an informed election to receive benefits under his wife's group health plan and that the claimant established he had disability due to his compensable injury from December 15, 1992, and continuing thereafter.

The claimant appeals the findings and conclusions of the hearing officer concerning his failure to provide timely notice contending that the employer had actual notice that his on-going shoulder problems were work related, that he continued to believe that his shoulder injury was trivial until he reported it in August 1992 and he was initially unaware that repetitive trauma injuries were compensable. The carrier in its response to request for review requests that the decision of the hearing officer be affirmed except as to the findings by the hearing officer that the claimant was injured in the course and scope of employment and that the claimant did not make an election of remedies by filing on his wife's group health plan.

DECISION

Finding no reversible error in the record and sufficient evidence to support the decision of the hearing officer, we affirm.

The claimant had worked for 12 years installing acoustical ceilings and had worked for (employer) for 19 months prior to his injury. His job required him to stand on stilts with his arms extended overhead to install ceiling tiles. The claimant testified that he began treating with (Dr. L) in January 1992 for pain in both shoulders. The claimant testified that he had periodically been bothered by shoulder pain for a number of years which he considered to be a trivial consequence of his work.

In March 1992 the claimant underwent an MRI for his shoulders which revealed bilateral subacromial impingement. The claimant testified that Dr. L discussed the results of the MRI with him on (date of injury), and recommended surgery to both shoulders. The

claimant had surgery on his left shoulder in December 1992 and on his right shoulder in February 1993. The claimant testified that Dr. L had recommended a second surgery for the left shoulder. The claimant attempted to go back to work for the employer in April 1993. The employer had no work consistent with his doctor's restrictions and the claimant attempted, but was unable to perform, work outside these restrictions.

The claimant testified that he discussed his MRI with his supervisor in March 1992, believing that the supervisor knew his shoulder pain was work related due to the nature of the work, but did not actually report his shoulder problem was work related until August 1992 when he so informed the employer's personnel manager. The claimant testified he was unaware that repetitive trauma injuries could be compensable until the time of the benefit review conference in this case. The claimant also testified that he had received medical treatment under his wife's group health insurance program, stating that he had never before filed a workers' compensation claim and did not know that his medical treatment might be covered by his employer's workers' compensation insurance.

The claimant first contends that the employer had timely notice or actual notice of his injury because he had informed his supervisor in March 1992 that he was undergoing an MRI on his shoulders. The claimant seems to assume that due to the type of overhead work he was doing that anyone, including his supervisor, would know that if there were shoulder problems that they must be work related.

The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App-El Paso 1965, no writ). To be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact it is job related (emphasis added). DeAnda v. Home Ins. Co., 618 S.W.2d 529, 533 (Tex. 1980). Thus where the employer knew of a physical problem but was not informed it was job related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991. Also, the actual knowledge exception requires actual knowledge of an injury. Fairchild v. Insurance Company of North America, 610 S.W.2d 217, 220 (Tex. Civ. App.-Houston [1st Dist] 1980, no writ). The burden is on the claimant to prove actual notice. Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.).

In the present case, the hearing officer found as a matter of fact that the claimant did not report to the employer that his shoulder condition was work related until August 1992. Section 410.165(a) provides that 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. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review, we find no basis to set aside the finding of the hearing

officer.

The 1989 Act provides that the Texas Workers' Compensation Commission (Commission) may determine that good cause exists for failure to provide notice of injury to an employer in a timely manner. Section 409.002(3). We have held that good cause for failure to timely report an injury can be based upon the injured workers' not believing the injury is serious and his initial assessment of the injury as being "trivial," but this belief must be based upon a reasonable or ordinarily prudent person standard. Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991; Texas Workers' Compensation Commission Appeal No. 93184, decided April 29, 1993; Baker v. Westchester Fire Insurance Co., 385 S.W.2d 447 at 449 (Tex. Civ. App.-Houston 1964, writ ref'd n.r.e.). Good cause exists for not giving notice until the injured worker realizes the seriousness of his injury. Baker, 385 S.W. 2d at 449. In the present case, the record supports a finding that the claimant had a "serious" injury, not a "trivial" injury. As early as January 1992, Dr. L indicated that he might require surgery, and, according to the testimony of the claimant, he was aware he would have to have surgery as of his (date of injury), meeting with Dr. L.

Stated in terms of burden of proof, it is the claimant's burden to prove the existence of good cause for failing to give the employer notice. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). Good cause must be shown to exist up to the time the claimant gives notice of the claim. Lee v. Houston Fire & Casualty Company, 530 S.W.2d 294, 296 (Tex. 1975); Farmland Mutual Ins. Co. V. Alvarez, 803 S.W. 2d 841, 843 (Tex. Civ. App.-Corpus Christi 1991, no writ). Here, the claimant's evidence fell short of proving continuous good cause until his report of injury in August 1992.

Finally, we turn to the claimant's contention that he was unaware that repetitive trauma could constitute a compensable injury. Texas courts have consistently held that ignorance of the workers' compensation law is not good cause for failure to comply with the law. Texas Workers' Compensation Commission Appeal No. 93551, decided August 19, 1993. Thus, in Applegate v. Home Indemnity Company, 705 S.W.2d 157 (Tex. App.-Texarkana 1985, writ dism'd), it was held that ignorance of the notice and filing provisions of the workers' compensation law were not good cause for failing to comply with those provisions.

As to carrier's complaints raised in its response to request for review, the first question is whether they are properly before us. We have previously held that, even if styled as a response, a pleading may operate as an appeal if it is filed within the time provided for filing a request for review and asks us to consider an issue and take action. Texas Workers' Compensation Commission Appeal No. 92141, decided May 21, 1992. In the present case, the carrier's response meets these criteria, and we will consider carrier's points of error.

Carrier contends that there is insufficient evidence to support the hearing officer's

finding of injury in the present case. Injury in the course and scope of employment is a question of fact. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Corroboration of an injury is not required and may be found based upon a claimant's testimony alone. Gee v. Liberty Mutual Insurance Co., 765 S.W.2d 394 (Tex. 1989). We cannot say that the hearing officer's finding that the claimant suffered a compensable injury in this case is so against the great weight and preponderance of the evidence as to be manifestly unjust. Cain v. Bain, *supra*; Pool V. Ford Motor Co., *supra*.

The carrier argues that the hearing officer's conclusion that the claimant is not barred from pursuing workers' compensation benefits because he failed to make a knowing election of benefits when he filed for benefits under his wife's group health insurance places too high a burden of proof on the carrier to prove election. The hearing officer applied the legally correct standard. *See* Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992; Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980).

The Texas Supreme Court in Bocanegra articulated the following test for election of remedies:

> The election doctrine . . . may constitute a bar to relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice. *Id.* at 851.

The Court further said that a person's choice between inconsistent remedies or rights does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problems, facts, and remedies "essential to the exercise of an intelligent choice."

Having found the points of error of both the claimant and the carrier without merit, we affirm the decision and order of the hearing officer.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge