APPEAL NO. 93102

This case arises under the Texas Workers' Compensation Act (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). A contested case hearing was held January 11, 1993, in (city), Texas, before hearing officer (hearing officer). The two issues to be decided were whether the claimant's foot problem was an injury that arose in the course and scope of her employment, and whether the claimant gave her employer notice of her injury in a timely manner. The appellant, who is the claimant's employer's workers' compensation insurance carrier (hereafter carrier), disputes the hearing officer's findings of fact that the claimant did not believe the problems she had with her feet were caused by her job, and that the claimant learned that her condition (plantar fasciitis) might be a work-related injury in (date of injury). The carrier also disputes the hearing officer's conclusion of law that the claimant has shown by a preponderance of the evidence that she had good cause for failure to report her injury within 30 days. The carrier does not appeal the hearing officer's determination that claimant established by a preponderance of the evidence that she sustained a compensable injury in the course and scope of her employment. The claimant contends that the hearing officer correctly determined that she reported her injury in May 1992, when she was first aware that it was work related; she contends that her testimony does not indicate that she had this knowledge in January of 1991.

DECISION

Finding error in the hearing officer's determination on the issue of good cause for failure to timely notify, we reverse the decision and order of the hearing officer and render a new decision that good cause does not exist for the claimant's failure to timely report her injury.

The statement of evidence contained in the hearing officer's decision and order adequately sets forth the evidence in this case, which will not be repeated at length here. Claimant was a registered nurse who performed floor duty at (employer), a job which required walking for most of an eight hour shift. She said she felt a severe pain in her left foot and began to limp during her shift on (date). By the next day, her foot would not bear her weight and she went to see her doctor, Dr. B. Her foot was x-rayed, and although no fracture was detected, she was advised to stay off it. When her foot became worse, she was referred to Dr. B, a foot specialist, who on January 23, 1991 diagnosed chronic plantar fasciitis and released her to light duty work. (At the hearing, the claimant defined plantar fasciitis as an inflammation of the tissue which runs along the bottom of the foot.) She said her employer gave her duties that allowed her to stay off her feet, such as watching cardiac monitors and doing cholesterol screenings. After the initial onset, similar problems thereafter developed in her right foot as well. She said she had had foot pain before but not of this degree of severity.

Although steroid injections provided some relief from claimant's pain, Dr. B recommended surgery; however, claimant said she initially sought a second opinion from

Dr. O before she made a decision. No medical reports from Dr. O were made part of the record except for a July 16, 1991 letter asking that claimant be given only limited job duties. In April of 1991 the claimant returned to Dr. B to discuss her options; apparently she reached no decision at that time because the medical evidence in the record shows she went back to Dr. B in March of 1992 to report that despite multiple injections her pain had increased to the point she was not able to walk for more than 15 minutes. She finally determined to go ahead with the surgery (bilateral subtotal plantar fasciectomy), which Dr. B performed on March 17, 1992. Her feet were in casts for eight weeks and then were in removable casts until June 1992. Physical therapy was thereafter ordered. The claimant said she claimed her medical treatment under her husband's group health insurance.

The claimant said she was not aware her condition could be job-related until (date of injury), when a friend told her she might have an occupational disease because she was on her feet all the time. She said that prior to that time she thought workers' compensation was limited to accidental injuries. On May 27, 1992, she talked to Dr. B about it; she said he did not encourage her because she was probably too late, and he encouraged her to try to get Social Security benefits. Also on May 27th, she went to the Texas Workers' Compensation Commission (Commission) office and talked to the ombudsman about the statutory 30-day notice provision and its good cause exception. Because she felt she had good cause, she went the same day to her employer's personnel office and filled out an employee incident/accident report. She filed her claim for compensation with the Commission on September 9, 1992.

On November 9, 1992, Dr. B wrote to claimant as follows: "As per our discussion regarding working on your feet and total disability, I do not feel that you are totally disabled from your chronic plantar fasciitis or the resulting surgery. I also do not feel that you could return to a nursing job that would require you to work long hours on your feet as working for long hours on your feet on hard floors is a contributing factor to this disease and would likely cause you continued symptoms in the future." The claimant maintained that November 9th was the first time she was told by her doctor that her condition was work-related.

The carrier on appeal takes issue with the hearing officer's finding of fact that the claimant did not believe the problems she had with her feet were caused by her job and that she learned that plantar fasciitis might be a work-related injury in May 1992. The carrier states that claimant's testimony showed she knew her condition was related to work as of (date), and that the evidence shows that what the claimant learned in (date of injury) was that her injury could be compensable under the 1989 Act.

Article 8308-5.01(a) provides as follows:

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.

> If an injury is an occupational disease, the employee or person shall notify the employer of the injury not later than the 30th day on which the employee knew or should have known that the injury may be related to the employment.

Article 8308-5.02 provides, among other things, that an employee's failure to notify the employer as required under Section 5.01(a) relieves the employer and its insurance carrier of liability under the act unless the Commission determines that good cause exists for the employee's failure to give notice in a timely manner.

Good cause is an issue which may arise both as to notice of injury and to filing a claim for compensation. In determining whether good cause exists, the Texas Supreme Court has held:

> The term "good cause" for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a question of fact to be determined by the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion.

Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948).

The law is well settled that a claimant's bona fide belief that his injuries are not serious is sufficient to constitute good cause for delay in giving notice. Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). That clearly was not the situation in this case, where the claimant testified that she felt immediate pain and debilitation on (date), for which she promptly sought medical attention. It has also been held 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. Hawkins, *supra*; Hartford Accident & Indemnity Co. v. Jackson, 201 S.W.2d 265 (Tex. Civ. App.-Galveston 1947, writ ref'd n.r.e.). The facts of this case also do not indicate that any of claimant's doctors trivialized her illness. Her first doctor performed x-rays on January 17, 1991, and referred her within one week to Dr. B of South Texas Orthopaedic Foot and Ankle Associates, who made a diagnosis of chronic plantar fasciitis on January 23rd, placed her on light duty, and began a treatment program. The record further shows that she continued to see Dr. B over the next few months, and that he was recommending surgery as an option as early as March of 1991.

The claimant's argument in this case centers on the fact that it was not until (date of injury) that she knew her condition was work-related, and that, in fact, no doctor told her directly that her injury was work-related until November 9, 1992. (We observe in passing that Dr. Bs January 23, 1991 letter acknowledged that the claimant worked as a nurse; however, it also noted claimant's accounts of pain while walking in a store. The extent to which the claimant informed this doctor about any onset of pain while she was working appears to be questionable, and given the fact that walking is a usual activity for most people, it does not seem unusual that Dr. B did not pursue the causal connection to any greater degree. As we stated earlier, however, the carrier did not appeal the hearing officer's determination that the claimant had sustained an injury within the course and scope of her employment.) While Texas case law, as noted above, has defined good cause to include situations where a doctor may have misled a patient concerning the extent of an illness or injury, it nevertheless allows such justification for delay only until the claimant learns, or by reasonable diligence should have learned, otherwise. With regard to when she first knew her condition was related to her job, the claimant testified on direct examination as follows:

Q:Up until the time of the surgery, had you ever thought that you had something that resulted from work, or what did you think your medical status was at that point?

A:At that point I felt like it was my problem because I thought workman's compensation was for, you know, like accidents. It never occurred to me that it might be like, a disease that would be covered by workman's comp.

Q:When exactly did you become aware that you had a disease that may be job-related?

A:When I was recuperating from surgery a friend of mine came to see me in May, and she talked to me about it. She had some knowledge of this disease and said I think it might be possible, you know, it's an occupational disease since I'm on my feet all the time. On May 27 I went to see Dr. B and I asked him about it. He didn't really encourage me too much because I hadn't made a first report of injury and it was late. . .

On cross-examination the claimant testified as follows:

Q:On January 15 you realized that your work, that the walking you did in your work was causing that pain to worsen?

A:Yes.

Q:And then I believe you told us that on May 27, 1992, that is the day you actually filled out these accident reports, correct?

A:That is correct.

Q:And at that time you learned that the type of pain you were suffering could be compensable under the workers' compensation system, right?

A:Yes.

Q:So back in January, you already realized that possibly your work was causing that pain to worsen, correct?

A:The disease itself I found out in May.

Q:Right. My question was, back in January you realized that the walking you did in your work was causing your pain to worsen, correct?

A:That's right.

Q:So that it wasn't until May 27, 1992, that you learned that that might be classified as an occupational disease that was compensable under workers' compensation, correct?

A:Right.

Claimant's testimony, taken as a whole, indicates that claimant learned in (date of injury) that her condition might be compensable under the workers' compensation act, not that it might be related to her work. This conclusion is further buttressed by other facts in the record, such as her description of the physical requirements of her job and the sudden and severe onset of symptoms while at work on (date), and her treatment by a foot specialist who immediately diagnosed her condition and put her on light duty status at work because of her inability to walk or stand. It has been held that a belief that compensation is not payable for a particular injury does not constitute good cause for delay in filing. Allstate Insurance Co. v. King, 444 S.W.2d 602 (Tex. 1969). A claimant is presumed to know the law. *Id*. at 605; Consolidated Casualty Ins. Co. v. Perkins, 154 Tex. 424; 279 S.W.2d 299 (Tex. 1955).

See also Texas Workers' Compensation Commission Appeal No. 92657, decided

January 15, 1993, citing Applegate v. Home Indemnity Co., 705 S.W.2d 157 (Tex. App.-Texarkana 1985, writ dism'd) for the proposition that "[t]he test, well established by precedents, is not whether the insurer was harmed by the delay [in notice], but whether or not the injured worker was prudent in his beliefs that caused the delay." The court in Applegate went on to observe that an employee's ignorance of the provisions of the Workers' Compensation Act does not constitute good cause.

We agree with carrier's contention that the claimant's delay in reporting cannot be explained by lack of knowledge about her foot condition or its relation to her employment, and that therefore no good cause has been shown for the late reporting. We therefore reverse the decision and order of the hearing officer and render a new decision that no good cause exists for the claimant's failure to report her injury within thirty days, as required by the 1989 Act.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge