APPEAL NO. 93708

At a contested case hearing held in (city), Texas, on July 1, 1993, the hearing officer, (hearing officer), determined that the respondent (claimant) sustained an injury to her left shoulder on (date of injury), which was compensable under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), and that she had good cause for failing to report that injury to her employer, (employer), until (date). Appellant (carrier) challenges the pertinent findings and conclusions for sufficiency of the evidence and maintains, in essence, that if the hearing officer and claimant's doctor could deduce that claimant, who had sustained a prior compensable injury to the same shoulder on (date of injury), sustained a new injury to that shoulder on (date of injury), then claimant, too, should have so deduced, should have timely reported it, and thus did not have good cause. Claimant responds urging the sufficiency of the evidence and seeks our affirmance.

DECISION

The evidence being sufficient to support the challenged findings and conclusions, as reformed, we affirm.

Claimant, the sole witness, testified that she sustained a work related injury to her left shoulder on (date of injury), which, according to her medical records, consisted of bursitis and tendinitis of the left shoulder and a neck sprain incurred when she lifted a heavy box. Claimant said she was off work for some time and returned to work in March 1992. She thereafter refrained from playing volleyball during the August - December 1992 season as she did not want to reinjure the shoulder. She said, variously, that she did and did not recover from the original injury. Claimant stated that on a Friday, which she referred to in response to the examiners' questions as (date), (year) she pulled a pallet jack up and down the "action alley" throughout the day and experienced pain in her left shoulder which she thought was from overuse. She said she did not then know whether the pain was from her previous injury or from a new injury but thought it was the earlier injury. The following Tuesday she said she went to (Dr. B), who had treated the earlier injury, and also on that day told the store manager, (Mr. C), about her shoulder pain. Although claimant said she knew the pain on (date) was from pulling the pallet jack, she did not tell Mr. C she had injured herself on that day because she did not then know whether her pain was from the prior injury. She said that Dr. B did not initially indicate whether she had sustained a new injury but that later, on a date she could not recall, he did so and she called the carrier and reported that Dr. B had said there was a new injury.

Dr. B's records reflect that claimant saw him November 11th complaining of the return of back and shoulder ache and that he took claimant off work. She saw Dr. B again on November 25th and December 16th. Dr. B's records of these visits stated the date of injury as "(date)" and copies were sent to the carrier. However, in a letter of December 31st, Dr. B wrote: "The patient had two injuries, one (date) and the other (date). Both of these are workman's compensation injuries," and in a letter of January 14, 1993, Dr. B advised the carrier that claimant had had another injury which was an aggravation of the earlier injury. Dr. B's reports of claimant's visits in 1993 continued to state the injury date as "(date)."

Carrier introduced an investigative report summarizing interviews with Mr. C and with claimant. According to this exhibit, claimant initially advised Mr. C of her neck and shoulder pain on (date) and indicated she did not think it was work related, that Mr. C suggested she visit the doctor, that she returned from the doctor with an off-work slip and thereafter on several occasions told Mr. C she did not know whether her injury was work related, and that about six weeks after being off work claimant and her husband came in and told Mr. C they wanted to file a claim. Claimant testified that she did not tell Mr. C until sometime in January 1993 that the pain she had reported to him was related to pulling the pallet jack on (date).

Carrier's evidence included adjuster's notes to the effect that Mr. C related that he had asked claimant if she had injured herself at work and that she had responded in the negative. These notes also reflect that claimant's husband called the carrier on (date), to advise that Mr. C would not file a new claim for claimant's (date) injury, that carrier then undertook to investigate the claim, and that Mr. C subsequently acknowledged the claim.

The hearing officer found that claimant injured her left shoulder on (date of injury) in the course and scope of her employment, that the injury was an aggravation of her earlier injury, that she first became aware of the new injury on December 31st, that she reported her injury to employer on (date), although she had previously reported shoulder pain as early as (date), and that claimant acted as a reasonably prudent person in not reporting her injury until (date). Footed on these factual findings, the hearing officer concluded that claimant suffered a compensable injury on (date of injury) and had good cause for not reporting such injury until (date). In his discussion the hearing officer observed that claimant testified she was working with the pallet jack on (date of injury) but that (date) was used as the injury date because that is the date she first mentioned the pain to Mr. C. However, our review of the testimony reveals that claimant consistently stated (date) as the date she experienced the pain pulling the pallet jack, albeit merely answering "yes" or "no" to questions framed by the attorneys, and said it was a Friday. She said it was several days later that she spoke to Mr. C about her pain and thought it was the following Tuesday, that Mr. C suggested she see a doctor, and that she went to her doctor that same day. As mentioned earlier, Dr. B's records reflect claimant's first visit after (date) was on November 11th. Accordingly, the hearing officer's findings, conclusions, and decision must be and hereby are reformed to reflect the injury date as (date), (Year), wherever they refer to (date of injury).

We are satisfied that the hearing officer's findings and conclusions are sufficiently supported by the evidence. As we have many times observed, a claimant's testimony alone can establish the occurrence of a compensable injury. Sections 409.001 and 409.002 provide, in part, that an employee shall notify the employer of an injury not later than the 30th day after the date the injury occurs and that failure to provide such notice relieves the employer and the employer's insurance carrier of liability unless, among other things, the Texas Workers' Compensation Commission determines that good cause exists

for failure to provide notice in a timely manner. The "good cause" test for the filing of timely workers' compensation claims and for the provision of timely notice has been stated by the Texas courts to be one of ordinary prudence, that is, whether a claimant has prosecuted the claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. *See* Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). The evidence of claimant's having good cause for not timely notifying her employer, and that she sustained an injury on (date) is sufficient. The evidence of record indicates that claimant herself did not know whether the recurrence of her pain on (date) was a flare-up of her earlier injury from overuse or a new injury, and it was not until she was informed by her doctor that she had indeed sustained a new injury that she was able to know of that injury and thereafter report it. We cannot agree with the carrier's proposition that because the doctor and the hearing officer, "as reasonably prudent persons," were able to find that claimant sustained a new injury on (date) that she herself, applying the reasonably prudent person test, should similarly have known she sustained a new injury on that date, and that her 30 days for providing employer with notice of her injury should have begun to run from that date.

The issue challenged on appeal was one of fact for the hearing officer as the fact finder to determine. We are satisfied the challenged finding and conclusion are sufficiently supported by the evidence. Section 410.165(a) provides that the hearing officer is the sole judge not only of the relevance and materiality of the evidence but also of its weight and credibility. As the trier of fact the hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, (Tex. Civ. App.-Amarillo 1974, no writ). The hearing officer may believe, all, part, or none of the testimony of a witness (Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe one witness and disbelieve others (Cobb v. Dunlap, 656 S.W.2d 550 (Tex. App.-Corpus Christi 1983, writ ref'd n.r.e.)). We do not substitute our judgment for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ).

The findings, conclusions, and the decision, as reformed, of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge