APPEAL NO. 931012

This appeal arises under 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*.). At a contested case hearing held in (city), Texas, on October 8, 1993, the hearing officer, (hearing officer), found that at some time on (date of injury), while lifting an object at work in the course and scope of his employment, the respondent (claimant) felt a pain in his left groin area and was later in January 1993 diagnosed with a hernia. The hearing officer concluded that claimant sustained a compensable injury on (date of injury), and the appellant (carrier) challenges the sufficiency of the evidence to support this determination. The hearing officer, further finding that shortly after his diagnosis claimant reported to his employer that he had a hernia and asked about workers' compensation coverage, and that claimant had good cause for not reporting the injury to his employer within 30 days, concluded that claimant had good cause for not timely reporting his injury to his employer and reported it "as soon as he knew the seriousness of the injury." The carrier challenges these findings and the conclusion asserting that even if the claimant had good cause for not reporting his injury until after he was diagnosed with the hernia on January 12, 1993, he did not show continued good cause for not reporting the injury for another two to three weeks thereafter, and that his fear of losing his job did not constitute good cause. In his response, the claimant asserts the sufficiency of the evidence to support the challenged findings and conclusions and seeks our affirmance.

DECISION

The decision of the hearing officer is reversed and the case remanded for additional findings on the good cause for claimant's not timely reporting the injury to his employer.

Claimant testified that he commenced working for (employer) as a warehouseman in August 1992 and that his shipping and receiving duties involved handling boxes of auto parts and accessories, some of which were heavy. He said that on (date of injury), when he lifted a heavy box, he felt pain in his left groin area and thought he had just pulled a muscle. The pain was not too bad at first and was intermittent and noticeable when he lifted heavy objects. However, claimant stated that in December and January 1993 the pain became progressively worse and "a bump" became noticeable in his groin area. He said the pain increased to the point where on January 12th he saw a doctor, was diagnosed with a hernia, and was told he needed surgery. A letter from (Dr. A) stated he saw claimant on January 12th, diagnosed a left inguinal hernia, and recommended surgical repair since the condition incapacitated claimant from performing his work. Claimant's supervisor, (Ms. D), testified that she worked in the warehouse as well, that she lifted whatever claimant lifted, and that none of the lifting involved more than approximately 50 pounds. She also said she had no indication that claimant sustained the injury at the time he claimed, and that he never reported such an injury to her before he was terminated on February 12, 1993. She did state, however, that she had heard from the manager, (Mr. R), that claimant had complained of pain in the stomach area. Claimant never asserted that he had given notice of his injury to Ms. D. Ms. D also testified that in conversations with claimant when they worked together he indicated his awareness of the existence of workers' compensation.

On cross-examination claimant denied having a prior hernia condition or lifting weights.

We are satisfied the evidence sufficiently supports the hearing officer's finding that "[s]ometime on (date of injury), while lifting an object at work during the course and scope of his employment, claimant felt a pain in his left groin area," and the conclusion that claimant sustained a compensable injury in the course and scope of his employment on or about that date. As we have often stated, a claimant's testimony alone may establish the fact that an injury was sustained. *See e.g.* Texas Workers' Compensation Commission Appeal No. 91083, decided January 6, 1992. Not only was claimant's testimony concerning the lifting incident and immediate onset of pain on (date of injury) unrefuted, but Dr. A's letter was corroborative that an injury occurred. It was for the hearing officer, as the trier of fact, to resolve any conflicts and inconsistencies in the evidence since under the 1989 Act the hearing officer is the sole judge not only of the materiality and relevance of the evidence but also of its weight and credibility. Section 410.165(a). The hearing officer's determination that claimant sustained an injury in the course and scope of employment on (date of injury), is affirmed.

The evidence concerning the timely notice issue is far more problematical. Section 409.001(a) and (b) provides, in part, that an employee shall notify the employer of an injury not later than the 30th day after the date the injury occurs and that such notice may be given to an employee of employer who holds a supervisory or management position. Section 409.002 provides, in part, that failure to notify an employer of an injury as required by the aforesaid section relieves the employer and its insurance carrier from liability unless the employer or the carrier have actual knowledge of the injury or the Texas Workers' Compensation Commission (Commission) determines that good cause exists for the failure to provide timely notice.

Claimant testified that he had had a prior workers' compensation claim in 1988 and was aware of the importance of reporting an injury to the employer. He said that, initially, he thought he had just pulled a muscle so he did not report the incident to a supervisor and just kept working because he could continue to do his job. However, when the pain became progressively worse with heavy lifting in December and January 1993 and the bump appeared in his groin area, he visited a doctor on January 12, 1993, and was diagnosed with the hernia. He acknowledged that he did not tell the employer the day after he was diagnosed about his injury but said that on or about January 30th he spoke about it to Mr. R who had commenced employment with the employer on October 26, 1992, as the manager. Claimant explained his reason for not saying anything about his hernia before on or about January 30th thusly: "I was afraid that I might be getting fired." He said that employer had not provided him the back support device he had earlier requested, that he had not had a steady job for several years and wanted to keep his job, and that approximately two weeks after he reported his injury, his employment was terminated. While claimant said his reason for not reporting his injury between January 13th and January 30th was his fear of the loss of his job, he also said that he wanted medical treatment and the pain was getting worse so on or about January 30th he had the conversation with Mr. R.

The carrier's position was that claimant did not show good cause for not reporting his injury within 30 days of (date of injury). Recognizing, however, the case law to the effect that the "trivialization" of an injury by an employee can constitute good cause, the carrier further maintained that not only did claimant fail to show that his good cause continued from January 12th, when he was diagnosed with the hernia, to on or about January 30th, when he first conversed about it with Mr. R, but also that claimant's conversation with Mr. R on or about January 30th did not constitute notice that his hernia was work related.

Claimant testified that he told Mr. R the following: "I told him that I had a bump on the left side and that it hurt me when I lifted heavy boxes, and that it was a hernia, and that they're telling me that I needed medical attention, and if they had any medical insurance. I just wanted some help." Claimant said that Mr. R stated he would check on it but never got back to claimant, and that two days later claimant again asked Mr. R if he had checked to see whether the employer had "any medical insurance or workers' comp.," and again Mr. R said he would check into it. About a week later, claimant said he once again asked Mr. R about it and that Mr. R never did provide him with any information on whether employer had medical insurance or workers' compensation coverage. Claimant said he did not find out that employer had workers' compensation coverage until after he was terminated and filed a wrongful termination suit.

Mr. R testified that several months after he started work on October 26th, possibly around mid-January 1993, claimant pointed to his groin area and said he had pain in his groin and thought he had a hernia. Mr. R said he advised claimant to seek medical treatment. Mr. R described the conversation as a casual one of a minute or two and insisted that claimant did not mention a lifting incident or otherwise indicate that his hernia was job related; nor did claimant indicate he needed financial help to get medical treatment. Mr. R further stated that claimant was terminated within a short time after their conversation for reasons unrelated to his injury. He said he had no idea at that time or earlier when claimant complained of his pain, that claimant had a workers' compensation claim. He further testified that he never associated claimant's complaint of pain with claimant's work nor did he know that claimant had a diagnosis from a doctor. Mr. R said his first indication that claimant was asserting that his hernia was job related was in March when he received a letter from claimant's attorney apparently concerning a wrongful termination suit.

With respect to claimant's failure to report his injury after his hernia was diagnosed on January 12th, the hearing officer's statement of the evidence stated the following: "CLAIMANT did not report this to his EMPLOYER for about two weeks because he was afraid he would be fired. CLAIMANT was afraid to lose his job because he had not had steady employment for several years." With respect to the content of claimant's conversation with Mr. R on or about January 30th, the hearing officer stated: "In late January, 1993, CLAIMANT told [Mr. R] that he had a bump on his left side, that it hurt, and that it was a hernia; and asked about medical insurance. [Mr. R] said he would check and see. Two days later, CLAIMANT asked [Mr. R] if he had checked about insurance or compensation and [Mr. R] said he was still checking. CLAIMANT asked [Mr. R] again about a week later. [Mr. R] never gave CLAIMANT any information about insurance or

compensation."

The hearing officer made the following findings of fact and conclusion of law pertinent to the timely notice of injury issue:

FINDINGS OF FACT

4.Sometime on (date of injury), while lifting an object at work during the course and scope of his employment, CLAIMANT felt a pain in his left groin area.

5.CLAIMANT thought he had pulled a muscle, that his injury was trivial and that it would go away.

6.CLAIMANT was able to continue working, having slight pain only when lifting.

7.When the pain became unbearable and a knot appeared in his groin, in January, 1993, CLAIMANT sought medical attention, was diagnosed with a hernia, and was told he needed surgery.

8.Shortly after his diagnosis, CLAIMANT reported to [Mr. R], a person in a supervisory or management position with his EMPLOYER, that he had a hernia and inquired about workers' compensation coverage.

9.CLAIMANT had good cause for not reporting his injury to his EMPLOYER within 30 days.

CONCLUSIONS OF LAW

3.CLAIMANT had good cause for not timely reporting his injury to his EMPLOYER and reported it as soon as he knew the seriousness of the injury.

The carrier has challenged Finding of Fact Nos. 8 and 9 as well as Conclusion of Law No. 3. While the hearing officer's decision does contain a lengthy "Statement of the Evidence," it provides no insight and contains no discussion of the hearing officer's rationale for reaching the totally conclusory Finding of Fact No. 9 and Conclusion of Law No. 3. This case has certain similarities with the facts in Texas Workers' Compensation Commission Appeal No. 93815, decided October 22, 1993, and as we did in that case, we must here also reverse and remand for additional findings on the good cause for claimant's not timely reporting the injury to his employer.

In Appeal No. 93815, the employee said he fell at work in (month year) injuring his back but did not think his injury serious, continued to work, and first sought medical treatment on January 23, 1993. While the employee within a few days said he told his supervisor he had pain, he did not tell the supervisor about his fall or how the pain originated. On

February 11th, the employee had further conversation with his supervisor about his back. The evidence was in sharp conflict as to whether at that time the employee connected up his back pain to an on-the-job incident with the employee stating that he did and the supervisor insisting he did not. There was evidence that the employee did not tell his employer for fear of losing his job. The hearing officer found that the employee first sought medical attention on January 30th, that the employee first reported his injury to his employer as a job-related injury on February 11th, that the employee acted as a reasonably prudent person in not reporting his injury prior to February 11th, and that the employee had good cause for failure to report his injury within 30 days of October 30, 1992. Based on these findings, the hearing officer concluded that the employee had good cause for failure to report his injury before February 11, 1993. As in the case we now consider, the hearing officer in Appeal No. 93815 did not enlighten the Appeals Panel as to the facts found to constitute good cause and a remand became necessary.

In Texas Workers' Compensation Commission Appeal No. 92075, decided April 7, 1992, where we considered the correctness of the hearing officer's determination that the claimant had good cause for not reporting her back injury within 30 days of a lifting incident at work, we stated that "`good cause' is that legal excuse preventing a reasonably prudent person from complying with the notice requirements and whether a person has exercised the degree of diligence under the ordinary prudent person test is usually a question of fact to be determined by the trier of fact. (Citation omitted.)" Good cause may be determined against a claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion. *See* Texas Workers' Compensation Commission Appeal No. 93494, decided July 22, 1993, and Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. The existence of good cause is a question of fact and the test for reversal is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 91120, decided March 20, 1992. The "totality of a claimant's conduct must be primarily considered in determining ordinary prudence." Texas Workers' Compensation Commission Appeal No. 93544, decided August 17, 1993.

In Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991, the Appeals Panel observed that "[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.)" *And see* Texas Workers' Compensation Commission Appeal No. 91123, decided February 7, 1992. There is evidence in this case that the claimant "trivialized" his injury up to January 12th when the pain and his concern with the bump in his groin motivated him to seek medical attention. However, as has been held, a claimant must show that the good cause for not providing the employer with notice of the injury continues up to the time that notice is actually provided. *See* Appeal No. 91066, Appeal No. 93677, and Appeal No. 93815, *supra*. This does not mean, however, that a report of injury must be made "immediately" upon termination of good cause. *See* Appeal No. 93544, *supra*.

The hearing officer made no findings respecting whether claimant trivialized his injury up to January 12th, when his hernia was diagnosed, or beyond that date; nor were there

any findings regarding what constituted claimant's good cause continuing up to the date he contended he first provided notice, that is, his conversation with Mr. R on or about January 30th. Clearly, the evidence would support a finding that claimant had good cause for not reporting his injury up to January 12, 1993, based upon his trivializing his injury.

In Appeal No. 91066, *supra*, the Appeals Panel also stated that "[t]he notice of injury must give notice to the employer that the condition is work related. (Citation omitted.)" We also noted that "[t]o fulfill the purpose of the notice provision, 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. (Citation omitted.)" In affirming the hearing officer's determination in Appeal No. 91066 that claimant had not provided timely notice of his injury, we commented that ". . . notice to the supervisor or manager of his back condition without notice that the condition was work related generally would not be sufficient. (Citation omitted.)" Again, we are left to speculate as to what information the hearing officer regarded as sufficient notice of injury. Finding of Fact No. 8 comes the closest in stating that claimant told Mr. R that he had a hernia and that he inquired about workers' compensation. However, both our review of the evidence as well as that of the hearing officer indicates that in his first conversation with Mr. R on or about January 30th claimant mentioned his hernia and inquired only about the availability of medical insurance and that two days later, and a week later, when claimant again approached Mr. R. he asked about both medical insurance "and comp." Because of the inadequacies of the factual findings, we are unable to know whether the hearing officer regarded the first or the three collective conversations as constituting claimant's notice of injury, let alone what she found to be the good cause continuing up to the times of those conversations.

We affirm the hearing officer's determination that claimant sustained an injury in the course and scope of his employment on (date of injury). We remand the case to the hearing officer for such additional findings of fact, conclusions of law, and evidentiary development as is appropriate on the issues of claimant's having good cause after January 12, 1993, for not timely reporting his injury, and on the issue of what constituted his notice of injury.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION

I dissent, and would affirm the hearing officer's findings on good cause and notice. As we've repeatedly stated, the standard of review on good cause is abuse of discretion. That being stated, that is the standard to which we should adhere. That hasn't been done in this decision in which the majority returns the decision to the hearing officer for the additional findings of fact without applying our articulated standard of review.

The record and findings of fact in this hearing give this Appeals Panel what it needs to review the decision in light of our articulated standard of review. Requiring additional findings so that we may "know" what the hearing officer considered seems to me to be nothing more than consumption of time on everyone's part for the dotting of "i's" and the crossing of "t's." It seems clear to me that she felt that the passage of 18 days (which translates into fewer working days) was not an inordinate or unreasonable length of time from claimant's appreciation of the seriousness of his injury to the reporting of that injury. In short, she felt that good cause continued to the date of reporting, and, having so found should be supported. This is far less than the jury finding of two months that was upheld by an Appeals Court, in Memorial Hospital of Galveston County v. Gillis, 731 S.W.2d 692 (Tex. App. -Houston [1st Dist.] 1987, *rev'd on procedural grounds at 741 S.W.2d 364)*. She obviously believed that claimant's conversation with Mr. R constituted a report, a result clearly supportable under our evidentiary standard of review. As to whether his fear of losing his job if he reported an accident should factor into a reasonably prudent person standard, the record indicated that the claimant actually did lose his job. Whatever the reason for termination, it indicates that his fears about assuming a "high profile" at work were not without some foundation.

As stated in Applegate v. Home Indemnity Company, 705 S.W.2d 157 (Tex. App. - Texarkana 1985, writ dism'd), a case where a jury finding against good cause was upheld, the court discussed notice and good cause:

> The purpose of [the notice section] of the Worker's Compensation Act is to give the insurance carrier an opportunity to immediately investigate the facts surrounding the injury. (citations omitted). Yet, the test, well-established by

> precedents, is not whether the insurer was harmed by the delay, but rather whether or not the injured worker was prudent in his beliefs that caused the delay. Such a test has the effect of punishing a worker for his poor judgment or ignorance, even though no harm resulted from his inaction.

Nevertheless, this court is bound to abide by the jury's finding by numerous precedents unless the jury's finding is against the great weight and preponderance of the evidence and reasonable minds could not differ as to the conclusion to be derived therefrom (citation omitted).

Likewise we have repeatedly stated that we will not substitute our own judgment for that of the hearing officer, who is in the best position to evaluate credibility. What we have declined to do directly I do not believe should be done through remand. When a hearing officer's findings of fact are inconsistent, or truly do not articulate a rationale for a legal conclusion, then I believe that a remand for additional fact finding is appropriate. (Appeal No. 93815 is, in this sense, distinguishable from our case here, because in this case, the hearing officer made many of the findings found lacking in Appeal No. 93815). However, I believe that remand is not appropriate for mere bolstering of a decision that others may see differently. When we remand a case without applying the articulated standard, we are not giving the guidance that I believe it is incumbent upon us to do.

Susan M. Kelley
Appeals Judge