APPEAL NO. 94050

In Texas Workers' Compensation Commission Decision No. 93815, decided October 22, 1993, the Appeals Panel affirmed the determination of the hearing officer, (hearing officer), that the appellant (claimant) sustained a back injury in the course and scope of his employment on (date of injury), but remanded the case for additional findings on the disputed issue concerning whether claimant had good cause for not reporting his injury to his employer by the 30th day after the injury as required by the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 409.002 (1989 Act). The hearing officer had determined both that claimant reported his injury to his employer on (date), and that he had good cause for not timely reporting the injury. The Appeals Panel found the evidence sufficient to support the determination that claimant reported his injury to his employer on (date), but remanded for additional findings concerning the existence of good cause for the untimely reporting. Upon remand, the hearing officer apparently conducted no further proceedings but reconsidered the evidence, made additional findings, and issued a new decision. He found that while claimant had good cause for not reporting his injury up to January 23, 1993, the date he first sought medical attention and became aware his condition was serious, claimant did not thereafter continue to have good cause until February 11th because his reason was fear of losing his job. Claimant's request for review, in essence, re-argues the evidence and asserts that he told his supervisor on February 5th and on February 11, 1993, that he was injured on the job, and further asserts his unawareness that he was required to show that his good cause continued after January 23, 1993. The response filed by the respondent (carrier) contends that the evidence sufficiently supports the two legal conclusions specifically challenged by the claimant, namely, that claimant did not have good cause for failing to report his injury after January 23, 1993, and that carrier and employer are relieved of liability for compensation due to claimant's failure to timely report his injury.

DECISION

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

The carrier's response asserts that the Appeals Panel has no jurisdiction over claimant's appeal because the claimant failed to certify to service of his request for review on the carrier. Not only does claimant's request for review filed with the Commission contain the certificate required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(b) (Rule 143.3(b)), but the Appeals Panel has held that failure of service of the appeal on the respondent is not jurisdictional. *See e.g.* Texas Workers' Compensation Commission Appeal No. 92383, decided October 12, 1992.

The evidence in this case was fully set out in our decision in Appeal No. 93815 and will not be here repeated. Claimant testified he hurt his back when he fell from a table while removing wallpaper for his employer on (date of injury), and the hearing officer's determination that claimant was injured in the course and scope of his employment on that date was affirmed. The medical evidence indicated claimant had spondylolysis at the L5 level. Claimant testified that he continued working after his injury until April 14, 1993, when

his doctor took him off work for four weeks and, on May 4th, for another four weeks, recommending physical therapy (PT). Claimant said he did not undergo the PT because the carrier refused payment and that he has not received medical treatment for his injury since May 1993. On the matter of notice of injury, claimant contends in his appeal that on February 5, 1993, he told his supervisor, (Mr. C), that he was getting x-rays, that on February 11th he took the x-rays to Mr. C, and that he told Mr. C on both dates that his back injury occurred on the job. Mr. C testified that he specifically asked claimant about the occurrence of the injury and that claimant did not on either date indicate his injury was job related. In our earlier decision we found the evidence sufficient to support the hearing officer's finding that notice was given on February 11, 1993.

The report of (Dr. I), the doctor claimant first saw for his back injury on January 23, 1993, stated the following: "Patient also complained of lower lumbar pain which started after he fell off from [sic] a ladder while trying to carry some wallpaper at work. Patient stated that he did not tell his employer (and urged me very strongly not to mention it to his employer) as he was afraid that he might lose his job."

The hearing officer on remand found that claimant first reported his injury to his employer as an on-the-job injury on February 11, 1993, that he first sought medical attention for the back condition on January 23, 1993, that he thought any injury to his back was trivial from (date of injury), until January 23, 1993, that he was aware his condition was serious on January 23, 1993, when his chiropractor talked with him about reporting his injury and recommended he see an orthopedic surgeon, and that he failed to report his injury until February 11, 1993, "for fear of losing his job." Based on these findings, the hearing officer concluded that while claimant had good cause for not reporting his injury until January 23, 1993, he did not have good cause for failing to report the injury after that date.

In his discussion the hearing officer stated that "fear of losing a job was not good cause under the prior law for failing to report an injury and should not be under `the Act.'" Neither the carrier in its brief urging affirmance based on sufficient evidence, nor the claimant in his request for review, mention the finding that claimant failed to report his injury until February 11th for fear of losing his job. Our review of the Texas case law reveals that the reasons or excuses commonly recognized as "good cause" include the claimant's belief that the injury is trivial, mistake as to the cause of the injury, reliance on the representations of employers or carriers, minority, and physical or mental incapacity, while the advice of third persons and ignorance of the law are frequently held not to constitute good cause. Professor Larson, in 2B, Larson, Workmen's Compensation Law, page 15-337 (1993), states: "In the ascending scale of employer fault, needless to say, the employer will be estopped if he caused the claimant to forego filing a claim by threatening to prevent her getting any employment if she did." This statement cites to Bayshore Indus. Inc. v. Ziats, 232 Md. 167, 192 A.2d 487 (1963); and to Riddle v. Sears, Roebuck & Co., 8 Or. App. 438, 494 P.2d 901 (1972); *c.f.* Mager v. H.H. Robertson Co., 27 Pa. Commw. 478, 367 A.2d 414 (1976); Wallis v. Whirlpool Corp., 12 Ark. 101, 671 S.W.2d 760 (1984); Deaboy v. St. Regis Paper Co., 442 A.2d 963 (Me. 1982).

"Good cause" for failing to timely comply with both notice and filing requirements must continue to the date when the claim is actually filed and has been defined as "that legal excuse preventing a reasonably prudent person from complying with the notice and filing requirements up to the date of the filing of the claim. [Citations omitted.]" Farmland Mutual Insurance Company v. Alvarez, 803. S.W.2d 841, 843 (Tex. App.-Corpus Christi 1991, no writ). Whether a claimant has exercised that degree of diligence required under the ordinarily prudent person test is usually a question of fact for the trier of fact. A claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met and, as the court in Alvarez observed, "[g]enerally, the claimant's reason for delaying the filing of his claim is found in his own testimony. [Citations omitted.] The jury determines the credibility of the witnesses and weighs the evidence of good cause. [Citations omitted.]" *Id at* 843-844.

The evidence that claimant did not report the injury to his employer after January 23, 1993, for fear of losing his job was the statement in Dr. I's report. Claimant contends in his appeal that on February 5th he spoke to his supervisor, Mr. C, about x-rays and on February 11th actually took x-rays to him, and that on both occasions told Mr. C his injury occurred on the job. Mr. C testified he specifically inquired of claimant as to whether the injury was job related and took him to a doctor. Further, claimant continued to work until April 14th when his doctor took him off work. While the evidence was in conflict as to whether claimant feared he would lose his job if he reported his injury, we cannot say that Dr. I's report was not some evidence sufficient to support the finding under discussion. However, there was no evidence of conduct on the part of the employer such as would substantiate claimant's fear. We note that Section 451.001(1) prohibits discrimination against an employee for filing a workers' compensation claim in good faith and Section 451.002 provides certain remedies.

While we do not embrace the hearing officer's discussion to the apparent effect that fear of job loss cannot constitute good cause under any circumstances, we find the evidence sufficient to support his determinations, in this case, that claimant did not report his injury after January 23rd until February 11th because he feared the loss of his job, and that claimant thus failed to show good cause for not reporting his injury after January 23, 1993.

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge