APPEAL NO. 93550

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On May 25, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues presented as unresolved and agreed upon were: "1. Did CLAIMANT give timely notice of the injury to her employer? 2. Did CLAIMANT suffer an injury in the course and scope of her employment on (date of injury)?" The hearing officer determined that claimant suffered an injury to her knees in the course and scope of her employment on (date of injury), and that claimant had good cause for failure to notify the employer of the injury within 30 days of the (date of injury), accident.

Appellant, carrier herein contends that the hearing officer misapplied the facts that claimant had not promptly reported her injury, that claimant had not exercised due diligence in reporting her injury, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified she was employed by (employer), apparently a subsidiary of (employer), the employer, as a sales coordinator on (date of injury). Claimant testified, and is supported in her testimony by witnesses, that on (date of injury), she was working at her desk and stood to get up to move some data binders on a rack. Claimant states as she was lifting the binders her chair apparently scooted back and she fell forward, landing heavily on both knees. Both claimant and a witness stated that claimant's supervisor (Ms. Mc) was within six to eight feet away at the time of the fall. Claimant and other witnesses testified that claimant dropped the data binders as she fell and they made quite a bit of noise when they hit the floor. Claimant and other witnesses state that several people came over and asked claimant if she was all right, that claimant was embarrassed by the fall and got up saying she was okay. Claimant states her knees hurt that day and she rubbed them but "it was not until months later that [she] started noticing that her knees started hurting" and that her knees started popping when she climbed stairs. Claimant states she mentioned it to coworkers and they would "joke about it" stating claimant was getting old. Claimant stated she "left it alone" and kept on going. In December 1992, after her condition kept getting worse, claimant stated, she decided to see an orthopedic surgeon about the problem. Claimant first sought medical attention for her knee problems on January 5, 1993, when she saw (Dr. H).

Dr. H records on 1-5-93 that claimant complained of bilateral knee pain "for several months [and] on occasion she has popping sensations." Dr. H records claimant "does not have any true swelling. She has no history of actual trauma, however, she states she has fallen several times." Dr. H's diagnosis was "[i]nternal derangement of both knees" and

ordered an "MRI examination" of both knees. In a follow-up examination on January 26, 1992, Dr. H records the MRI ". . . revealed some evidence of contusion to the inferior aspect of the patella of the right knee. She also had evidence of a posterior horn tear of the medical (sic) meniscus in the left knee." Dr. H states he believes claimant will require surgery in the future. By note dated 4-14-93, Dr. H states "I have been treating [claimant] for bilateral knee pain. She states she fell at work 3-92 but never reported it to her employer."

Claimant stated initially she was very embarrassed by the fall and believed her injury to be trivial. With the passage of time, as her knees began to bother her, claimant states she had forgotten about her fall and did not associate her pain with the fall. When she was asked by Dr. H about a history of a fall, claimant states she had forgotten about the fall and it was only after her sister, who had witnessed the accident, had reminded her of the March 1992 fall did she establish a connection. Claimant states Dr. H told her that her injury was "caused by a hard blow or a hard fall." Claimant reported the injury to the employer on an Employee's Notice of Injury (TWCC-41) on 1-29-93. Claimant has lost no time from work.

The accident of (date of injury), was witnessed by a coworker, Mr. M, who testified at the CCH, AM, another coworker, whose sworn statement was admitted and EA, claimant's sister and coworker who testified. All state that Ms. Mc, claimant's supervisor, was close by and must have seen the aftermath of the accident because of the noise the data binders made when they fell to the floor. Ms. Mc, in a transcribed statement, stated that she was the Director of Sales Analysis and Forecast, was claimant's supervisor in March 1992, and that she does ". . . not remember the incident and she (claimant) says that I was present at the time, I don't deny that. I just don't remember." Ms. Mc states the injury was never reported to her.

Carrier contests the following hearing officer's determinations:

FINDINGS OF FACT

8.CLAIMANT had good cause for failing to report her injury within 30 days of (date of injury).

CONCLUSIONS OF LAW

2.CLAIMANT had good cause for failure to notify EMPLOYER within thirty days of the (date of injury), accident and therefore her notice to EMPLOYER was timely.

3.CLAIMANT suffered injury to her left and right knees in the course and scope of her employment on (date of injury), and is entitled to benefits under the Texas Workers' Compensation Act.

Carrier argues that the test to determine the existence of good cause for not filing a claim within the statutory time limit is that of ordinary prudence or "that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." We do not necessarily disagree with that definition but only point out that it is within the purview of the hearing officer, as the fact finder, to determine what ordinary prudence is under the same or similar circumstances and it then becomes a sufficiency of the evidence question whether the hearing officer's fact finding is supported by sufficient evidence. The carrier cites King v. Texas Employers' Insurance Association, 416 S.W. 2d 533, 536 (Tex. Civ. App.-Amarillo 1967, writ ref'd, n.r.e.) for the proposition that the "mere statement by an injured person that he did not regard his injuries as serious will not raise a fact issue as to good cause." The cited passage actually goes on to say it 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 . . . ." The court goes on to say "[i]t ['good cause'] 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." Citing Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948). King also states that ordinarily the question of good cause is one for the trier of facts to determine.

Carrier at the CCH, not specifically repeated in the appeal, made the argument that even if Ms. Mc, the supervisor, saw the fall that would not constitute notice. We would add that it may, however, constitute actual knowledge. In Miller V. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.) in the presence of his supervisor, an employee fell five feet off the bed of a truck, immediately got up, and told his supervisor "I didn't think I was hurt" and that he did not want to see a doctor. The court held that there are many mishaps, falls and minor accidents that result in no compensable injury. On the other hand, the court notes, there are "spectacular injuries" the viewing of which would be knowledge as a matter of law. In between, there will be many accidents, the viewing of which is not notice, as a matter of law, but which would raise a fact issue for the trier of fact. The hearing officer, as the trier of fact, could have perhaps found actual knowledge of the injury in this case.

Carrier also at the CCH cited a series of Appeals Panel decisions, apparently for the proposition, that notice to a coworker who does not have status as either a manager or supervisor is not "notice" for purposes of Article 8308-5.01(c). We do not disagree with that general proposition, but note that in all the cases cited we have held that the issue of good cause is one for the trier of fact.

Similarly claimant at the CCH cited a series of Appeals Panel decisions, apparently for the proposition that a *bona fide* belief of a claimant that injuries are not serious is sufficient to constitute good cause. We affirm that general statement of law noting however, that the hearing officer as the trier of fact could believe or not believe the employee's testimony that he/she had a *bona fide* belief that the injury was trivial or not serious. In the instant case,

the hearing officer apparently accepted claimant's testimony of a *bona fide* belief the injury was not serious and found good cause for not giving notice within the statutory time limit. There is sufficient evidence to support a finding to that effect.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). In this capacity the hearing officer judges the credibility of the witnesses and the evidence and resolves any conflicts and inconsistencies in the testimony. The hearing officer clearly found that claimant initially believed her injury to be trivial, but that later the knee injury became a "major problem" and that this constituted good cause for failing to timely report the injury. Where, as here, there is sufficient evidence to support his determinations, there is no sound basis to disturb his decision. Only if we were to determine, which we do not in this case, that the determinations were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we be warranted in setting aside the decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992.

The decision is affirmed.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Gary L. Kilgore
Appeals Judge