APPEAL NO. 931135

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). A contested case hearing was held in (city) on November 3, 1993, (hearing officer) presiding. The appellant, hereinafter carrier, appeals the hearing officer's determination that the respondent, hereinafter claimant, sustained a compensable injury on (date of injury), and that she had good cause for failure to timely notify her employer of her injury; basically, the carrier contends that the great weight and preponderance of the evidence is contrary to the hearing officer's decision. No response was filed by the claimant.

DECISION

We affirm the decision and order of the hearing officer.

The claimant was employed as a security guard for (employer) on (date of injury). She testified that on that date, while she was working at a motel, she saw a vagrant enter the building and she ran down five flights of metal stairs, stopping on each floor, in an attempt to apprehend him. Claimant completed her shift about two hours later, and went home to bed. She said that she awoke on the following morning with pain and tingling in her right arm. She said she tried to get a doctor's appointment that day and the next, but was unable to do so. (month) was her day off, but she reported to her next scheduled shift on (month) , where she told (Mr. D), employer's lieutenant supervisor, that she was in pain and had had to take medication from a prior incident in December. (Claimant testified that in December she had fallen in her bathroom and struck her breast on a metal bar attached to the wall; however, she stated that she had healed from that event.) By the completion of her shift she said the pain had moved into her chest and she was unable to drive home. She said her husband took her to the emergency room at Hospital, where she was checked for signs of a heart attack, diagnosed with chest pain/chest wall pain, and given medication.

Claimant said she next saw (Dr. C), who is the associate of her family doctor, (Dr. M), on (month) and that he gave her medication. On (month) she returned to the hospital due to severe pain in her right arm (the form noted, "Pt. is holding R arm up on pillow. . . ."). Once again, she was given pain medication and released. Patient notes from Dr. M indicate claimant returned to see him, with the same complaints, on (month) , May 4th, May 7th, and May 14th. On May 21st Dr. M admitted claimant to Hospital "for further investigation." Upon admission, Dr. M recorded the December 1992 fall, stating "she had a lot of pain in her shoulder and her neck and her chest wall and her arm. This finally subsided with physical therapy treatment. She did well for about three to four months when she awoke one morning with sudden pain in her shoulder and her chest wall and her arm. . . ." Claimant also saw (Dr. B) in consult, who reported an MRI scan as suggestive of a herniated disk at C6-7 on the right and questionably a disk abnormality at C5-6 on the right. On May 28th Dr. B performed an anterior cervical diskectomy and fusion of C5-6 and C6-7, with a bone graft from her hip.

It was claimant's testimony that, on a date she thought was May 21st, Dr. M asked

her to "backtrack" as to her activities prior to her onset of pain, and she recalled the stair incident. She said Dr. M's response was "Bingo, vertebrae damage," and that Dr. B concurred. Dr. M's initial medical report, dated August 1, 1993, gave the history of claimant's injury as running down the stairs. He also wrote on September 27, 1993, that claimant "injured her right breast in a fall in January '93. She also injured her right knee in February. Neither of these injuries had anything to do with her neck injury."

The claimant testified that Mr. D called her every week or so and that she talked to him just before her surgery and told him "the doctors finally figured it out" and that she was going to file a workers' compensation claim. Shortly thereafter, she said she called (Ms. DH), employer's office manager, and told her basically the same thing. She said she "did the paperwork" at Dr. M's office a few days later when she went to have her bandages removed, and that she again called her employer, speaking to Ms. DH and to (Mr. L), employer's president.

Mr. D testified that he spoke to claimant on several occasions after (month), but that she never told him her injury was job related. He said claimant had told him, her last day on the job, that she had hurt herself in the shower that day. He also said claimant missed time in (month) 1993 and that he had heard she had hurt herself while breaking a horse. Ms. DH similarly testified that she was aware of claimant's chest and shoulder pain, but that claimant never called and told her it was job related. She said she found out about claimant's workers' compensation claim when a doctor's office called on a date which she did not recall. She also remembered claimant missing time from work around February 1993, and returning with her leg bandaged, after a horse kicked her. Both (Mr. JH), who was in charge of personnel, and (Mr. S), claimant's immediate supervisor, stated that claimant never reported a work-related injury to them and that they had heard about an injury from a horse. Mr. JH said he first knew about claimant's claim in July, when Dr. M's office contacted him. The claimant testified that she had broken and trained horses until 1978, when she had back surgery. She said she continued to ride horses, although not break them, and that she missed five days of work in February after she bumped her knee on a box of hay.

In its appeal the carrier contends that witness testimony and the medical evidence "clearly show" the claimant did not sustain an injury in the course and scope of her employment. Claimant's testimony, carrier alleges, is comprised of inconsistent statements as to the cause of her complaints, which are in conflict with the medical records. Our review of the evidence, however, shows that the medical records fairly track the claimant's testimony at the hearing, showing a sudden onset of pain in claimant's chest and arm for which she promptly, and repeatedly, sought medical attention. Records from both the hospital and Dr. M's office also show a relatively non-specific diagnosis, with little treatment other than pain medication. It was also claimant's testimony that she had experienced a fall in her home some three to four months before, but that those problems had resolved, and that she did not attribute her current pain to the (month) incident at work until her doctor had her "backtrack" to prior events. Claimant's testimony was, and Dr. M's records indicated, that her doctor agreed that this was the cause. The hearing officer as sole judge of the relevance and materiality of the evidence and of its weight and credibility, Section

410.165, was entitled to believe claimant's testimony and resolve any conflicts and inconsistencies therein. Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no writ). With regard to the other witness testimony, we note that it was many times vague and not based on an individual's direct knowledge. While Mr. D said claimant told him she was hurt in the shower, claimant's own testimony was that she mentioned to him that she had had to take pain medication prescribed as a result of that incident. Regarding testimony concerning a horse-related injury, Ms. DH indicated claimant's injury was to a different part of her body, and claimant herself conceded she had hurt her knee (although she denied she had been kicked by a horse). In short, a claimant's testimony, if believed, can support a finding of compensable injury. Texas Workers' Compensation Commission Appeal No. 91013, decided September 13, 1991. Our review of the record below convinces us that sufficient evidence existed to support the hearing officer's finding on this issue, and that his decision was not against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The carrier also alleges that the evidence conclusively establishes that the claimant had no good cause for failing to report her injury timely; however, it points to testimony by carrier's witnesses to the effect that claimant did not inform them at all about a job-related injury. The testimony of claimant and carrier's witnesses was clearly at odds as to whether the claimant informed them that her injury had been caused by the (month) incident; however, it was conceded at the outset of the hearing that claimant did not report her injury within 30 days of its occurrence. The hearing officer found that claimant was unable to identify the cause of the pain in her neck and right arm until she had been examined and treated by her health care providers on May 20, 1993,[1] and that accordingly she had good cause for failing to timely report her injury because she had trivialized the nature and extent of her injury and was not able to ascertain the cause of her medical problem until she had sought and received competent medical examinations and treatment. A claimant relying upon good cause for failure to file a claim within the statutory period is charged with the duty of prosecuting his or her claim with that degree of diligence which a reasonably prudent person would exercise under the same or similar circumstances. Travelers Insurance Company v. Warren, 447 S.W.2d 698 (Tex. Civ. App.-Tyler 1969, writ ref'd n.r.e.). It has been held that a good faith belief of a claimant, based on reassurances of a physician, that injuries are not serious, has been held to constitute good cause. Texas Employers Insurance Association v. Sapien, 458 S.W.2d 203 (Tex. Civ. App.-El Paso 1970, writ ref'd n.r.e.).

Texas courts previously have been called upon to determine the existence of good cause in cases which involved reliance upon a physician's advice. *See* Hayes v. Commercial Standard Insurance Company, 140 S.W.2d 250 (Tex. Civ. App.-Fort Worth 1940), *writ ref'd per curiam*, 135 Tex. 288, 142 S.W.2d 897 (1940) (fact issue as to good cause existed where the employee did not associate internal injuries with fall at work); Travelers Insurance Company v. Rowan, 499 S.W.2d 338 (Tex. Civ. App.-Tyler 1973, writ ref'd n.r.e.) (employee did not know her skin condition was job-related until doctor made the diagnosis; "It is not realistic to assume from the record that she should have known

[1]The evidence, however, supports a finding of May 21st.

something which her doctors did not ascertain for two years."); Allstate Insurance Company v. Maines, 468 S.W.2d 496 (Tex. Civ. App.-Houston [14th Dist.] 1971, no writ) (where a doctor diagnoses a condition as being caused by something other than an industrial accident, it is not the claimant's legal or absolute duty to ask the doctor specifically anything further to show reasonable diligence).

Claimant's testimony in this case, if credited by the hearing officer, was that she had a sudden onset of pain which she did not relate to the running incident, that she sought medical attention promptly but was only treated symptomatically. Upon more thorough examination, including testing and discussion with her doctor, she received a diagnosis and it was determined that the stair incident was the cause. Thereafter, according to her testimony, she immediately notified persons in a supervisory capacity. We find the evidence sufficient to support the hearing officer's determination that good cause existed for untimely notice.

Finally, carrier argues on appeal, as it maintained at the hearing, that claimant's use of her husband's private medical insurance constituted an election of remedies. The claimant testified that she used her husband's insurance during the time that neither she nor her doctor attributed her problems to work; although she acknowledged the private insurance also covered her surgery, which took place after she was aware that her condition was work-related, she stated that "they said go ahead and file it like that . . . I just did what they told me to." Election of remedies was not an issue at the hearing and the hearing officer did not make any findings or conclusions on it and we do not address issues first raised on appeal. Under similar fact situations, however, we have held that no election of remedies occurred. *See* Texas Workers' Compensation Commission Appeal No. 92273, decided August 7, 1992.

Based upon the foregoing, the decision of the hearing officer is affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge