APPEAL NO. 93677

This appeal is brought pursuant to the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 15, 1993, in (city), Texas, (hearing officer) presiding as hearing officer. The issues at the CCH were whether the respondent (claimant) had good cause for not timely reporting her on-the-job injury to the appellant and whether the claimant had disability as a result of this injury. The hearing officer concluded that the claimant had good cause for not timely reporting her injury and that she has disability beginning on January 6, 1993, and continuing to the date of the hearing.

The appellant (carrier/college) seeks review of this decision and urges that the hearing officer's finding of fact and conclusions of law were not supported by the evidence.

DECISION

The decision of the hearing officer is affirmed in part and reversed and remanded in part.

The parties agree that on (date of injury), the claimant injured her lower back while picking up boxes. At the time she worked as an administrative assistant in the admissions office of a community college. She continued working until December 11, 1992, when she was terminated for cause unrelated to the claimed injury. The college closed for the holidays on December 23, 1992, and reopened again on January 4, 1993. According to the testimony of the claimant and (BH), the manager of benefits and employee relations, there was no one at the college to whom the claimant could have reported her injury during this time except by calling BH at home. On January 4, 1993, the claimant filed for unemployment compensation. The claimant reported her injury to the carrier/college on January 6, 1993, some 49 days after it occurred.

On November 22, 1992, the claimant was seen by (Dr. Y), her personal physician for a "personal reason" not otherwise described in the record. At this visit, claimant did not mention her back. She first described her lower back injury to (Dr. L) on January 26, 1993. He diagnosed thoracolumbar strain and recommended physical therapy. On March 11, 1992, claimant sought a referral from Dr. Y to a chiropractor. The claimant complained of pain and Dr. Y found "tenderness around T3 and T4." On April 5, 1993, claimant consulted with (Dr. T), a chiropractor, who diagnosed "irritated lumbar plexus, lumbar facet syndrome, a lumbar fixation, and a pelvic tilt, as well as a fixation of the cervical and thoracic spine." In a letter of May 26, 1993, Dr. T states:

Due to her injuries sustained on (date) and 11-18-92 (claimant) has not been able to work or enjoy leisure activities that she participated in before she was injured.

On June 11, 1993, Dr. T concluded that the claimant, "suffered from chronic severe upper back, as well as lower back and leg pain which have made it impossible for her to be gainfully employed in almost any position because the length of time she needs to spend at

a full time job would aggravate her condition." He diagnosed thoracic muscle spasms, brachial radiculitis and cervical cranial syndrome as well as lumbar muscle spasms, sciatica and irritated lumbar plexus. The carrier/college introduced no medical evidence.

The pertinent stipulations, findings of fact and conclusions of law are:

STIPULATIONS

2. The parties stipulated the Claimant had an injury within the course and scope of employment on (date of injury).

3. The parties stipulated the Self-Insured Carrier/college did not timely contest compensability.[1]

FINDINGS OF FACT

4. The Claimant was injured at work on (date of injury), when she lifted boxes.

5. The Claimant did not report her injury until January 6, 1993.

6. The Self-Insured Carrier/college was closed for the Christmas Holidays from December 23, 1992, through January 3, 1993.

7. The Claimant has not been released to return to work.

9. The Carrier does not contest compensability, only timely reporting.

10. Claimant started losing time from work, because of this injury on January 6, 1993.

CONCLUSIONS OF LAW

[1]We note that the report of the benefit review officer (BRO), admitted as hearing officer's exhibit 1, states that the carrier filed a TWCC-21 on January 26, 1993, in which it denied the claim "because the claimant failed to report injury with (sic) 30 days." The TWCC-21 itself was not introduced into evidence at the CCH. The Benefit Review Officer noted that the carrier contested timely reporting of the injury, but specifically did not contest compensability. For this reason, we address on appeal only the timeliness of claimant's report of injury. We do not decide whether carrier's stipulation that it did not timely contest compensability encompasses a waiver of its claim that the report of injury was not timely filed. See Texas Workers' Compensation Commission Appeal No. 92028, decided March 11, 1992, and Appeal No. 91016, decided September 6, 1991.

2.The Claimant was injured in the course and scope of her employment on (date of injury).

3.The Carrier did not timely contest compensability.

4.The Claimant had good cause for not timely reporting her injury to her Carrier/college.

5.The Claimant is presently unable to obtain employment at pre-injury wages.

Section 409.001 of the 1989 Act provides that an employee or a person acting on the employee's behalf must notify the employer of an injury not later than the 30th day after the date on which the injury occurs. An employee's failure to notify the employer as required by Section 409.001 relieves the employer and the carrier of liability, unless, among other things, the Commission determines that good cause exists for failure to give notice in a timely manner. Section 409.0029(2). The test for the existence of good cause 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...trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorable for the claimant, admits no other reasonable conclusion.

Hawkins v. Safety Casualty Company, 146 Tex. 381, 207 S.W.2d 370 (1948); Texas Workers' Compensation Commission Appeal No. 93102, decided March 22, 1993.

The hearing officer found as a matter of fact that the claimant had good cause for not reporting her injury until 49 days after it occurred. Ordinarily, a hearing officer's finding of fact will not be disturbed on appeal unless the evidence to support the finding is so weak or the finding so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. In Re King's Estate, 244 S.W. 2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 93477, decided July 19, 1993. The test for reversal of a finding of good cause is even more stringent and, as we have held, is one of abuse of discretion. Texas Workers' Compensation Commission Appeal No. 91120, decided March 20, 1992.

The claimant cites three reasons for failing to report her injury within 30 days. First, she asserts that she was too busy at work to make the report. While we question whether the workload can ever in itself justify a failure to report an injury, we note that in this case,

the claimant worked for carrier/college only through December 11, 1992, that is, seven days prior to the end or the 30 day period. Secondly, the claimant asserts that the carrier/college was closed for the holidays from December 23, 1992, until January 4, 1993, and that during this time there was no one at the job location to whom she could report her injury. BH confirms this. During this time, the only way the claimant could report her injury was by means of a phone call to the residence of the appropriate supervisor. While a phone call to a supervisor at home may not be an unreasonable requirement under these circumstances (something which we need not decide), it is also important to note that this school holiday period began more than 30 days after the injury. Finally, claimant contends that she did not realize how serious her injury was until after the normal 30 day period had run. It is well settled that an injured employee's "trivialization" of an injury or reasonable belief that the injury is not serious may amount to good cause for not reporting the injury within the statutory time constraints. Texas Workers' Compensation Commission Appeal No. 93544 decided on August 17, 1993, and Texas Workers' Compensation Commission Appeal No.93155, decided on April 14, 1993. The evidence on the question of trivialization comes from the claimant herself. She states that she previously had back problems that resolved themselves over time at least to the extent of not causing her to miss time from work. In this case, however, she stated that her pain became increasingly severe after she was terminated and especially over the holidays and that had the carrier/college been open for business she would have reported it then. Nonetheless, at her final, or "exit" interview on or about December 22, 1993, with BH the subject of injury was never brought up. In her visit of November 22, 1992, with Dr. Y, the claimant never mentioned her back problem, although this would have been an opportune time to do so. After evaluating this evidence, the hearing officer found good cause. Under these circumstances, even though the evidence may lend itself to different inferences or conclusions, *see* Garza v. Commonwealth Insurance Company Newail, New Jersey 508 S.W.2d 701 (Tex. Civ. App.-Amarillo, 1974), or even though, if we engaged in fact finding in this case, we may have found otherwise, we believe the testimony of the claimant provides some probative evidence on which the hearing officer could base his findings and precludes us from setting aside the finding of the hearing officer as being arbitrary and without any basis in the record.

The carrier/college also argues that any good cause that may have existed lasted only until January 4, 1993, when the carrier/college reopened for business, and that "the claimant should have immediately reported her injury" and not have waited until January 6, 1993. The claimant admitted that she applied for unemployment compensation on January 4, 1993. Thus, the carrier/college argues if she could have applied for unemployment compensation, she presumably also could have provided notice on January 4, 1993, of her work related injury. Although good cause must exist up to the time an otherwise untimely report or injury is filed, *see* Texas General Indemnity Company v. McIlvain, 424 S.W.2d 56, the Appeals Panel has refused to require a claimant to "immediately" report his injury upon the termination of good cause. Texas Workers' Compensation Commission Appeal No. 93544, decided on August 17, 1993. A claimant must only 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." Appeal No. 93544, *supra*, and cases cited therein. The hearing officer found good cause to continue up to the day the claimant reported the injury (January 6, 1993). To the extent that the hearing officer considered the claimant to have acted prudently under the circumstances, we do not find this decision necessarily arbitrary or without any basis in the record.

The carrier/college also argues that there is no evidence to support the hearing officer's finding that disability began on January 6, 1993. In so doing, the carrier/college contends that the "medical evidence puts the earliest (disability) date at 5/26/93."

The claimant in a workers' compensation case has the burden to prove by a preponderance of the evidence that she sustained a compensable injury. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Section 410.165 of the 1989 Act provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility to be given the evidence. In reviewing a no evidence point, an appeals body should consider only the evidence and reasonable inferences therefrom which support the finder of fact and reject all evidence and inferences to the contrary. *See* Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987); Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. We have held that in applying this standard of review, we should uphold the finding of the hearing officer if any evidence of probative force supports it. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993. A claimants testimony alone may establish that a compensable injury occurred. Gee v. Liberty Mutual Insurance Company 765 S.W.2d 394 (Tex. 1989; Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. In the present case, the claimant testified that she did not consider seeing a doctor until a (Mr. E), an insurance adjuster, suggested it in a conversation on January 8, 1993. Just prior to this, on January 4, 1993, she had applied for unemployment and for the next couple months at least had been attending job fairs, sending out resumes and otherwise seeking employment.[2] Claimant did not indicate to Dr. Y an inability to find work because of her injury. Dr. L, on January 26, 1993, stated, that he did not think "anything very severe is going on." The claimant did not raise the subject of disability, nor was it brought up by a health care provider until claimant's second visit to Dr. T on May 26, 1993, wherein he states that claimant "has not been able to work..." because of her injuries. No attempt was made by Dr. T to pinpoint the onset of this inability to work. The only evidence in the record connected to January 6, 1993, refers to the day the claimant reported her

[2]BH also testifies that the exit interview was conducted at a time to accommodate claimant's part-time holiday work schedule.

injury.[3] Although neither the injury itself, nor the conclusion that it is compensable is disputed, the record contains no probative evidence that supports the conclusion of the hearing officer that disability began on January 6, 1993, as opposed to any other date.

Finding no evidence to support this challenged finding, we reverse the hearing officer's decision and remand on the sole issue to determine if and when claimant's disability began. Reconsideration and development of the evidence on this issue, together with additional and/or different findings may be appropriate as determined by the hearing officer.

A final decision has not been made in this cased. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review no later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

CONCURRING OPINION:

I concur, but do not want to allow unartful and overstated language propounded by the parties' stipulation to go unclarified.

A "compensable injury" is defined not only in terms of any injury that occurs in the course and scope of employment, but as one "for which compensation is payable under this

[3]The BRO, in what is apparently, a typographical error, refers to claimant as requesting income benefits from January 6, 1993, "when I (claimant) first went to the doctor..." The date should be January 26, 1993.

subtitle." Section 401.011 (10). Compensation is not "payable", according to Section 409.002, for an injury not timely reported in accordance with Section 409.001 when exceptions do not apply. Therefore, a carrier must raise a defense based upon lack of notice within the same 60 day time period that a dispute over course and scope is required. Section 409.021(c).

The hearing officer's decision, by finding that compensability was not disputed but that notice was, appears to endorse the concept that notice to the employer need not be raised as a contest to compensability within the required 60 days. I believe what the parties meant to stipulate to, and what the hearing officer had in mind and should have made clear, is that the occurrence of an injury in the course and scope of employment was not timely disputed. One can infer from the benefit review conference report that notice was timely disputed and therefore properly raised.

Susan M. Kelley
Appeals Judge