APPEAL NO. 93858

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.011 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq*.). At a contested case hearing held in (city), Texas, on August 23, 1993, the hearing officer, (hearing officer), considered the following disputed issues unresolved from prior benefit review conferences (BRCs): 1. Whether or not appellant (claimant) was injured in the course and scope of his employment; 2. Whether or not claimant reported his injury to (employer) not later than the 30th day after the date on which the injury occurred or, if not, did good cause exist for failure to give notice in a timely manner; 3. Whether or not claimant filed a written claim for compensation with the Texas Workers' Compensation Commission (Commission) not later than one year after the date of the occurrence of the injury or, if not, did good cause exist for failure to file a claim in a timely manner; 4. Whether or not claimant's notice of claim was timely filed because of employer's failure to file Employer's First Report of Injury or Illness (TWCC-1), and if a delayed filing by employer extended claimant's filing period; and, 5. Whether or not claimant has had disability (as defined in Section 401.011(16)). After reaching a number of factual findings, the hearing officer concluded that claimant was injured in the course and scope of his employment and had disability from July 2, 1992, to February 9, 1993. Neither party has appealed from these conclusions. The hearing officer also concluded that claimant did not timely report his neck injury to the employer and lacked good cause for such untimely reporting, and further, that claimant did not timely file his workers' compensation claim and lacked good cause for such untimely filing. The hearing officer also concluded that the delayed filing of employer's TWCC-1 did not toll claimant's period for filing his claim because the employer and respondent (carrier) did not know claimant's neck injury "was [work] related" until after claimant's filing period had lapsed. Claimant specifically challenges the sufficiency of the evidence to support the latter three legal conclusions, which were adverse to him, as well as six of the 15 findings of fact. No response was filed by the carrier.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified that on (date of injury), he was pulling by hand a very heavy trailer containing a 200 gallon tank fully loaded with liquid coolant in an effort to move it forward to connect to the towing hitch of an electric cart when "something popped" in his neck. He said "it just felt like a snap, just inside my neck." He said he stopped, rubbed his neck for a few minutes, and then continued to work but that his neck pain became increasingly severe and his neck muscles felt as though they were in a spasm. Further, his left arm and fingers became numb and his chest was "pounding." He stated: "I didn't know really what was happening--I just knew that my neck popped." As noted, the hearing officer determined that claimant sustained a neck injury in the course and scope of his employment on (date of injury), and that determination has not been appealed. Claimant signed his Employee's Notice of Injury or Occupational Disease And Claim for Compensation (TWCC-41) for that injury on "12-08-92" and it was received by the Commission on December 10,

1992. The Employer's TWCC-1 was signed by employer's occupational nurse, (Ms. H), on "12/16/92."

With respect to the issue of claimant's having provided timely notice of the injury to his employer, Sections 409.001(a) and (b) provide that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs and that such notice may be given to the employer or to an employee who holds a supervisory or management position with the employer. Section 409.002 provides that the failure to notify an employer as provided by Section 409.001(a) relieves the employer and its insurance carrier of liability unless the employer has "actual knowledge of the employee's injury," or unless the Commission determines that good cause exists for failure to provide timely notice. Claimant did not assert at the hearing, nor does he on appeal, that the employer had actual knowledge of the injury and no finding concerning such was made by the hearing officer. As for his provision of timely notice, claimant's position at the hearing appeared to be twofold. First, claimant contended he provided his supervisor,(Mr. P), with oral notice of his neck injury approximately one hour after it happened. Secondly, claimant contended that on (date), he prepared and signed a written accident report on an employer form and gave it to Mr. P that day. While acknowledging that September 20th was the 31st day after his injury, claimant appeared to contend he had good cause for such untimely notice.

Claimant testified that shortly after the accident he stopped working because of the pain, went to another building, and told the dispatcher that something had popped in his neck and also that he was having chest pains and that his arms were numb. He said the dispatcher told him he may be having a heart attack and called for Mr. P. Claimant said that when Mr. P arrived about 15 minutes later, which was approximately one hour after the accident, he told Mr. P that he had hurt his neck, that "something popped in [his] neck a while ago," and that now his chest was hurting and his arms were numb. Claimant testified that while he never said he was having a heart attack, Mr. P, too, thought he might be and the dispatcher drove claimant to a hospital.

Claimant does not contend on appeal that he gave notice prior to (date), and relies solely on the written notice he contends he provided on that date. In his appeal, claimant asserts "that the evidence showed that Claimant reported his injury on (date) . . . Claimant maintains that the report dated (date), provides notice to the employer and that good cause existed for not turning the form into the employer until the 31st day." Claimant specifically challenged certain of the factual findings and legal conclusions but did not challenge Finding of Fact No. 5 which stated:

"At the time of his injury on (date of injury), CLAIMANT did not tell his supervisor that he had injured his neck while working, but instead only related symptoms which the supervisor thought were caused by a heart attack."

Finding of Fact No. 5 is thus not before us as an appealed issue.

Claimant said that when he arrived at the hospital on (date) he told personnel there who administered an EKG test that he "already had a blockage" but he was nevertheless kept there for three days being tested for a heart condition. Claimant said that "they didn't even look at my neck." Claimant stated that (Dr. RL), the cardiologist who had previously treated him, told him he could not find claimant's problem but that it was not a heart problem. The records of claimant's hospitalization were not introduced and only a few notes of Dr. RL were offered.

In a "To Whom It My Concern" letter dated August 26, 1991, Dr. RL released claimant to return to work but restricted him to light duty until September 13th after which he could return to regular duty. Dr. RL's September 4th letter "To Whom It May Concern" stated that "due to injury of [claimant's] muscles," Dr. RL recommended that claimant could not work on that date but could return to work the next day. According to claimant's documentary evidence and testimony, Dr. RL referred him for examination by (Dr. O), a neurosurgeon. In a note of September 27, 1991, Dr. O stated he found no evidence of a neurosurgical problem, that claimant "appears to have `pulled muscles,"' and that his prognosis was "excellent." In an undated report, Dr. O stated: "On the basis of the patient's history and physical examination and imaging, I feel that the patient has sustained a muscular injury as a result of his activities at work on (date of injury)." Claimant's testimony indicated that in compliance with employer's requirements he gave Dr. RL's authorizations to return to work to Mr. P as well as to Ms. H.

Claimant further testified that he completed and signed a written accident report on an employer's form which included the essential details of his (date) accident including the description of his injury as "pulled neck muscle." However, the date of the accident was stated on the form as "(date of injury)," and when asked about this date claimant indicated there was confusion over whether he was to write in the date of the accident or the date he signed the report and that he did the latter. Claimant introduced a copy of this report. He testified that as a member of his union's safety committee, he had such forms in his possession and that sometime after he returned to work he asked Mr. P to complete the form but that Mr. P said he did not "have time to mess with it." Claimant said he next spoke with a union steward and asked him to get Mr. P to complete the report. He said the steward advised him to complete the form himself and take it to Mr. P who would sign it, so that is what he ended up doing. However, the supervisor's signature block on the report in evidence was blank. Claimant said he gave a copy of the report to Mr. P to sign and that Mr. P never signed claimant's copy. Ms. H testified that at or after a BRC she was provided with a copy of the accident report which had the "(date of injury)" date altered to "(date of injury)" and that she did not have copy of the report with the unaltered date in her file. Claimant's testimony indicated a lack of knowledge as to how the date was altered on the other copy and again indicated confusion over which date was to be used. The copy with the altered date was introduced into evidence by claimant and it too was unsigned by the supervisor.

Claimant testified that he handed the accident report to Mr. P and walked out the door. When asked in direct examination the date he gave the report to Mr. P, claimant first

testified as follows: "Buddy, I flat don't remember the date I handed it to him. I really don't." When asked whether the "(date of injury)" date on the report had "anything to do with the date" he gave it to Mr. P, claimant responded that "[m]ore than likely that was it," and that the medications he had been on makes one forget "little bitty things like dates." However, on voir dire examination claimant stated that the medicine he was taking had not affected his ability to recall "the events." In response to another question, claimant stated that the report was given to Mr. P "on or about that date" to the best of his recollection. On cross-examination, claimant first agreed he could not recall the exact date he completed the report but then insisted he gave it to his supervisor on the date it was filled out, namely, (date). He also testified in response to a question on cross-examination that the report was his "formal notice" to the employer of his on-the-job injury, and acknowledged that September 20th was not within 30 days of (date of injury). On re-direct examination claimant again said he had given Mr. P oral notice earlier and that September 20th "was as soon as I could get him to give me the accident reports." However, as mentioned, claimant earlier testified he already had accident report forms in his possession.

Claimant also testified and the carrier's documentary evidence indicated that Dr. RL took claimant off work on or about April 14, 1992, for additional evaluation; that claimant was later referred to a (Dr. W) who, according to claimant, diagnosed a cervical spine injury on June 3, 1992; that claimant was then referred to Dr. WL who, on July 2, 1992, diagnosed a cervical spondylosis and radiculopathy; and that on August 4, 1992, Dr. WL performed a discectomy and fusion on claimant's cervical spine.

The challenged findings relating to timely notice and good cause are as follows:

FINDINGS OF FACT

7.CLAIMANT filled out an accident report, which originally stated the accident date was (date) and later altered by an unknown party to (date of injury), stated he injured his neck while working for EMPLOYER, but he did not give that report to a supervisor until some later date that he does not recall.

8.The accident report is the first notice that anyone in a supervisory capacity could have had notice that CLAIMANT'S neck injury was work-related, and it could not have been prepared prior to sometime after CLAIMANT received notice from his doctors of the cervical injury.

12.CLAIMANT did not have a good reason for failing to report his neck injury as being work-related to EMPLOYER continuously until the date he did report the injury, which was well after the 30th day after the date of that injury.

In an unchallenged finding, the hearing officer found that on July 2, 1992, Dr. WL diagnosed claimant's problem as a cervical spine injury, informed him of that diagnosis on that date, and took claimant off work for his neck injury on that date until February 8, 1993.

Based on these findings, the hearing officer reached the conclusion, which claimant challenges, that claimant did not report his neck injury to employer not later than the 30th day after the date his injury occurred and that he did not have good cause for failing to timely report his injury.

Whether claimant provided timely notice of his injury to employer and, if not, whether he had good cause for such untimely reporting presented fact questions for the hearing officer's resolution. Section 410.165(a) provides that the hearing officer, the trier of fact at the contested case hearing, is the sole judge of the relevance and materiality of the evidence offered as well as of the weight and credibility it is to be given. As the trier of fact, the hearing officer can believe all or part or none of any witness' testimony including that of the claimant. The hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of witnesses, and make findings of fact. 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. 93155, decided April 14, 1993; Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. Where sufficient evidence supports the findings and they are not so against the overwhelming weight of the evidence as to be clearly wrong and unjust, the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951). We cannot say that the hearing officer's findings respecting the untimely notice and lack of good cause therefor are against the great weight of the evidence. Claimant stated that he knew he had injured his neck on (date of injury), that he returned to work after three days in the hospital, and that he had the accident report forms in his possession. While the hearing officer could have believed that claimant gave the report to Mr. P on September 20th as he at one point testified, in which case the notice would still have been untimely by one day and require a showing of good cause therefor, the hearing officer could also believe claimant's initial testimony that he did not recall when he gave the form to Mr. P. The hearing officer obviously believed that claimant did not give the report to Mr. P until sometime after doctors told him in June and in July 1992 that it was his neck and not his heart that was injured on (date of injury). The hearing officer just as obviously believed that claimant did not show good cause for his untimely reporting of his injury. Claimant insisted throughout his testimony that notwithstanding Dr. RL's continued testing for a heart condition, he knew all along that it was his neck, not his heart, that was injured on (date of injury).

Though not asserting that claimant had made an election of remedies, the carrier introduced numerous exhibits showing that claimant submitted claims for the payment of his medical expenses from employer's group health insurance plan for the period from April 1992 through October 1992, and also that he was paid short-term disability benefits from employer's group plan from sometime in June 1992 to sometime in October 1992. Many of these forms contained the statement that claimant's condition was not related to his employment. However, as claimant pointed out, most of these exhibits did not bear his signature or that of his wife, though some did. He also said that the top portions of the forms were already filled out when given to him.

Claimant also stated that the disability benefits were discontinued sometime in

October 1992 when an adjustor for employer's group plan advised him his claim should be a worker's compensation claim. Claimant acknowledged that Dr. O had diagnosed him as having a neck injury (pulled muscles) on September 27, 1991, and that he knew the injury had occurred on (date). Claimant stated that when Dr. W diagnosed his neck injury on June 3, 1992, he knew all along that his symptoms related to his (date) injury; however, he also said that no one would listen to him and that in Dr. W he finally found a doctor who recognized that his problem was with his neck, not his heart. No records of Dr. W were introduced. Claimant also testified that when Dr. WL diagnosed his cervical spondylosis and radiculopathy on July 2, 1992, and performed a discectomy and fusion on his cervical spine on August 4th, he again knew his condition was work related but indicated he did nothing to stop the group health carrier's payments of his medical bills. He also said that when he advised the group carrier of "the correct diagnosis," he continued to receive the disability benefits because he was told they were already scheduled.

Claimant's position seemed to be that his condition was misdiagnosed up to at least June 3rd or July 2, 1992, and that such circumstance was good cause for not filing his claim at least up to that time period. Claimant testified that he had had two prior workers' compensation claims under other employers. When asked why did he did not sign his workers' compensation claim form until December 8, 1992, he stated that after being told by the disability benefits carrier in October that his claim should be a workers' compensation claim, he had his wife call the Commission. When she learned that a workers' compensation claim had not been filed, he "immediately" obtained the form and filed his claim. He also said he thought both that he had done all that was required of him and that employer would automatically take care of "the paperwork" in getting his benefits changed from the group plan to a workers' compensation claim. Ms. H testified, however, that new employees are briefed on workers' compensation claim procedures and are not told that the employer will file their claims.

In addition to those mentioned above, claimant has challenged the following three factual findings:

FINDINGS OF FACT

12.CLAIMANT did not have a good reason for failing to file a claim for workers' compensation benefits with the Commission continuously up to the date he filed on 12-10-92.

14.CARRIER contested the compensability of CLAIMANT'S neck injury on (date), soon after receiving notice of that injury.

15.EMPLOYER did not have notice of a job-related neck injury until December of 1992.

Based on the several findings, the hearing officer made the following two legal conclusions, in addition to the earlier mentioned conclusion that claimant did not timely

report his neck injury and lacked good cause for his untimely reporting:

CONCLUSIONS OF LAW

4.CLAIMANT did not file a claim for workers' compensation benefits with the Commission within one year after the date of his injury and no good cause existed for his failure to timely file this claim.

6.The delayed filing of a TWCC-1 did not toll CLAIMANT'S period for filing a claim with the Commission because CARRIER and EMPLOYER did not know that the neck injury was related until after claimant's filing period had lapsed.

Section 409.003 requires an employee to file with the Commission a claim for compensation for an injury not later than one year after the date the injury occurred. Section 409.004 provides in part that failure to file a claim as required by Section 409.003 relieves the employer and carrier of liability unless good cause exists for failure to file a claim in a timely manner. Section 409.008 provides as follows:

If an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 [death benefits] does not begin to run against the claim of an injured employee until the day on which the report required under Section 409.005 has been furnished.

Section 409.005 requires an employer to file a written report with the Commission and the carrier if an injury results in the absence of an employee from work for more than one day. The report is required to be mailed or delivered to the Commission not later than the eighth day after the employee's absence from work for more than one day due to an injury and an administrative penalty is provided for violation of this section. *And see* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 120.2 (Rule 120.2).

As with the evidence on the timely notice and good cause issues, we find the evidence sufficient to support the hearing officer's findings that claimant neither timely filed his claim nor showed good cause for his untimely filing. The finding and conclusion that claimant's time for filing his claim was not tolled pursuant to Section 409.008 are similarly supported by sufficient evidence because the hearing officer also determined that the employer had not been given notice of and did not have knowledge of claimant's work-related neck injury until after the one year period for filing the claim had lapsed. The hearing officer did not determine the actual date in December 1992 when claimant did provide employer with notice of the work-related injury, either by providing employer with the written accident report or by filing his claim or some other means. However, the sum of the findings makes clear that the hearing officer did not believe the claim form, the accident report or

some other form of notice was provided to employer or the carrier, or that the employer or carrier had knowledge of his work-related neck injury, until sometime after one year from (date of injury).

We cannot say that such findings are against the great weight and preponderance of the evidence. Claimant testified that he knew all along it was his neck and not his heart that was injured on (date of injury), notwithstanding Dr. RL's continued efforts thereafter, and particularly commencing in April 1992, to investigate his heart condition. When Dr. W diagnosed his cervical injury on June 3,1992, and when Dr. WL also diagnosed it on July 2, 1992, claimant said he knew such injury had occurred on (date of injury). However, notwithstanding such knowledge, claimant stated that he continued to accept employer's group health and short-term disability benefits until the carrier stopped them in October 1992, that he assumed employer would take care of his paperwork, and that he made no effort to file a workers' compensation claim until after the group carrier terminated his benefits in October and his wife called the Commission and discovered he had no claim on file after which, on December 8th, he signed his claim. In Cigna Ins. Co. of Texas v. Evans, 845 S.W.2d 417, 420 (Tex. App.-Texarkana 1993, n.w.h.), the court discussed good cause for an untimely filing of a claim as follows:

> The test is that of ordinary prudence, that is, whether the claimant prosecuted the claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. The totality of the claimant's conduct must be considered in determining whether he or she acted with such ordinary prudence. (citation omitted.)

Finding the evidence sufficient to support the challenged findings and conclusions, the hearing officer's decision is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge