APPEAL NO. 93544

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. Articles 1.01 through 11.10 (Vernon Supp. 1993). On May 20, 1993, a contested case hearing was held in (City 1), Texas, with (hearing officer) presiding as the hearing officer. She determined that the appellant (claimant) did not give timely notice of a work-related back injury and did not establish good cause for his failure to give timely notice to his employer. The hearing officer ordered that the respondent (carrier) is not liable for workers' compensation benefits on this claim. The claimant asserts that he established good cause for failure to give notice to his employer in a timely manner. The carrier argues that sufficient evidence supports the hearing officer's conclusion that the claimant did not establish good cause for failing to give timely notice to his employer.

DECISION

Determining that sufficient evidence exists in the record to support the hearing officer's decision and that the hearing officer did not abuse her discretion, we affirm.

The claimant asserts one issue on appeal: Whether good cause was established for failure to give timely notice to his employer of the injury. The claimant worked as a machine operator cleaning pipes for his employer. He testified that he injured himself on ___, while operating the machine which cleaned the pipes. While engaged in his job duties, the claimant testified that he slipped and fell in a sitting position. When the claimant fell, he struck his back against pipes on the floor. The claimant stated that he continued working, and then stated that he did not report this incident to his employer. The record reveals that the claimant saw Dr. R for back pain on March 10, 1992. Dr. R examined the claimant and referred the claimant to Dr. K, an orthopedist. Dr. R instructed the claimant to discontinue work, and the claimant testified that he could not physically take the pain of continuing to work. Upon questioning by the hearing officer, the claimant testified that his physical activities around the house were limited because his back pain became a lot worse by March 10, 1992. Dr. K ordered an MRI which showed a herniation and compression of the nerve root on the left posterior of the L5 disc at the L4-L5 level. Dr. K also noted a condition of moderate spinal stenosis.

In his letter of May 6, 1992, Dr. K stated that the claimant's pain was related to a lifting injury in the last week of ___. Dr. K wrote that conservative treatment was used at first but the claimant did not improve. In his letter of June 5, 1992, Dr. K related the back injury not to a specific date but to "repetitive lifting" at work. On March 17, 1992, Dr. K urged the patient "to use more strict bed rest," but the notes, dated March 31, 1992, taken by Dr. K, indicated that even staying in bed caused "more acute pain" to the claimant. The claimant finally underwent an MRI, and Dr. K informed the claimant of the exact cause of the pain in his back on ___. As early as April 29, 1992, Dr. K noted in his medical records of the claimant that if claimant was no better in one week, then the doctor would consider a surgery referral. The first actual notice to the employer of a possible workers' compensation claim came from Dr. K's letter dated May 6, 1992.

Article 8308-5.01(a) requires that the employee or a person acting on the employee's behalf must notify the employer not later than the 30th day after the date on which the injury occurs. The claimant acknowledged his understanding of the notification requirements while testifying:

> Q. At the time of the accident did you know that you're supposed to report a job related injury to your supervisors within 30 days of the injury?
>
> A. Yes. I did know.

"[T]he purpose of this statute is to give the insurer an opportunity immediately to investigate the facts surrounding an injury. . . . [T]his purpose can be fulfilled without the need of any particular form or manner of notice." DeAnda v. Home Insurance Co., 618 S.W.2d 529, 532 (Tex. 1980); *citing* Booth v. Texas Employers' Insurance Ass'n, 132 Tex. 237, 123 S.W.2d 322 (1938). Despite testifying he was aware of this notice requirement, the claimant did not report the injury within the statutorily required 30 days.

Article 8308-5.02(2) expressly allows an exception for failure to give notice within the 30 days after the date of the injury when "the commission determines that good cause exists for failure to give notice in a timely manner. . . ."

Good cause for delay is an issue relevant both to notice of injury and for delay in filing a claim for compensation. The Supreme Court of Texas has stated:

> 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 at 372 (1948). The burden of proof rests with the claimant to establish good cause. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d 294 at 296 (Tex. 1975).

Good cause for failure to timely report an injury within 30 days can be based upon the injured worker's 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 Appeal No. 91030, decided

October 30, 1991; Texas Workers' Compensation 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 Appeal No. 91030, *supra*, the Appeals Panel affirmed a finding of a "good cause" excuse for the injured employee, who continued working until she began her new job. At the new job the injured employee found that her injury was disabling and prevented her from doing her new job, and she notified her former employer within a few days. Her injury occurred on ___, but she believed her injury was trivial until a few days before she called her former employer's manager on May 29, 1991.

When the facts in evidence indicate a serious injury and the employee understands such, the employee is held to the standard of a reasonable or ordinarily prudent person under the same or similar circumstances. This standard applies analogously where a claim is not filed within the statutory time. *See* Texas Employers Insurance Association v. Hubbard, 518 S.W.2d 529, 531 (Tex. 1974). The facts of Hubbard are similar to this situation in that the injured worker, Hubbard, suffered back injuries which he believed were trivial at first. The Supreme Court found that the evidence showed Hubbard suffered from severe and continuing pain. Further, Hubbard could not perform the heavy work he did before injuring his back. Finally, Hubbard knew he had at a minimum a back sprain, and he does not claim that any doctor ever told him that the sprain was not serious. *Id.* at 531-532.

The record here supports a finding that the claimant had a "serious" injury, not a "trivial" injury. At the hearing, the claimant made the following responses on cross-examination:

> Q. So, when the doctor took you off work on March, 10, 1992, that was the first time you had ever been taken off work because of your back?
>
> A. Yes.
>
> Q. And missing work is an important thing to you isn't it?
>
> A. A lot, yes.
>
> Q. It's important because you don't get paid your check if you miss work; is that right?
>
> A. Yes.
>
> Q. So, when the doctor took you off work on March 10, 1992, that was an important thing to you, wasn't it?

A. Yes.

Q. And it was very clear to you that the reason the doctor took you off work on March 10, 1992 was because of your back injury?

A. Yes.

The evidence from the claimant's own testimony shows that the injury had a significant impact on the claimant. The injury forced the claimant to miss work. From the day he stopped working until the day his doctor notified his employer, he missed almost two months of work.

The seriousness or triviality of back injury cases tend to be fact specific and there are decisions holding both ways. Claimant relies upon the Farmland Mutual Insurance Co. v. Alvarez case for support in this situation. Farmland Mutual Insurance Co. v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). In Alvarez, the trial court found that the injured employee had good cause for his delayed filing because of the differing diagnoses and therapies by a succession of health care professionals, and the injured employee continued to work. *Id.* at 846. In Alvarez, the injured employee continued working and received several incorrect diagnoses and unsuccessful treatments, and after all these mistakes the injured worker finally filed his claim before a neurosurgeon made the final correct diagnosis. The Appeals Court upheld the lower court. The present case is distinguishable in that the claimant did not continue to work because of physical pain, and his doctor also instructed him not to work.

A manifest and disabling condition of which a claimant is fully aware would be a condition which would lead any reasonably prudent person to protect his rights by filing a claim. Texas Employers' Insurance Ass'n. v. Portley, 263 S.W.2d 247, 250 (Tex. 1954). Portley, the injured worker, continued to work with a hurt foot despite several doctors' advice to Portley not to work because of the "serious nature" of the injury. *Id.* at 249. In Portley, the injured worker may not have thought the injury was serious, but the Texas Supreme Court said that the injured worker's mere statement that he did not regard the injury as serious "will not raise a fact issue when the facts themselves put the matter beyond the pale of reason or beyond belief by a prudent person." *Id*. at 250. In the present case, the claimant continued to work for several weeks, but after seeing a doctor, the claimant stopped working and discontinued his chores around the house because of both his own bodily pain and his doctor's specific instructions.

The claimant raised another matter which must be considered with the totality of the facts in determining if good cause existed within the standard of a reasonable or ordinarily prudent person acting under same or similar circumstances. This matter presented at the contested case hearing on good cause was that the claimant did not speak much English. The record reveals that the claimant, himself, testified that language was not a problem at

work, and the claimant even reported a prior injury to his hand on the job in 1989. The claimant's testimony on direct and cross-examination contradicted some of his own answers. No evidence was presented as to the claimant's education or intelligence level. Testimony from other witnesses who worked with the claimant also indicates that the claimant's language abilities did not unreasonably delay or hinder his timely filing.

The testimony of both the claimant and his spouse indicates that the claimant works diligently and dependably. Both the claimant and his wife also indicated that they both were fearful of the claimant losing his job, the significance of his not working and the financial effect. Where triviality is asserted, an important fact to be determined is when the injury could no longer be viewed as a trivial injury but could only be viewed as a serious injury. The hearing officer determined that the injury could no longer reasonably be viewed as trivial by the claimant after March 10, 1992.

"Good cause" is a legal excuse for failure to timely notify the employer or to file the claim, and it has been held that good cause must continue to the date when the injured worker actually files 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). An injured worker owes a duty of continuing diligence in the prosecution of his claim, and the claimant must prove that the good cause exception continued up to the date of filing. Texas Casualty Insurance Company v. Beasley, 391 S.W.2d 33, 34 (Tex. 1965). Even if a claimant at one point had good cause, the claimant must act with diligence to notify the employer of a claim or to file a claim. The totality of a claimant's conduct must be primarily considered in determining ordinary prudence. Lee v. Houston Fire & Casualty Insurance Co., 530 S.W.2d at 297; Moronko v. Consolidated Mutual Insurance Company, 435 S.W.2d. 846 (Tex. 1968). The Appeals Panel has refused to establish a standard that a claimant must "immediately" give notice to perfect a finding of good cause for delay in giving timely notice. Texas Workers' Compensation Appeal No. 93494, decided July 22, 1993. The Texas Supreme Court has decided:

> In all cases a reasonable time should be allowed for the investigation, preparation and filing of a claim after the seriousness of the injuries is suspected or determined. No set rule could be established for measuring diligence in this respect. Each case must rest upon its own facts.

Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370, 373 (1948). Although the claimant may have initially had good cause, the hearing officer as the finder of fact determined that the claimant could not have believed his injury was trivial after March 10, 1992. Good cause does not only arise from the trivial or serious nature of the injury, but the totality of the circumstances must be examined. The hearing officer determined as a matter of law that the claimant did not establish good cause for his failure to give notice in a timely manner under the facts of this case.

There was evidence that the employer was aware that the claimant had back pain; however, the employer indicated it did not know of any work related cause of the back pain. The hearing officer found that the employer did not have actual knowledge of a work-related injury to the claimant's back. While actual knowledge of a work-related injury will excuse a failure to timely notice (Article 8308-5.02(1)), the knowledge involves not only knowing of an injury but also that it is work related. Texas Workers' Compensation Commission Appeal No. 91016, decided September 6, 1991.

Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing, and the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8303-6.34(e) and (g). The trier of fact can believe all or part or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign their testimony, and then resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeals No. 93155, decided April 14, 1993. As the fact finder, the hearing officer has the responsibility and the authority to resolve conflicts and inconsistencies in the evidence, to assess the testimony of the witnesses, and to make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided Jan. 15, 1993; *citing* Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The findings of fact made by the hearing officer are supported by sufficient evidence. The hearing officer, as the trier of fact, must look to the totality of the claimant's conduct to determine if he acted as a reasonably prudent person under the circumstances. The hearing officer found as fact that the claimant's back pain significantly restricted the claimant's daily activities following doctor's instructions on March 10, 1992 and that this level of back pain was more than "trivial" when the claimant continued to miss work and limited his daily activities after March 10, 1992. We hold that sufficient evidence supports the hearing officer's conclusions that the claimant's failure to notify his employer timely was not excused for good cause because the claimant did not have a reasonable and continuing good faith belief that his injury was not serious. The hearing officer's decision was not against the great weight and the preponderance of the evidence. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

Finding no reversible error and finding sufficient evidence to support the challenged findings, we affirm the hearing officer's decision and order.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge