APPEAL NO. 93757

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S. art. 8308-1.01 *et seq*.), a contested case hearing was held in (city), Texas, on July 26, 1993, (hearing officer) presiding as hearing officer. He determined that the appellant's (claimant) repetitive trauma injury date was (date of injury), and that she failed, without good cause, to timely notify her employer of her injury. Accordingly, benefits under the 1989 Act were denied. Claimant, faulting several of the hearing officer's findings and conclusions, urges that she did not know for sure that she had a repetitive trauma injury (carpal tunnel syndrome (CTS)) until March 1993 and that she reported her injury at that time. Respondent (carrier) asks that the decision be affirmed pointing out the evidence is sufficient to support the determinations of the hearing officer.

DECISION

Determining that there is sufficient evidence to support the findings and conclusions of the hearing officer, the decision is affirmed.

The claimant, a credit coordinator whose job required considerable writing and other general office work, testified that in June or July of 1992 she noticed a problem in her wrists but did not know what was causing it. Since there was arthritis in her family she thought that might be involved. She also has done needlework most of her life. In any event, she says she went to her doctor on (date of injury), because of sinusitis and told her doctor about the wrists. He prescribed wrist braces for her to wear at night. She testified she continued working and did not report any injury as she was not certain of the cause of her wrist problem and because she did not want to file a fraudulent workers' compensation claim. She saw her doctor in February 1993 on an unrelated matter and again in March because the wrist problems became much worse. After that visit, her doctor wrote a "TO WHOM IT MAY CONCERN" letter dated March 15, 1993, indicating the claimant had CTS and that it was job related. She then reported an injury to her employer. Her initial report of injury listed an injury date of (date of injury).

The reports from the claimant's doctor were admitted and indicate a diagnosis of CTS dating from the (date of injury), visit with a reference to "some paraesthesias" after writing at work. A wrist splint was listed in the treatment plan. The February records from her doctor also refer to her CTS condition. The claimant was interviewed regarding the claimed injury on March 22, 1993. During that interview, the claimant stated her hands started bothering her a couple of months before she went to the doctor in (date). She indicated the doctor told her at that time that it was probably CTS and that it was from her job. When asked why she waited so long to report it, the claimant responded:

> A lot of different reasons, #1 I don't like filing claims because what you do if you go to another company regardless of what the laws are if they find out they will not hire you uh because you have filed on workers comp and if you've done it once they feel like you will do it again, basically you are treated pretty much like a criminal if you do file, because there are so many people who abuse it that I just as soon not file on it at all

but uh like I said this was getting to the point that I could. . . .

Section 409.001 provides in pertinent part:

(a)An employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which:

(1)the injury occurs; or

(2)if the injury is an occupational disease, the employee knew or should have known that the injury may be related to the employment.

Failure to provide timely notice relieves a carrier of liability for benefits unless the employer has actual knowledge, does not contest the claim or "(2) the commission determines that good cause exists for failure to provide notice in a timely manner." Section 409.002.

As indicated, the hearing officer determined that the claimant's repetitive trauma injury (included in the definition of an occupational disease) date was (date). The claimant's own statements during the interview of March 22, 1993, in addition to the notations in the doctor's report dated (date of injury), provide sufficient evidence to sustain the hearing officers's finding on this issue. Although the claimant's testimony at the hearing tends to trivialize the hand or wrist problem in (month), it is clear that it was bothering her in June/July, she brought it to the attention of her doctor in (month), he noted in his "ASSESSMENT" No. 1 "carpel tunnel syndrome" and related the claimant's history of the matter to her job, and prescribed a wrist splint. Where there is conflicting or inconsistent evidence or testimony, it is for the hearing officer, as the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence (Section 410.165(a)), to resolve such conflicts and inconsistencies. Garza v. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. Clearly, with an injury date of (date of injury), and a reporting date in mid-March 1993, the notice was not timely.

Concerning the issue of good cause for failure to timely notify, the weight to be given the claimant's testimony at the hearing became a pivotal factor. The hearing officer apparently determined, in weighing the testimony and assessing credibility, that the other evidence, including the doctor's reports, the interview of the claimant and the facts and circumstance surrounding the claimant's actions in this case did not constitute good cause for the untimely notice. The burden of proof to establish good cause rests with the claimant. Lee v. Houston Fire & Casualty Co., 530 S.W.2d 294 at 296 (Tex. 1975). Good cause for failure to timely report an injury can be based upon an injured worker's not believing the injury is serious and an initial assessment of the injury as being "trivial," (*See* Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991); however, this

belief must be based upon a reasonably prudent person standard. In Hawkins v. Safety Casualty Co., 207 S.W.2d 370 at 372 (Tex. 1948), the Texas Supreme Court in discussing good cause 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.

Again, the hearing officer determined that good cause was not established under the facts and circumstance of this case. We can find no abuse of discretion in his determination and certainly find no basis to rule, as a matter of law, that good cause, under the facts and circumstances of this case, was established.

We have reviewed the complete record and find sufficient evidence to support the decision of the hearing officer. Only were we to determine, which we do not, that his findings and conclusions were so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust would there be a sound basis to disturb his decision. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge