APPEAL NO. 931087

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S. Article 8308-1.01 *et seq*.) (1989 Act). Following a contested case hearing held in (city), Texas, on October 19, 1993, hearing officer (hearing officer) determined that the appellant, hereinafter claimant, did not sustain a repetitive trauma injury, nor did he injure his left knee, in the course and scope of his employment, and that he did not timely notify his employer of any work-related injury. The claimant seeks our review of this determination, citing case law and evidence in support of his position. The respondent, hereinafter carrier, contends that the hearing officer's decision is supported by the evidence and should be affirmed.

DECISION

We affirm the hearing officer's decision and order.

The claimant had been employed by (employer), for 24 years and at the time of the hearing and all times relevant to this claim worked as a foreman. Employer furnished a pickup truck for claimant's use, which claimant drove to and from work and, as necessary, used to run work-related errands. The pickup was apparently furnished as a convenience to claimant, as he testified that it was not furnished as part of his contract of employment, he was not controlled or directed by employer in its use, and he was able to use it for his own personal use. During an average work day, claimant testified, he drove the truck a total of about six miles, which included an average of one errand a day. He said that his job did not require him to drive, and that it involved work "mostly in the plant."

The claimant testified that beginning around the middle of (month year) the clutch on the pickup began malfunctioning, and he had to exert great pressure and completely extend his left leg when shifting gears, in order to drive. He began experiencing pain and swelling in that knee, and on (date of injury) went to see (Dr. B), whose patient notes of that date gave a history of knee pain for 3 to 4 days, with swelling. The claimant said that Dr. B told him the problem was caused by the clutch; a (date of injury) note from Dr. B says, "Trauma to L knee from driving truck." An August 3, 1993, letter, from Dr. B indicates that on (date of injury) he drained claimant's knee and prescribed medication. Claimant did not miss any time from work due to his condition.

The claimant returned to Dr. B on February 22, 1993, presenting, according to Dr. B's August 3rd letter, with a swollen knee that was hot and tender. Dr. B referred the claimant to an orthopedic surgeon, (Dr. M), who ordered tests including x-rays and an arthrogram, and who said arthroscopy was indicated given evidence of a marginal tear of the medial meniscus.

The claimant said that shortly after he saw Dr. B on (date of injury), he told the plant manager, (Mr. S), that his knee problems were caused by the faulty clutch. Mr. S testified, however, that he first became aware that claimant was claiming a work-related injury in

February 1993, when claimant brought in a doctor's note after having seen Dr. B on February 22nd. Under cross-examination, he said he was aware claimant's knee was bothering him in (month year), and that he knew claimant went to the doctor and had his knee drained on (date of injury).

The claimant said he tried unsuccessfully to fix the clutch in the truck and that it was ultimately repaired around June of 1993. He said that he drove the truck only once or twice after November, but that his knee continued to bother him when he was doing other things, such as stooping and getting up, walking, and driving a vehicle without a bad clutch. Mr. S testified that he had told claimant to stop driving the truck but claimant continued to drive it through February, 1993; he said the truck was repaired in March.

Claimant's first point of error concerns the hearing officer's findings and conclusions with regard to timely notice. The hearing officer found that the claimant was aware that his knee problem may be work related after seeing Dr. B on (date of injury), but that he first notified his employer after his February 22, 1993, appointment; that he did not have good cause for such failure to timely report; and that the employer and carrier did not have actual knowledge that claimant was alleging a work related injury due to repetitive trauma from operating the pickup until after February 22nd.

As the claimant correctly notes, Section 409.001 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.1 (Rule 122.1) provide that if an injury is an occupational disease (which includes repetitive trauma injuries), the employee or a person acting on his behalf shall notify the employer of the injury not later than the 30th day after the date the employee knew or should have known that the injury may be related to the employment. The evidence in this case, in the form of the claimant's own testimony and the note from Dr. B, establishes that the claimant on (date of injury) had reason to know that his knee condition could be related to his job. Claimant points to the fact that the employer owned and furnished the vehicle, and knew that it had a faulty clutching mechanism; however, to fulfill the statutory notice requirements the employer must know both the general nature of an injury and the fact that it is work related. DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980). The hearing officer, as sole judge of the relevance and materiality of the evidence and of its weight and credibility, Section 410.165(a), was entitled to credit the testimony of Mr. S that the claimant did not inform his employer that his knee problem was related to his work until more than 30 days after his doctor told him it arose from driving the truck.

The claimant also argues that a good cause exception exists in this case, citing cases in which employees delayed notifying employers due to a belief the injury was trivial. It is true that Texas courts have held that a bona fide belief by a claimant that an injury is not serious is sufficient to constitute good cause. *See* Texas Casualty Insurance Company v. Crawford, 340 S.W.2d 110 (Tex. Civ. App.-Amarillo 1960, no writ). Such cases are distinguishable from this one, wherein the claimant experienced swelling and pain, and promptly saw a doctor who drained his knee, prescribed medication, and opined the same day that the injury was work related. Under these circumstances, we find that the hearing officer's determination that no good cause existed is supported by the evidence. *See* Texas

Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992.

The claimant's second point of error concerns the hearing officer's determination that the claimant did not suffer a work related injury. In support, claimant cites Dr. B's opinion as set forth in his August 3, 1993, letter, as follows: "It is my opinion that he has osteoarthritis of the knee. It is also my opinion that his condition was aggravated by repetitive pushing in of a faulty clutch. It is my opinion that there is a causal connection between the trauma and his job duties . . . . " The claimant also cites that portion of the 1989 Act, under the definition of "course and scope of employment" concerning transportation to and from employment, contending that the employer's furnishing of the pickup truck comes within the exception to noncompensability found in the statute. *See* Section 401.011(12).

The claimant in a workers' compensation case has the burden to establish by a preponderance of the evidence that his injury occurred in the course and scope of his employment. Reed v. Aetna Casualty and Surety Company, 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). While the records of Dr. B show that, in his opinion, claimant's injury was caused by the clutch, claimant's own testimony was that his use of the vehicle during working hours was quite limited, that his symptoms arose relatively shortly before he saw the doctor on (date of injury), and that he also suffered knee pain while engaging in numerous other activities. There was also evidence that the claimant drove the faulty vehicle during non-working hours. The hearing officer, who as fact finder is entitled to resolve conflicts and inconsistencies in the evidence, Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.), was entitled to weigh all the evidence and resolve such conflicts against the claimant. With regard to claimant's arguments under the "going and coming" rule, we note that this portion of the statute was not argued at the hearing, nor did the hearing officer make any findings and conclusions thereon. We would observe that the statute requires, for a finding of compensability, that the injury be incurred in the course of transportation that is furnished as part of the contract of employment, that the means of transportation are under the employer's control, and that the employee is directed in his employment to proceed from place to place. Mr. S testified that the pickup was not furnished as part of claimant's contract of employment, and both claimant and Mr. S testified that the employer did not direct the claimant in his use of the vehicle.

Upon our review of the evidence in the record, we find that the hearing officer's decision was not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Thomas A. Knapp
Appeals Judge